STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-987

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

January 3, 1979

Mr. Richard A. Gander
[redacted]

Dear Mr. Gander:

I have received your letter regarding a denial of access to the radio tapes of a rescue alarm in possession of the Nassau County Fire Communications Center. The tapes in question were transmitted to the Center by the West Hempstead Board of Fire Commissioners. According to your letter, Chief O'Brien of the Center advised you that you must have written authorization from the Board of Fire Commissioners to gain access to the tapes. Consequently, your request has been denied to date.

In my opinion, the rationale for the denial is without foundation. It is noted that 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..." [see attached, Freedom of Information Law, §86(4)]. In view of the definition, it is clear that any information in possession of an agency is subject to rights granted by the Freedom of Information Law. Therefore, the fact that the Nassau County Fire Communications Center may not be the original custodian of the tapes but rather the secondary custodian is irrelevant, and your rights are in no way dependent upon the approval or lack thereof by the original custodian of the tapes, the West Hempstead Fire District. In sum, Nassau County does not in my opinion require any authorization from the West Hempstead Board of Fire Commissioners to disclose the tapes.

It is also emphasized that the Freedom of Information Law is based upon a presumption of access. Specifically, §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 enumerated categories of deniable information. Based upon my knowledge of the contents of the tapes in question, I do not believe that any of the grounds for denial of access could appropriately be raised under the circumstances.

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

cc: Chairman Frank Mahoney
Chief Howard J. O'Brien

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-988

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

January 4, 1979

Ms. D. Bazzano
Assistant Director
J.A.B. Investigation &
Security Agency, Inc.
21 Hyacinth Road
Levittown, NY 11756

Dear Ms. Bazzano:

I have received your letter of December 29 regarding a denial of access to an accident report in possession of the Nassau County Police Department. According to the response by the Police Department appended to your letter, the County contends that "...accident reports are available only to persons having an interest in the accident, their attorney or their agent." In my opinion, the accident report should be made available to you.

Section 66-a of the Public Officers Law simply states that accident reports in possession of police authorities "shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent..." The cited provision also states that police authorities may withhold "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."

I believe that the Police Department has interpreted §66-a in an unnecessarily narrow fashion. In my opinion, although you may not have been involved directly in the accident, your letter indicates that you are not seeking the accident report out of curiosity, but rather that you have an interest in the accident. Further, your letter makes clear that the accident report is sought on behalf of a client. Consequently, in the terms of §66-a, I believe that your request is appropriate and should be granted, for you apparently have an "interest" in the accident and the report compiled in relation to it.

Further, it is noted that §66-a of the Public Officers Law has been interpreted expansively in conjunction with the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nassau County Police Department

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-989

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

January 5, 1979

Mr. Jan Campbell
[redacted]

Dear Mr. Campbell:

I have received your letter and the attached materials regarding a denial of access to a request for "Miller Brewing Company's Cayuga County lease map" by the Department of Environmental Conservation.

According to a letter written by Robert H. Chase, Regional Supervisor for the Department, the lease information may be "kept confidential pursuant to New York State Oil and Gas Rules and Regulations, Sections 550.5 and 554.7." Having reviewed the regulations cited by Mr. Chase as well as the Environmental Conservation Law, I do not believe that the regulations cited can serve as appropriate bases for a denial of access. On the contrary, the map is in my view 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 available, except to the extent that records or portions thereof may be withheld under one or more of the categories of deniable records enumerated in paragraphs (a) through (h) of the cited provision. Under the circumstances, I do not believe that any of the grounds for denial can appropriately be cited.

While Sections 550.5 and 554.7 appear to permit confidentiality in some instances, they cannot be cited to diminish rights of access granted by the Freedom of Information Law, for regulations do not have the same status or weight as statutes. Therefore, §87(2)(a), which enables an agency to withhold records that are specifically exempted from disclosure by "state or federal statute", cannot be cited as a ground for denial.

Furthermore, the courts have held that an agency cannot adopt regulations that restrict rights granted by the Freedom of Information Law [see e.g., Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405]. Additionally, the map in question is not "specifically" exempted from disclosure by any statute of which I am aware.

Although §32-0305(f) of the Environmental Conservation Law alludes to the confidentiality of some records regarding mineral resources submitted to the Department by persons who produce, sell, purchase, acquire, store and transport oil and gas, that provision does not include within its scope the map in question. Moreover, §550.5 of the regulations appears to permit a grant of confidentiality that goes far beyond the language of Article 23 of the Environmental Conservation Law. Section 554.7, which was also cited, simply has no relevance to the records sought, for it pertains to "completion reports, well logs and samples." In addition, a denial of access to the maps would appear to contradict the clear declaration of policy stated in §23-0301. That section states that it is in the public interest to promote the development of natural resources of oil and gas in such a manner as to give effect to the "...rights of all persons including landowners and the general public...". Here, a denial of access would in my opinion disavow the intent to ensure that the public possess rights individually and collectively in relation to the development of mineral resources.

Further, it is noted that case law has long held that a promise of confidentiality is all but meaningless. As stated in Langert v. Tenney, "[T]he concern...is with the privilege of the public officer, the recipient of the communication, rather than with the maker of the communication" [5 A.D. 2d 586, 589 (1958); see also People v. Keating, 286 App. Div. 150 (1955), Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)]. In view of the foregoing, there are only two instances in which records may be deemed confidential. First, a record is confidential when a statute (as opposed to a regulation) specifically prohibits disclosure. Second, a record may be deemed confidential if in the opinion of a court disclosure would on balance result in detriment to the public interest (see Cirale, supra). Therefore, as a general matter, I do not believe that the policy of confidentiality as expressed in Mr. Chase's letter carries any legal weight.

Finally, it appears that the maps would constitute "factual data" that must be made available under §87(2)(g)(i) of the Freedom of Information Law. None of the remaining grounds for denial enumerated in the Freedom of Information Law could in my view be cited.

In sum, the map in which you are interested is in my opinion available, and the grounds for denial offered by the Department of Environmental Conservation are without merit.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert H. Chase
John J. Dragonetti
Richard Schneider

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-990

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

January 5, 1979

Mrs. Pearl Michaels
[redacted]

Dear Mrs. Michaels:

I have received your letter of December 29 regarding an alleged failure to comply with the Freedom of Information Law by the Community School District 19.

It it noted at the outset that other than minutes, I have no knowledge of the remaining records in which you are interested. In any event, I can advise that the Freedom of Information Law is based upon a presumption of access. All records in possession of government in New York are available, except to the extent that records or portions thereof fall within one or more enumerated grounds for denial listed in §87(2)(a) through (h) of the Law. Further, each agency must comply procedurally with the direction given in the Committee's regulations, which have the force and effect of law. Each agency in the state, including school districts, must adopt regulations no more restrictive than those promulgated by the Committee.

With respect to the action that you may take, I believe that educating yourself, other members of the public, and representatives of the School District is the first step that must be taken to gain compliance with the Freedom of Information Law. Second, in situations in which there may be a dispute, I would be happy to write an advisory opinion on your behalf. While the opinions are not binding, the courts have cited them often as a basis for their determinations. As a consequence, in many cases the opinions from this office may be influential. Third, if all else fails, an individual who is denied access may challenge the denial judicially. In such a case, the

agency has the burden of proving that the records withheld fall within one or more of the categories of deniable information listed in §87(2) of the Law. In addition, the Committee has proposed that the Legislature amend the Law to enable a court to award reasonable attorney fees to a person who successfully challenges a denial of access in court.

A copy of this response as well as the Freedom of Information Law, the regulations to which reference was made earlier and an explanatory pamphlet on the subject will be sent to you and Mr. Gibson, the Community Superintendent.

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

Enclosures

cc: Oliver Gibson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-991

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

January 5, 1979

Mr. Leonard X. Farbman
President
Plumbing Industry Affairs Corp.
55 Willoughby Street
Brooklyn, New York 11201

Dear Mr. Farbman:

I have received your most recent letter regarding the payrolls of employees of private contractors engaged in work by the New York City Housing Authority.

Although I sympathize with your points of view, I cannot in good faith advise you or the Housing Authority that the identities of such employees must be made available. Further, the power of the Committee is solely advisory. Therefore, even if I were to suggest that the Housing Authority disclose the information in question, it would not be obliged to do so.

In sum, I must reiterate the position taken in our previous correspondence - that the Housing Authority or any other agency in possession of payroll records relative to persons employed by private industry may be withheld.

I regret that I cannot be of further assistance. Should any 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-992

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

January 5, 1979

Mr. Ivan T. Yost
[redacted]

Dear Mr. Yost:

I have received your letter concerning the state of the law in New York with respect to the release of lists of public employees.

In this regard, please be advised that §87(3)(b) of the Freedom of Information Law, a copy of which is attached, specifically requires that all agencies of government in the state maintain a payroll record consisting of the name, public office address, title and salary of every officer or employee of the agency. It is noted that this information was made available by means of judicial determination long before the enactment of the Freedom of Information Law.

With respect to other lists of names and addresses such as those which might identify members of the public rather than public employees, the Freedom of Information Law permits an agency to withhold such information. One of the grounds for denial in the Law concerns records the disclosure of which would result in an "unwarranted invasion of personal privacy" [§87(2)(b)]. Further, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, including the sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes. In sum, lists including the names and addresses of the public generally may be withheld. However, payroll records identifying public employees are required to be compiled and made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-287
FOIL-AO-993

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

January 8, 1979

Mr. John C. Baumgarten
Executive Director
Delaware Opportunities, Inc.
129 Main Street
Delhi, New York 13753

Dear Mr. Baumgarten:

I have reviewed your letters and the materials appended to them regarding your contention that Delaware County has not acted in accordance with the spirit of the Freedom of Information Law. In conjunction with the materials, I offer the following comments.

In terms of background, your questions have arisen because Delaware County has rejected applications for funding of your organization, Delaware Opportunities, Inc., and you are attempting to learn the reasons for rejection of the applications.

First, it is important to note at the outset that the Freedom of Information Law grants access to existing records. Therefore, an agency, such as the Delaware County Manpower Office, has no obligation to create records in response to requests, except in specific circumstances. Therefore, if there are no written reasons for a rejection of an application, there is no requirement that records indicating the reasons be created, unless required by provisions of law other than the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are accessible to any person, 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) of the Law. Moreover, if there is a denial of access, the reasons must be stated in writing and you must be apprised of your right to appeal to the head of

the agency or whomever has been designated to determine appeals. Section 89(4) of the Law also requires that an agency in receipt of an appeal transmit a copy of the appeal as well as the ensuing determination to this Committee. Finally, in a judicial proceeding, the agency has the burden of proving that the records withheld in fact fall within one or more of the categories of deniable information listed in §87(2).

Your central question deals with the reasons for failure by Delaware County to accept Delaware Opportunities' applications. In my opinion, there may be several means by which you can learn of the possible grounds for rejection and the reasons for rejection of an application. First, it appears that recommendations regarding the acceptance or rejection of applications are made by the Title VI Project Advisory Council. Based upon statements made by Mr. Ronovech in his letters to you and the nature and duties of the Council, it is clear that the Council is a public body subject to the Open Meetings Law. Although the Council is merely an advisory body that does not make final determinations, this Committee has consistently advised and the courts have upheld the notion that advisory bodies are public bodies that must comply with the Open Meetings Law.

Section 97(2) of the 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..."

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

First, the Council 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, even if the Council is not 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 the Council "transact public business"? While it has been argued that advisory bodies 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 Court of Appeals (Orange County Publications v. Council of City of Newburgh, 60 AD 2d 409, aff'd _____ NY 2d _____, Nov. 2, 1978).

Third, the Council in question performs a governmental function for a public corporation, Delaware County.

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 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Further, §101 of the Open Meetings Law requires public bodies to compile minutes regarding the action taken and the proposals made during meetings. In addition, §99 of the Open Meetings Law requires that all meetings of public bodies be preceded by notice to the public and the news media. I have attached a copy of the Open Meetings Law for your consideration.

Since the meetings of the Council must be open to the public, it would appear that you or your staff may attend the meetings to attend and listen to the deliberations and decisions

that go into the making of the recommendations to approve or reject applications.

With respect to guidelines used regarding the basis for acceptance or rejection of applications, it is suggested that you request all written procedures developed by Delaware County, the New York State Department of Labor or by the Employment and Training Administration. Procedures are available under §87(2)(g)(ii) and (iii) of the Freedom of Information Law, which respectively grant access to "instructions to staff that affect the public" and "final agency policy or determinations." If there are specific standards or guidelines, you may have the ability to determine whether the reasons offered for rejection of your applications have merit, or whether they must be more specific.

There are indications that the Manpower Office, and perhaps Delaware County, have not adopted rules for the procedural implementation of the Freedom of Information Law. In this regard, the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations which govern the procedural aspects of the Freedom of Information Law. In turn, each agency in the state must adopt regulations no more restrictive than those promulgated by the Committee. In terms of your correspondence, it appears that the Committee's regulations have not been followed. For example, both the Law [§89(3)] and the regulations [see attached, §1401.5(d)] require that a response to a request be givin within five business days of its receipt. It is noted that an agency may, but need not require that requests be made in writing. As noted earlier, §1401.7 of the regulations requires that a denial be in writing and that the person denied access be informed of his or her right to appeal. In sum, Delaware County and its Manpower Office are required to adopt regulations in accordance with those promulgated by the Committee. If they have not done so, the Freedom of Information Law has been violated.

I have enclosed for your perusal copies of the Freedom of Information Law, regulations promulgated under the Freedom of Information Law by the Committee, model regulations that can be used as a guide to compliance by agencies, and an explanatory pamphlet entitled "The New Freedom of Information Law and How to Use It." A copy of my response to you as well as the materials to which reference was made in the preceding sentence will be sent to Mr. Ronovech.

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: Victor Ronovech

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-994

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

January 9, 1979

Ms. Laurie Thompson
Consultant
490 West End Avenue
New York, New York 10024

Dear Ms. Thompson:

The copies of your letter to Anthony Durso, Kings County Clerk, that were sent to Lieutenant Governor Cuomo and Secretary of State Paterson have been transmitted to this office, which is responsible for advising with respect to the Freedom of Information Law.

Your contentions pertain to the availability of census information and the fees that may be assessed in conjunction with a search of a census.

In my opinion, census records in possession of a 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 records or portions of records 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 in my view accessible, except to the extent that they contain the confidential information previously discussed.

It is noted that §87(2)(b) of the Law permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy." Nevertheless, I do not believe that the privacy provisions could appropriately be cited in this instance, for the information in question is of an historical nature.

Finally, with respect to fees, §87(1)(b)(iii) of the Freedom of Information Law states that a maximum of twenty-five cents per photocopy may be assessed, "except when a different fee is otherwise prescribed by law." In this case, there is a different fee prescribed by law. Specifically, §8021(d) of the Civil Practice Law and Rules, which relates to fees that may be charged by county clerks, states that:

> "[F]or certifying to a search of any records, other than those in an action or relating to real property, in the counties within the city of New York, for a consecutive two-year period or fraction thereof, for each name so searched, five dollars, and in all other counties for a consecutive five-year period or fraction thereof, for each name so searched, one dollar; except that in the counties within the city of New York, when the records so searched are the census records of the state of New York, the charge shall be one dollar for a consecutive two-year period or fraction thereof."

Without greater knowledge of the circumstances, I could not conjecture as to the propriety of the fee. However, it is clear that the County Clerk has the legal authority to charge for a search, whether or not the search resulted in locating the information sought. Further, as stated earlier, if the information sought exists, it should in my opinion be made available to you.

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
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-995

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

January 9, 1979

Mr. James H. Sherman, Sr.
[redacted]

Dear Mr. Sherman:

I have recently received your letter of December 20. As requested, enclosed is a copy of the pamphlet entitled "The New Freedom of Information Law and How to Use It."

Your letter also indicates that you would like to obtain information regarding the organizations and groups to which information was sold without your consent. In this regard, it is difficult to respond without more specific knowledge of the nature of the records to which you are referring. Nevertheless, if indeed information has been sold, any vouchers, checks, or other records of expenditure or receipt are available to the public from the agency that sold the information. In addition, it is noted that §§87(2)(b) and 89(2)(b) of the Freedom of Information Law permit an agency to withhold information when a disclosure would result in "an unwarranted invasion of personal privacy." From my perspective, the cited provision of the Law is intended to protect against disclosures that involve the details of an individual's life.

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-996

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

January 9, 1979

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

I received your letter of January 6 this morning and will attempt to answer each of your questions.

Your first area of inquiry concerns the legislative histories of the Freedom of Information Law and the Open Meetings Law. You are probably aware of the fact that the State Legislature does not maintain any record analogous to the Congressional Record, for example. In the case of the Freedom of Information Law, there was virtually no debate preceding passage of either the original law, a copy of which is attached, passed in 1974, or the amended law passed in 1977. The comments of lobbyists and of state agencies are maintained in "bill jackets," which can be found at the Legislative Reference Library, which is part of the New York State Library. It is located at the Cultural Education Center, Nelson A. Rockefeller Empire State Plaza, Albany. If you request the bill jackets, you should identify them by "Chapter" numbers. The original Freedom of Information Law appears in Chapters 578-580 of the Laws of 1974; the amendments to the Law appear in Chapter 933 of the Laws of 1977.

Passage of the Open Meetings Law was preceded by debate in the Assembly, and I have attached a copy for your consideration. If you seek the bill jacket for the Open Meetings Law, it should be identified as Chapter 511 of the Laws of 1976.

You mentioned that the police "managed to get...huge exceptions" in the Freedom of Information Law. I disagree with your contention. The language of §87(2)(e) represents a significant change from the original Law, which stated that an agency could deny access to "investigatory files compiled for law enforcement purposes" [§88(7)(d)]. Under that

standard, if a record was initially "compiled for law enforcement purposes," it could forever be denied. The amended Law, however, permits denial of such records only under specified circumstances that are based upon harmful effects of disclosure. It is noted that the "law enforcement" provisions are similar in structure to those contained in the federal Freedom of Information Act (Title 5 §552). In my opinion, New York was able to learn from Congress' mistakes or oversights, and as a consequence, I believe that the New York law is clearer than its federal counterpart, provides greater access to records of the operation of government, and concurrently provides more protection to the public.

A question has arisen regarding the status of local laws. Local laws have relevance in relation to the Freedom of Information Law only with respect to fees. While the amendments make specific reference to a maximum of twenty-five cents per photocopy, the original law merely stated that the Committee could issue regulations concerning procedures and fees for copying [see §88(2)]. In relevant part, §1401.8 of the original regulations stated that no more than twenty-five cents per photocopy could be charged, "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..." Stated differently, if a municipality had passed a local law regarding fees for copying prior to the effective date of the Freedom of Information Law, September 1, 1974, that fee could remain in effect. Based upon the foregoing, if a fee had been established by law with respect to accident reports prior to September 1, 1974, it may remain in effect. As noted in an earlier letter, the Committee has called upon the Governor and the Legislature in its report (see attached) to amend the fee provisions to preclude local government from charging more than twenty-five cents for photocopying.

With regard to "interest" in records, one of the basic principles of the Freedom of Information Law is that accessible records are equally available to any person, without regard to status or interest. This represents a departure from previous access laws, which made rights contingent upon residence or interest, for example, as in the case of §66-a of the Public Officers Law. In terms of the relationship between §66-a and the Freedom of Information Law, I believe that the former prevails. The Freedom of Information Law is a "general" statute that deals with records generally. A statute that deals with specific records is known as a "special" statute. The courts have long held that a "special" statute supersedes a "general" statute.

Therefore, rights of access to accident reports are based upon a showing of an "interest" (whatever that may be) pursuant to §66-a of the Public Officers Law. Access to police records which are not subject to any "special" statutory direction fall within the Freedom of Information Law, and no demonstration of an "interest" need be made.

Finally, I have received your earlier letter. No response was given because, in all honesty, I read it as a commentary rather than a request for an opinion. Further, I believe that I have sent all of my communications with the Town of Southhold 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.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-289
FOIL-AO-997

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

Basil A. Paterson

January 10, 1979

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
Liberty, New York 12754

Dear Mr. Gerber:

I have received your letter which raises questions concerning both the Freedom of Information Law and the Open Meetings Law. I will attempt to answer each of them.

Your first question concerns the relationship between §87(2)(c) of the Freedom of Information Law and the Village Law insofar as it pertains to the budget process. According to your letter, you believe that I have stated in the past that the Village Board of Liberty may withhold records reflective of the proposed salaries of department heads while the Village is engaged in collective bargaining negotiations with other Village employees. In all honesty, although I remember discussing this issue, I do not believe that my response was as you have presented it. Section 87(2)(c) states that an agency may withhold records if disclosure would "impair present or imminent contract awards or collective bargaining negotiations." The key word in the quoted provision is "impair." Since the proposed salaries of department heads must be contained in the tentative budget prusuant to Village Law, §5-508(3), it is clear that disclosure of such information would not "impair" the collective bargaining process. Moreover, the Freedom of Information Law is a statute of general application. In this regard, when there is a "special" statute that deals with specific records and either directs that particular records be made available or be withheld, the "special" statute prevails over the statute of general application. In this instance, the direction in the Village Law to make the records in question available supersedes any grounds for denial of access appearing in the Freedom of Information Law, such as §87(2)(c).

The second question concerns a public hearing held by the Town of Liberty Zoning Board of Appeals that dealt with a special use permit. Your letter states that notice was sent to all residents living within 500 feet of the property that was the subject of the hearing, and that one person protested the policy of enabling anyone to speak. Apparently he contended that a person may speak at a public hearing only if he or she lives within 500 feet of the property under discussion.

It is important to emphasize that the question raised does not pertain to the Open Meetings Law, but rather to a public hearing required to be held by other provisions of law. The Open Meetings Law is silent with respect to public participation. Therefore, although a public body may permit public participation at a meeting, it need not. However, it appears that the public hearing to which you referred may have been mandated by law. In this regard, case law has long held that all interested parties attending a hearing must be accorded an opportunity to be heard [see e.g., Lamb v. Town of East Hampton, 162 NYS 2d 94, 96 (1957); Rod v. Monserrat, 312 NYS 2d 377, 380 (1970)]. On the basis of the decisions of which I am aware, it appears that the Zoning Board of Appeals must provide a reasonable opportunity to permit all interested members of the public to be heard at a public hearing, and I do not believe that there is any restriction on the ability to speak based upon the proximity of ownership to the parcel that is the subject of the hearing.

The third area of inquiry concerns a situation in which the Zoning Board of Appeals, after the hearing, closed the meeting and went into executive session to discuss the property. You also stated that you have been unable to obtain minutes of the executive session or discover the nature of the Board's decision.

In my opinion, the Zoning Board of Appeals should have deliberated publicly and voted in public. It is noted that §103(1) of the Open Meetings Law exempts quasi-judicial proceedings from the coverage of the Law. Nevertheless, §105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §267(1) of the Town Law has long provided that all gatherings of town zoning boards of appeals "shall be open to the public." As such, although a town zoning board of appeals might in some instances act in a quasi-judicial capacity, §267(1) of the Town Law, which, under the circumstances, is less restrictive than the Open Meetings Law, requires that such meetings be open to the public. Consequently, it is my view that the exception for quasi-judicial proceedings is inapplicable with respect to town zoning boards of appeal. Moreover, an informal opinion rendered by the Attorney General on October 18, 1977, arrived at the same conclusion and advised that the exemption in the Open Meetings Law regarding quasi-judicial proceedings cannot be invoked by a town zoning board of appeals. Consequently, a zoning board of appeals may in my opinion enter into executive session only in accordance with the provisions of §100 of the Open Meetings Law.

Your fourth question concerns notification of a "special meeting." Section 99 of the Open Meetings Law requires that, if a meeting is scheduled at least a week in advance, notice must be given to the public and the news media at least seventy-two hours prior to the meeting. 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. As such, notice must be given to the public and the news media prior to all meetings, whether regularly scheduled or "special," for example.

Finally, with respect to minutes, it is noted that §101 of the Open Meetings Law requires that minutes of executive sessions be compiled and made available within one week of an executive session. However, there is no time limit regarding the compilation of minutes of open meetings. To avoid situations in which minutes may not be made available until they are approved, the Committee has advised that minutes are available as soon as they exist, whether or not they have been approved. In such cases, it has been suggested that the minutes be marked "unapproved," "draft," or "non-final." By so doing, the public is apprised that the minutes are subject to change and the members of a public body are given a measure of protection.

As requested, enclosed is a copy of the Freedom of Information Law and an explanatory pamphlet on the subject, as well as the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Board of Trustees
Village of Liberty

Liberty School Board

Zoning Board of Appeals
Town of Liberty

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-998

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

January 10, 1979

Ms. Ruth C. Boice
Editorial Department
Patent Trader
Box 240
Mount Kisco, New York 10549

Dear Ms. Boice:

I have received both of your letters and background materials regarding your efforts to gain access to records in possession of the Town/Village of Mount Kisco.

According to the information you have provided, two reports have been denied. The first was prepared by a private firm, Cole, Layer and Trumble; the second was prepared by the State Division of Equalization and Assessment. The denials of access by the Village Manager, Mr. Garofano, were based upon his contentions that the reports "are investigatory in nature, and would serve as the basis for future proposed litigation..." and that they constituted "inter-agency or intra-agency materials."

It is important to note at the outset that the Freedom of Information Law, as amended, is based upon a presumption of access. Specifically, §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. Further, in the event of a judicial challenge to a denial of access, the agency has the burden of proving that the records withheld in fact fall within one or more of the categories of deniable information.

Based upon a review of the Freedom of Information Law, the report prepared by the private firm is in my opinion accessible in its entirety, for none of the grounds for denial could appropriately be raised. I disagree with Mr. Garofano's statement that the report is "investigatory in nature." In my view, the report could not justifiably be considered as a record "compiled for law enforcement purposes"

[see §87(2)(e)]. Contrarily, it was prepared pursuant to contract and its contents could be accepted or rejected by the municipality that ordered it. Moreover, decisions rendered under both the original and the amended Freedom of Information Law have held that the "law enforcement purposes" exception may be raised only by criminal law enforcement agencies [see e.g., Broughton v. Lewis, Sup. Ct., Albany Cty. (1978); Young v. Town of Huntington, 388 NYS 2d 978 (1976)].

While the report may at some time be relevant to litigation, it is clear that it was not prepared for litigation, but rather in the ordinary course of business. As such, although it conceivably could be cited as the basis for litigation, that factor does not in my view restrict rights of access. Further, the Cole, Layer and Trumble report is neither inter-agency nor intra-agency, for it is a firm outside of government.

In addition, a decision rendered by the Appellate Division, Second Department, in 1969 held that data prepared by a consulting firm for a county board of supervisors to be used by assessors to reappraise real property was available (Sanchez v. Papontas, 32 AD 2d 948). In view of the similarity between the Cole, Layer and Trumble report and the records in question in the Sanchez case, I believe that the existing case law on the subject tends to bolster my opinion that the consultant's report is available.

With respect to the second document, which was furnished by the State Division of Equalization and Assessment to the Village, it is likely that portions of the report are accessible, while the remainder is deniable. I have discussed the report with both Mr. Garofano, the Village Manager, and Mr. Kitchen, the Deputy Director of the Division of Equalization and Assessment. Based upon our conversations, it appears that the report was provided informally and that it was prepared in part to gain experience regarding a new computer. In fact, Mr. Kitchen informed me that his office does not maintain custody of a copy of the "informal" report transmitted to the Village.

Nevertheless, in view of the definition of "record" in the Freedom of Information Law [§86(4)], the report is subject to rights of access granted by the Law. The only exception to rights of access relevant in this case 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 provision quoted above contains what in effect in a double negative. Although an agency may withhold 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. Under the circumstances, the report constitutes "inter-agency" material. However, to the extent that it contains "statistical or factual tabulations or data," it is available. Narrative portions of the report which are advisory, for example, may be withheld.

In discussing the matter with Mr. Garofano, it appears that the recalcitrance with regard to disclosure of the reports is based upon a contention that disclosure will result in a multitude of lawsuits. While I do not believe that the possible initiation of suit constitutes an appropriate ground for denial under the Freedom of Information Law, the courts have held that an agency may withhold information if it can be demonstrated that disclosure would, on balance, be detrimental to the public interest (see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. Therefore, while I am not suggesting that disclosure would indeed result in detriment to the public interest, such an argument might be made.

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. Garofano

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-999

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

January 11, 1979

Mr. Paul A. DiNardo
Assistant Chief
Binghamton Police Department
Binghamton, New York 13901

Dear Chief DiNardo:

I have been requested by Mr. John J. Sheehan to "remind" you that a specific procedure must be followed when a request is made under the Freedom of Information Law.

In this regard, please be advised that §1401.5(d) of the regulations promulgated by the Committee, which have the force and effect of law, states that:

> "[I]f 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."

If you would like to discuss any of the above, I am at your service.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: John J. Sheehan

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1000

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

Basil A. Paterson

January 11, 1979

Mr. Vincent T. Franciamone
[redacted]

Dear Mr. Franciamone:

I have received your letter of January 2 regarding your requests directed to the Tompkins County Department of Social Services.

Please be advised that I have contacted Commissioner Wagoner on your behalf in order to provide accurate advice. I was informed that the "itemized audit report" in which you are interested simply does not exist. In this regard, the Freedom of Information Law specifically provides that an agency need not create a record in response to a request [§89(3)]. Therefore, the Department of Social Services is not obliged to compile an audit at your request.

However, Commissioner Wagoner also informed me that copies of weekly payment cards containing a breakdown of the means by which the $40 deduction is expended will be made available to you on request. He noted that the Department maintains custody of the cards going back to January 1, 1978. The remaining payment cards are in possession of the Family Court Clerk. Consequently, if you are interested in the earlier cards as well as those in possession of the Department of Social Services, it is suggested that you contact the Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Robert Wagoner

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §267(1) of the Town Law has long provided that all gatherings of town zoning boards of appeals "shall be open to the public." Consequently, although a town zoning board of appeals might in some instances act in a quasi-judicial capacity, §267(1) of the Town Law, which, under the circumstances, is less restrictive than the Open Meetings Law, requires that such meetings be open to the public. Therefore, it is my view that the exemption for quasi-judicial proceedings is inapplicable with respect to town zoning boards of appeals.

Moreover, an informal opinion rendered by the Attorney General on October 18, 1977, arrived at the same conclusion and advised that the exemption in the Open Meetings Law regarding quasi-judicial proceedings cannot be invoked by a town zoning board of appeals.

In view of the foregoing, I believe that a zoning board of appeals may exclude the public from its proceedings only in accordance with the provisions for executive session appearing in §100 of the Open Meetings Law. Subdivision (1) of the cited provision requires that a procedure be followed prior to entry into executive session. Specifically, §100(1) 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..."

In addition, the Law limits the subject matter that may be discussed in an executive session in paragraphs (a) through (h) of §100(1).

Although the Board may have identified the subject matter for discussion in its closed session of November 22, there is no indication that the procedural steps required by the Open Meetings Law were followed. Moreover, in my

opinion, no ground for executive session could have appropriately been cited. As such, it appears that the Board did not have the capacity to discuss your application behind closed doors.

With regard to the minutes of executive session in question, §101(2) of the Open Meetings Law requires that minutes of executive sessions be compiled only when determinations are made behind closed doors. Therefore, when a determination is made during an open meeting that follows deliberation in executive session, minutes of the executive session need not be compiled. Nevertheless, as noted earlier, I believe that the Board should have deliberated in open session, for the discussion was not consistent with any of the grounds for executive session enumerated in the Law.

Your letter also makes reference to a meeting of the Zoning Board of Appeals held on January 24. During the meeting, the Board "physically left the meeting" for the purpose of discussing whether or not your application for re-hearing would be heard on the merits.

My response to this situation is essentially the same as that offered concerning the closed session held on November 22. In brief, the Zoning Board of Appeals may enter into executive session only to discuss those subjects enumerated in the Law as appropriate for executive session. Based upon the contents of your letter, there was no apparent ground for executive session regarding the meeting on January 24.

Your final question concerns minutes of meetings of the Board that are not made available until they are approved by the Board at the ensuing scheduled meeting. You have indicated that the meetings are usually held approximately a month apart, and on some occasions, are as much as two months apart. Further, you have stated that unapproved minutes have been denied to date due to the absence of formal approval by the Board.

Due to the substantial lapse of time that often exists between a meeting and the approval of minutes, the Committee has consistently advised that minutes are accessible as soon as they exist, whether or not they have been approved. This stance is based upon the notion that, while unapproved minutes may not be "official", they constitute a "record" within the scope of §86(4) of the Freedom of Information Law and therefore are subject to rights of access. However, it has also been advised that the clerk or whoever maintains custody of unapproved

minutes mark the minutes as "unapproved," "draft," or "non-final" when the minutes are disclosed. By so doing, the public is given an opportunity to learn of the general nature of events that transpired at a meeting; concurrently, the members of the Board to which the minutes relate are given a measure of protection.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Mamaroneck Zoning Board of Appeals
Dorothy Miller, Town Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1001

DEPARTMENT OF STATE, 152 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

Basil A. Paterson

January 12, 1979

Mr. Elliott Vorce
President
Penn Yan Teachers Association
Penn Yan Central Schools
Penn Yan, New York 14527

Dear Mr. Vorce:

I have received your letter of January 5 concerning your unsuccessful attempts to obtain "information regarding the dollar amount of Superintendent Michael W. Thompson's 1978-79 salary."

The information that you are seeking is clearly available.

According to your letter, you have been informed that the specific information in question does not exist. Although the Freedom of Information Law does not generally require an agency to create a record in response to a request [see attached Freedom of Information Law, §89(3)], one of the exceptions to that rule concerns payroll information. Specifically, §87(3)(b) of the Law provides that each agency shall maintain:

> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

In view of the quoted provision, every agency, including the Penn Yan School District, must compile a payroll record that identifies all officers and employees and their salaries.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1002

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

January 17, 1979

Alice Lucan, Esq.
Gannett Company, Inc.
Lincoln Tower
Rochester, New York 14450

Dear Ms. Lucan:

John Omicinski of your Albany bureau requested that I draft an opinion regarding a denial of access by the Division of Substance Abuse Services (DSAS) to information contained in a survey of drug use in public and parochial schools.

Specifically, Mr. Omicinski requested the surveys performed in schools in particular counties. In his response to the request, Leonard J. Berry, the Communications Coordinator for DSAS, wrote that when the survey was undertaken, representatives of his agency "guaranteed anonymity and confidentiality to those school districts which cooperated with the study." The determination following an appeal written by Douglas Eldridge, Counsel to DSAS, reiterated that:

> "[T]he information gathered in the school survey was obtained from school districts across the State only after those school districts elicited a promise that we would not release any information relating to individual school districts obtained through the survey. It was their concern that certain school districts are so small that information relating to a school within that district, and a grade within that school, might very well serve to identify a certain percentage of the students in that school and grade as substance abusers. In several instances, school districts refused to participate without the promise that such information would not be released."

Mr. Eldridge further noted that, if disclosure could be used as a means of identifying specific students, disclosure would result in an unwarranted invasion of personal privacy. He also cited 21 USC §1175, which "requires the confidentiality of the identity, diagnosis, prognosis or treatment of...any person involved in a drug abuse prevention function conducted..." by DSAS.

In my opinion, the blanket denial of access to the results of the survey is likely without merit.

The key factor in the denial appears to be the promise of confidentiality made by DSAS to schools. From my perspective, the promise of confidentiality may have minimal significance. As stated in Langert v. Tenney, "[T]he concern...is with the privilege of the public officer, the recipient of the communication, rather than with the maker of the communication" [5 AD 2d 586, 589 (1958); see also People v. Keating, 286 App. Div. 150 (1955), Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)]. Related to a promise of confidentiality is the common law privilege of confidentiality, the governmental privilege. In this regard, the courts have held that the privilege continues to exist, notwithstanding the enactment of the Freedom of Information Law. However, the privilege is based upon the notion that a public officer must prove that information in his or her possession would if disclosed result in detriment to the public interest. Further, a determination regarding the propriety of an assertion of privilege can be made only by a court on a case by case basis.

In view of the foregoing, there are in my opinion only two instances in which records may be deemed confidential. First, records are confidential when a statute specifically prohibits disclosure. Second, a record may be deemed confidential if in the opinion of a court disclosure would, on balance, result in detriment to the public interest. Therefore, as a general matter, I do not believe that the promise of confidentiality given to schools by DSAS is valid, unless DSAS can demonstrate that disclosure would indeed result in detriment to the public interest.

With respect to the protection of personal privacy, it is clear that the results of the survey are presented in the form of statistical or factual tabulations, and that the contents of the survey do not identify particular students. If, however, any component of the survey would identify a particular student or students, to that extent, the survey could justifiably be withheld. Information that would identify students could be denied under the Freedom of

Information Law, for disclosure would likely constitute an unwarranted invasion of personal privacy. More importantly, such a disclosure might violate the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment" (20 USC §1232g). In brief, the Buckley Amendment requires that information identifiable to a student maintained by an educational agency or institution is confidential to all but the parents of the student, and that the student acquires the rights of his or her parents when he or she reaches the age of 18. Nevertheless, in situations in which specific students could not be identified due to the size of the sampling, neither the Buckley Amendment nor the privacy provisions of the Freedom of Information Law could in my view be appropriately cited as a ground for denial.

Finally, the federal statute cited by Mr. Eldridge in my opinion is inapplicable in this instance. Specifically, 21 USC §1175(a) states that:

> "[R]ecords of the identity, diagnosis, prognosis or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section."

Although the records in question might be maintained in connection with the performance of a drug abuse prevention function, they do not deal with the diagnosis, prognosis, or treatment of "patients." Again, however, to the extent that specific individuals who responded to the survey may be identified, those portions of the survey may justifiably 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

Robert J. Freeman
Executive Director

RJF:nb
cc: Douglas A. Eldridge
John Omicinski

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1003

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

January 18, 1979

Mark Litwak, Esq.
Regional Director
New York Public Interest
Research Group, Inc.
1 Columbia Place
Albany, New York 12207

Dear Mr. Litwak:

I have received your letter of January 17. Your inquiry concerns whether the Albany County District Attorney's office is exempt from the Freedom of Information Law "because it is a law enforcement agency."

In my opinion, the District Attorney's office is subject to the Freedom of Information Law in all respects. Specifically, §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 propriety function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since a district attorney's office is a governmental entity performing a governmental function for a municipality, a county, it is subject to the Law.

I would like to emphasize that the foregoing should not be construed to mean that all records in possession of a district attorney's office are accessible, for all agencies subject to the Law may withhold records or portions thereof to the extent that records fall within one or more among eight categories of deniable records listed in §87(2)(a) through (h) of the Law.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1004

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

Basil A. Paterson

January 22, 1979

Ms. Aileen Jacobson
Newsday
550 Stewart Avenue
Gaden City
Long Island, NY 11530

Dear Ms. Jacobson:

I have received your letter of January 15 in which you have requested an advisory opinion regarding a denial of access by the Town of Oyster Bay to a copy of a report furnished by Cashin Associates to the Town. Cashin Associates is a firm of consulting engineers that was paid $32,000 to furnish a report comparing the possibility of using a private carter as opposed to a municipal garbage collection service.

Your request to the Town indicates that the report was denied on the ground that it is "preliminary" and a "working document." In addition, your letter advised that Mr. Joseph Catalano, the Assistant Town Attorney, told you that the Town considers the report "an inter or intra-agency document covered by an exception."

In my opinion, none of the bases offered by the Town for a denial have merit.

First, it is noted that the amended 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)]. In view of the definition, any information in possession of the Town constitutes a "record" subject to rights of access. Therefore, the classification of a record as "preliminary" or as "working document" has no effect upon rights of access.

Secondly, I believe that the characterization of the report in question as "inter-agency or intra-agency" is misplaced [see §87(2)(g)]. In my opinion, inter-agency and intra-agency materials consist of communications between agencies and within an agency. This contention is bolstered by a letter addressed to me by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law (see attached). While discussing the exception pertaining to inter-agency or intra-agency materials appearing in §87(2)(g) of the amended Law, Assemblyman Siegel made reference to written communications "transmitted from an official of one agency to an official of another or between officials within an agency." Since the report was prepared pursuant to contract by a third party, a consulting firm, I do not believe that it may be considered either inter-agency or intra-agency.

The Siegel letter also states that the language of §87(2)(g) represents an alteration from the initial legislative proposal to amend the Freedom of Information Law. One of the first bills to amend the Law would have permitted an agency to withhold "advisory" material. It was felt that the term "advisory" was too broad and could have been cited to deny access to records that were accessible under the Law as originally enacted. In his discussion of the exception in question, which compared the original Freedom of Information Law (cited as the "current" Law) and the amendments, Mr. Siegel wrote:

> "...there have been instances in which a private consulting firm prepares an audit or a survey at the request of an agency of government. In such a situation, the agency is free to accept or reject the findings. As such, the findings could be considered 'purely advisory' and therefore deniable. Nevertheless, the current Freedom of Information Law clearly provides access to external audits."

Replacement of the term "advisory" with the existing language of §87(2)(g)in my view evidences the intent of the sponsor to ensure that a survey or an audit prepared by a third party should remain accessible.

In addition, case law rendered before the passage of the Freedom of Information Law in 1974 held that a study prepared by third party consultant is available. In one case that was decided in Nassau County, it was held that an analysis regarding a project was available, whether disclosure would be "embarrassing or flattering" to the municipality that contracted to have it prepared [see Winston v. Magan, 338 NYS 2d 654, 660-661 (1972)].

In sum, it does not appear that any of the grounds for denial that have been offered to you may appropriately be cited to withhold the report.

It is also noted in closing that the regulations promulgated by the Committee, which govern the procedural aspects of the Law, require that a denial of access given by a records access officer be stated in writing and provide the reasons for the denial. According to the material appended to your letter, no reasons for a denial were stated.

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: Joseph Catalano

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1005

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

Basil A. Paterson

January 24, 1979

Mr. Martin E. Giles
[redacted]

Dear Mr. Giles:

I have received your letter of January 19 regarding tax assessment records of the Town of Wheatland.

Your first question is whether the tax records, "the work cards", are public information. In my opinion, the cards used by the assessor in performing his duties are available. This opinion is based not only on the Freedom of Information Law (see attached), but also on case law rendered long before the enactment of the Freedom of Information Law. Specifically, in the case of Sanchez v. Papontas [303 NYS 2d 711 (1969)], it was held that assessment cards similar to those to which you have referred are accessible.

Second, you have asked whether a monetary charge other than a copying fee may be charged for the assessment cards. In this regard, §87(1)(b)(iii) of the Freedom of Information Law states that the maximum fee that may be assessed for copying is twenty-five cents, unless a different fee is otherwise prescribed by law. Further, the regulations promulgated by the Committee, which have the force of law, preclude the use of a search fee, unless such a fee had been established by law prior to the enactment of the Freedom of Information Law in 1974.

The third question is whether the Town Clerk can produce copies of the work cards. Since the Town Clerk is the custodian of town records (see Town Law, §30), I believe that he or she may make copies.

Your fourth question is whether the work cards may be "locked up by the assessor." In the same vein, a question has arisen concerning the extent to which an individual can inspect the records if the assessor has limited business hours. In my opinion, although the Town Clerk is the legal custodian of all town records under §30 of the Town Law, the cited provision must be interpreted in a reasonable manner. Specifically, when the assessor needs the cards in question to perform his duties, it would appear reasonable that he should have possession of the cards. Further, in terms of making a request, it is clear that the Freedom of Information Law does not require that records be produced immediately, for §89(3) of the Law states that an agency must respond to a request within five business days of its receipt. Consequently, if, for example, the assessor received a written request on a particular date, presumably he would be able to respond to a request, make the materials available or deny access within five business days of receipt of a request. If an office does not have regular business hours, an appointment procedure should be adopted. In this regard, I suggest that you review the Committee's regulations, a copy of which is attached.

Your fifth question is whether it is "customary for land in the flood plain to be dropped in one classification." In all honesty, I do not have the knowledge to provide an appropriate answer, and I recommend that you direct your question to the Division of Equalization and Assessment.

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 Board of the
Town of Wheatland

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1006

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

Basil A. Paterson

January 24, 1979

Mr. David Dudenhoefer
[redacted]

Dear Mr. Dudenhoefer:

I have received your letter regarding your inability to obtain records of disposition from the District Court of Nassau County.

It is emphasized that the Freedom of Information Law, a copy of which is attached, specifically excludes court records from its coverage. Therefore, rights of access granted by the Freedom of Information Law are not applicable to the records in which you are interested.

Nevertheless, as a general matter, court clerks are required to search and make available records in their possession, unless there is specific statutory direction to keep records sealed or confidential. I direct your attention to §255 of the Judiciary Law, which states 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 to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Since the quoted provision is general in its application, it would be inappropriate to conjecture as to whether all of the records you are seeking are available, for there may be specific statutory restrictions. However, it is suggested that you might renew your request based upon §255 of the Judiciary 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: Mr. Arthur F. Gange

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1007

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

January 24, 1979

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

Dear Mr. Wolfe:

Thank you for sending a copy of the resolution adopted by the Lewis County Board of Legislators under the Freedom of Information Law and your interest in complying with the Law.

Your letter indicates that although the resolution sets a fee of twenty-five cents per photocopy, the County Hospital has been charging and continues to charge a standard fee of $5.00.

In my opinion, the twenty-five cent limitation is applicable to hospital records, unless the $5.00 fee had been set by means of local law prior to the effective date of the original Freedom of Information Law, September 1, 1974.

First, it is clear that information in possession of the County Hospital constitutes "records" as defined by §86(4) of the Freedom of Information Law. Second, §87(1)(a) of the Law requires that the governing body of a public corporation, such as a county, adopt uniform rules applicable to all agencies within its jurisdiction. In my view, the Lewis County Hospital is an agency subject to the general rules adopted by the governing body, the Lewis County Board of Legislators. Third, §87(1)(b) of the Law states that the maximum that may be charged for photocopying is twenty-five cents, "except when a different fee is otherwise prescribed by law." Again, unless a local law governing the fees that may be assessed for hospital records had been enacted prior to the effective date of the original Freedom of Information Law, the policy of charging $5.00 for hospital records would in my opinion be 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1008

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

January 29, 1979

Mr. Syd Askoff
President and Executive Director
Suffolk Regional Off-Track
Betting Corporation
222 Middle Country Road
Smithtown, New York 11787

Dear Mr. Askoff:

I have received both of your letters of January 22 regarding the Freedom of Information Law. One pertains to "just what a person or persons are entitled to look at in an organization such as ours." The other concerns a telegram sent to you by Robert W. Greene, Assistant Managing Editor of Newsday, which alludes to penalties that may be assessed for noncompliance with the Freedom of Information Law.

With respect to the first letter, it is difficult to respond without greater knowledge of the nature of records in possession of Suffolk County OTB. Should you raise questions concerning access to specific records, I will be happy to provide advice. However, in an attempt to provide general guidance, enclosed are copies of the Freedom of Information Law, regulations that govern the procedural aspects of the Law, an explanatory pamphlet on the subject, and a copy of a speech given before the New York State Bar Association shortly after the amended Freedom of Information Law went into effect. I believe that the explanatory pamphlet and the speech will provide an overview of rights of access and your responsibilities.

It is noted that the Freedom of Information Law does not distinguish among applicants in terms of rights of access. As a general matter, if a record is accessible, it is equally available to any person, without regard to status or interest. Consequently, when a request is received, the only question that should arise involves the extent to which records may be denied under §87(2) of the Law, if any.

In response to Mr. Greene's statement, there are no penalties for failure to comply with the Freedom of Information Law. Although an agency has the burden in a judicial proceeding of proving that records withheld fall within one or more categories of deniable information listed in the Law, the only "penalty" that may be assessed is that the agency must provide access. As a matter of fact, the Committee has submitted a proposal to the Governor and the Legislature which would if enacted give a court discretion to award reasonable attorney fees to a person who successfully challenges a denial of access. Enclosed is a copy of the report for your consideration.

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: Mr. Robert W. Greene

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1009

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

Basil A. Paterson

January 29, 1979

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

I apologize for the delay in responding to your letter concerning reasons for a denial. Appended to your letter is an application that includes a denial based only upon citations to the Freedom of Information Law.

In my opinion, the regulations promulgated by the Committee, which impose a responsibility upon the records access officer to provide the reasons for a denial in writing, do not require more than Assistant Chief DiNardo has written. Consequently, I believe that the statutory citations constitute a sufficient response in the nature of a denial.

It is noted that if a denial is appealed, the person or body designated to determine appeals must "fully explain in writing" the reasons for a final denial. In such a case, I believe that the rationale for a denial on appeal must be more expansive than the reasons given for an initial denial by a 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
Executive Director

RJF:nb

cc: Assistant Chief DiNardo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1010

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

January 29, 1979

Ms. Laurie Thompson
Consultant
490 West End Avenue
New York, New York 10024

Dear Ms. Thompson:

I have received your letter of January 15 and have made several unsuccessful attempts to contact you. Once again, your inquiry concerns access to census records in possession of the New York County Clerk.

Specifically, after having been denied access to the records in question by the County Clerk's office, you have asked how you can be charged. In my opinion, there appears to be some confusion on the part of the Clerk. If the Clerk has established a policy of nondisclosure, I believe that it would be inappropriate to assess a fee for searching records. Further, the fact that there is specific reference to census records in §8021(d) of the Civil Practice Law and Rules implies that there is an intent in the law to provide access to the census information you are seeking. However, it is noted that the language I quoted to you provides that a search fee may be assessed even if a search is unsuccessful and produces no records.

In view of the foregoing, it is suggested that you discuss the provision quoted in my earlier letter to you with the Clerk prior to renewing your request in order to insure that you will not be charged a fee unless there is an intent to make available the records sought if they exist.

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: Anthony N. Durso
County Clerk of Kings County

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1011

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

January 30, 1979

Mr. Norman Goodman
County Clerk and Clerk
of the Supreme Court
60 Centre Street
New York, New York 10007

Dear Mr. Goodman:

Your letter of January 11 addressed to Attorney General Abrams and the correspondence appended to it have been transmitted to this office by Jack W. Hoffman, Assistant Attorney General in Charge. The Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law.

The question concerns your ability as County Clerk to obtain lists of taxpayers to be used in the preparation of lists of prospective jurors. Your letter to Attorney General Abrams indicates that Peter Crotty, Deputy Commissioner and Counsel to the Department of Taxation and Finance, has denied access to lists of taxpayers in possession of his Department pursuant to §697 of the Tax Law.

In my opinion, the denial of access by Mr. Crotty is consistent with law. The Freedom of Information Law provides that an agency may deny access to records that are "specifically exempted from disclosure by state or federal statute" [§87(2)(a)]. Having reviewed several provisions of the Tax Law, it appears that the Department of Taxation and Finance has no discretion regarding the release of the records in which you are interested, because the records are "specifically exempted from disclosure" by statute. In short, I agree with Mr. Crotty's interpretation of §697(e) of the Tax Law, for the cited provision effectively precludes offficials of the Department to disclose "[E]xcept in accordance with proper judicial order." Similarly, §384 of the Tax Law, which pertains to personal income tax, also provides that it is unlawful to "divulge or make known in any manner" information disclosed by individuals "in any report or

return" required to be submitted by taxpayers. Again, unless records are disclosed pursuant to judicial order, §384 of the Tax Law precludes officials of the Department from disclosing any portion of returns "or evidence of anything contained in them."

Finally, §506 of the Judiciary Law concerning sources of names that may be used by a Commissioner of Jurors merely provides examples of the sources that may be used to elicit the names of prospective jurors. It is noted that the cited provision refers to "available lists of the residents of a county," including lists of "state or local taxpayers." Nevertheless, under the circumstances, I do not believe that lists of state or local taxpayers are "available" from the Department of Taxation and Finance in view of the clear intent of Sections 384 and 697 of the Tax Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Jack W. Hoffman
Paul Greenberg
Peter Crotty

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1012

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

Basil A. Paterson

January 31, 1979

Ms. Myrna Luster
[redacted]

Dear Ms. Luster:

Your letter addressed to Lieutenant Governor Cuomo has been transmitted to me for response. The Lieutenant Governor is a statutory member of the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law. Your letter and the correspondence appended to it make reference to approximately twenty items, and I will attempt to deal with each of them.

Before responding, there are several points that I would like to make. First, the Freedom of Information Law is based upon a presumption of access. The Law defines "record" expansively to include any information "in any physical form whatsoever" in possession of an agency [see attached, Freedom of Information Law, §86(4)], which includes a school district. Moreover, all records in possession of an agency are available, except to the extent that records or portions of records fall within one or more among eight enumerated categories of deniable information [§87 (2)(a) through (h)]. The presumption of access is carried over to judicial challenges to denials of access, for 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 information. Finally, it is emphasized that the Law provides access to existing records. Therefore, an agency need not create a record in response to a request, except in specific circumstances [§89(3)].

At this juncture, I would like to deal with the issues that you raised. My responses will be numbered in accordance with the enumeration appearing in your correspondence.

1. The first group of records sought pertains to expenditures regarding programs for gifted and talented children received by Community School District No. 10, as well as reports and accountings of monies expended and evaluations of programs concerning gifted and talented children. You also requested rankings relative to gradings, ratings or trackings used by Junior High School 141 and Community District No. 10.

In my opinion, to the extent that records exist that demonstrate the means by which monies were expended in relation to the program, they are accessible, for they constitute factual data, which must be made available under §87(2)(g)(i) of the Freedom of Information Law. Similarly, reports regarding the program would likely be available at least in part, for they would contain factual data and in some cases might constitute final determinations [see §89(2)(g)(iii)].

With regard to grading, rating or tracking information, as you are aware, the Family Educational Rights and Privacy Act (also known as the "Buckley Amendment") precludes an educational agency from disclosing information that would identify a particular student or students. The correspondence indicates that the smallest group of students that would be identified consists of thirty-three and that information has been provided pertaining to twenty-four. From my perspective, it is unlikely that disclosure of statistical information regarding groups as large as those that you are seeking would identify particular students or result in a violation of the Family Educational Rights and Privacy Act. It is noted that I have discussed similar matters with representatives of the United States Department of Health, Education and Welfare and its Family Educational Rights and Privacy Act office and have been advised that statistical information concerning students is available if the students would not be identified.

2. The second area of inquiry concerns a request for a transcript and/or minutes of a meeting held with members of the Community School Board on September 15. You have also requested that the minutes include the names and titles of all those who attended. The question here is whether a transcript or minutes exist. If either of the records exist, they should be made available to you. It is noted that although the Open Meetings Law generally requires that minutes of all meetings be compiled, the meeting in question would be outside the scope of the Open Meetings Law.

Specifically, §103(3) of the Law states that its provisions do not apply to "matters made confidential by federal or state law." Since the discussion concerned the education of your child, it would constitute a "matter" made confidential by the Family Educational Rights and Privacy Act. As such, the requirement that minutes be compiled would not be present. Again, however, to the extent that minutes or a transcript exist, they are available to you under both the Freedom of Information Law and the Family Educational Rights and Privacy Act.

3. The third item also pertains to minutes of a meeting. My response is the same as that offered concerning the second question. However, if the meeting may have dealt with students other than your own child, identifying details or other matters that would identify a specific student or students other than your child need not be made available.

4 & 8. Both items deal with Frequency Distribution scores of two classes as well as a request for clarification of the range of scores to determine whether the two classes are of equal composition. It appears that the Frequency Distribution scores constitute "statistical or factual data" and therefore are available under §87(2)(g)(i). In addition, item eight states that the records that you received make reference only to twenty-four of thirty-three class members. In this regard, I believe that if a statistical record concerning the entire class exists, it should be made available to you.

Your request for a clarification of the range of scores may be outside the Freedom of Information Law if no records exist that would clarify the range. Here, it is reiterated that an agency need not create a record in response to a request.

5. The fifth item pertains to records that were made available, but were not responsive to your request. In this case, since records were provided, perhaps there was a lack of communication. From my perspective, this is not inconceivable, for Dr. Goldberg listed specific documents sent to you, including "a final evaluation and report." It might be worthwhile to renew your request and attempt to specify with greater particularity the records that you are interested in obtaining.

Assuming that the response did constitute a denial of access, the denial should have stated written reasons

for withholding, apprised you of your right to appeal, and provided the name and address of the person to whom an appeal should be directed (see attached regulations).

6 & 7. The sixth and seventh items concern a denial of access to a transcript and/or minutes by an individual who directed you to request the information from the person who had called the meeting. In this regard, there should be a procedure in existence that specifies the person or persons to whom requests should always be directed in conjunction with their duties as records access officer. In my opinion, the purpose of the Freedom of Information Law and the regulations promulgated by the Committee is to facilitate and enhance the ability of the public to gain access to records. By means of regulations, the Committee has prescribed that all agencies designate one or more records access officers to respond to requests. Consequently, the public should have the ability to locate the person to whom requests should be made. If the procedures adopted by the Community School Board do not designate specific individuals by name or job title to act as records access officer, they should be amended accordingly.

In terms of rights of access, the issue was dealt with in a preceding portion of this response.

9. The ninth item concerns records relating to the innovative programs for gifted children for District No. 10 and Junior High School 141. Your letter indicates that although information was provided, it was not the information that you requested. Although these issues were discussed earlier, it is reiterated that statistical or factual data and determinations contained within the records and reports should be made available and that the District need not create records in response to your request.

10 & 11. The tenth and eleventh items have also been discussed previously.

13. Item 13 indicates that Chancellor Macchiarola believes that much of the information that you are seeking should be made available. In view of the Chancellor's position in relation to the District, it is suggested that you contact his office once again in an effort to compel the District to respond appropriately to your requests.

14. Item 14 refers to a letter addressed to you by Elaine Cohen which states that minutes of a meeting in which you

are interested, and regulations adopted under the Freedom of Information Law were made available and that there is no breakdown of expenditures regarding the $64,000 spent by the District for gifted and talented children. Ms. Cohen also indicated that an evaluation report had been sent to you on September 20. Nevertheless, you have contended that the minutes were inaccurate and that information was again denied.

Your letter also indicates that there may have been a tape recording of the meeting of September 15. In fact if there is a tape recording, it is available to you, for it constitutes a "record" whose contents would not contain deniable information. It is noted that the tape recording would be deniable to others, since its contents pertain to you and your child and therefore could be withheld under the Family Educational Rights and Privacy Act and as an unwarranted invasion of personal privacy under the Freedom of Information Law. Again, if there are statistical breakdowns of the expenditures made in conjunction with the program in question, they are in my view accessible.

The remaining items deal with my letter to you, issues discussed earlier and matters outside my area of expertise.

Copies of this response will be sent to Chancellor Macchiarola, Dr. Weisenthal, Dr. Goldberg, and Ms. Cohen.

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: Ms. Cohen
Dr. Goldberg
Chancellor Macchiarola
Dr. Weisenthal

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1013

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

February 1, 1979

Mr. Neal Hirschfeld
Daily News
220 East Forty-Second Street
New York, New York 10017

Dear Mr. Hirschfeld:

I have received your letter of January 24 regarding a denial of access to records by the Office of Court Administration.

According to a letter sent to you by William Bulman, Deputy Counsel to the Office of Court Administration, there are several grounds for denial. The first is that the Freedom of Information Law does not apply to courts or agencies in the judicial branch of government. The second ground for denial states that the report in which you are interested "does not constitute a final agency policy or determination." As such, §87(2)(g) of the Freedom of Information Law was cited as a ground for denial. Third, Mr. Bulman also stated that the report in question "could conceivably be exempt" under §87(2)(e) of the Law, "depending upon the status of any law enforcement investigation that might be pending or judicial proceeding that might eventuate."

In my opinion, two of the grounds for denial cited by Mr. Bulman could not appropriately be raised. The remaining ground, which is based upon §87(2)(g), is the focal point of the controversy.

First, I believe that the Office of Court Administration is subject to the Freedom of Information Law in all respects. It is true that the "judiciary" is exempt from the coverage of the Law. Nevertheless, §86(2) of the Law defines "judiciary" to mean "the courts of the state, including any municipal or district court, whether or not of record." The Office of Court Administration clearly is not a court, but rather is the administrative arm of the judicial system.

It has no authority to interpret the law in a judicial sense. Consequently, the Office of Court Administration falls within the definition of "agency" appearing in §86(3) of the Law.

Although the ensuing comments might not have significant evidentiary value, it is noted that I participated in negotiations with the Legislature regarding the amendments to the Freedom of Information Law. During the negotiations, the status of the administrative branches of the court system were discussed in relation to the definitions of both "judiciary" and "agency." The reason for the exclusion of the courts from the Freedom of Information Law is based upon the notion that there are numerous statutes in the Judiciary Law and court acts which specifically direct that records be available or confidential. Consequently, neither the original Freedom of Information Law nor the Law as amended would affect rights of access to court records, even if the courts were included in the Law. Moreover, during the discussion, it was agreed that the administrative branches of the court system, such as the Office of Court Administration, are not themselves courts and therefore are not subject to the access provisions contained within the Judiciary Law, for example. It was further agreed that for the purpose of the Freedom of Information Law, the Office of Court Administration should not be considered a court within the definition of "judiciary," but rather an agency subject to the broad access provisions applicable to government generally. In sum, I contend that the Office of Court Administration is not part of the "judiciary" and is an "agency" subject to the Law.

Second, I do not believe that the report in question could be denied pursuant to §87(2)(e) of the Freedom of Information Law, which enables an agency to withhold records or portions thereof that are compiled for law enforcement purposes and which if disclosed would result in the harm described in subparagraphs (i) through (iv) of the cited provision. Based upon the materials appended to your letter, the investigation was not a "law enforcement" investigation. Consequently, it would appear that the records are not compiled for law enforcement purposes. Moreover, decisions rendered under both the original and the amended Freedom of Information Law have held that the "law enforcement" exception may be invoked only by criminal law enforcement agencies [see Young v. Town of Huntington, 388 NYS 2d 978 (1976); Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)].

The third ground for denial is based on §87(2)(g) of the Law, which 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, 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. Therefore, to the extent that the report contains statistical or factual data, statements of policy of the Office of Court Administration or are reflective of final determinations, such materials must be in my view made available to you.

This contention is bolstered by a letter addressed to me by Assemblyman Mark Siegel, the sponsor of the amendments to the Freedom of Information Law. Having quoted §87(2)(g), Mr. Siegel wrote that:

> "[T]he basic intent of the quoted provision is twofold. First, it is the intent that any so-called 'secret law' of any 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 a 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 the foregoing, even if the report in question is deniable in part, the remainder should in my opinion 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:jm

cc: William Bulman
Richard J. Bartlett

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1014

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

February 2, 1979

Mr. Elliot Seiden
President
Dobbs Ferry Civic Affairs Assn., Inc.
Box 96
Dobbs Ferry, New York 10522

Dear Mr. Seiden:

I have received your letter of January 29 regarding rights of access to records indicating the wages of teachers of the Dobbs Ferry Union Free School District.

In my opinion, the information in which you are interested is clearly available. Specifically, §87(3)(b) of the Freedom of Information Law requires each agency, which includes a school district, to maintain:

> "...a record setting forth the names, public office address, title and salary of every officer or employee of the agency..."

In view of the foregoing, every unit of government in New York subject to the Freedom of Information Law is required to compile a record which identifies all public employees, their salaries, public office addresses and titles.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force of 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:jm
Encs.
cc: Mildred Tackett

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1015

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

February 2, 1979

C. Frederick Kurtz, M.D.
[redacted]

Dear Dr. Kurtz:

I have received your letter of January 26 regarding Article 78 insofar as it relates to the Freedom of Information Law.

Enclosed are copies of the statutory language of Article 78, which appears in the Civil Practice Law and Rules. If you are interested in learning more about Article 78 proceedings, a law library will contain a great deal of information, some of which would likely appear under the headings of "special proceedings" or "proceedings against a public officer." In addition, volumes entitled "McKinney's Forms" provide examples of the types of materials that may be submitted in a judicial proceeding.

As a general matter, the burden of proof in an Article 78 proceeding is on the public, which must demonstrate that the public officer failed to perform a duty required to be performed or that action taken by a public offficer was arbitrary and capricious. It is emphasized, however, that the Freedom of Information Law as amended alters the burden of proof generally required. Specifically, §89(4)(b) requires that the agency has the burden of proving that records withheld fall within one or more of the grounds for denial enumerated in §87(2)(a) through (h) of the Law.

Enclosed for your perusal is an explanatory pamphlet that 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

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1016

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

February 2, 1979

Mr. Thomas K. Topping
#78D-214
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Dear Mr. Topping:

Your letter of January 26 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.

As you requested, enclosed is a copy of the Freedom of Information Law, which is applicable to records in possession of government in New York, as well as an explanatory pamphlet on the subject. To date, no privacy act has been enacted in this state.

With respect to records in possession of hospitals and doctors, there may be no direct rights of access, for they may be outside of government and therefore beyond the scope of the Freedom of Information Law. Nevertheless, I have also enclosed a copy of §17 of the Public Health Law, which states that some medical records in possession of hospitals and physicians must be transmitted to physicians designated by a patient.

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-1017

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

February 2, 1979

Ms. Catherine G. Farrell
President
West Islip Chapter SEPTA
1669 Fairfax Road
West Islip, New York 11795

Dear Ms. Farrell:

I have received your letter of January 29 regarding a denial of access to records identifiable to your child.

As requested, enclosed are the regulations promulgated by the United States Department of Health, Education and Welfare under the Family Educational Rights and Privacy Act (FERPA), which include a definition of "education records," and with which every educational agency or institution subject to the Act must comply.

Your letter indicates that you and other parents in your school district have been denied access to copies of tests and evaluations due to possible violations of the Copyright Act. In addition, you have been informed that providing copies of the evaluations and tests would invalidate the tests for future use.

In my opinion, much of the information you are seeking should be made available. It is noted that I have contacted the FERPA office in Washington on your behalf to confirm my contentions.

According to Ms. Pat Ballinger of the FERPA office, any evaluations identifiable to your child must be made available under both the Family Educational Rights and Privacy Act and the Education for the Handicapped Act. With respect to the tests, it is possible that disclosure of the tests in their entirety would constitute a violation of the Copyright Act. However, assuming that answers to the tests are recorded separately from the test itself, the answers must be made available. Further, Ms. Ballinger

advised that if the test questions and answers appear in a single booklet, it should be made available to you in its entirety.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me. If you believe that Ms. Ballinger can be of assistance, it is suggested that you call her at (202) 245-7488 or write to her at the FERPA Office, Room 526F, Hubert Humphrey Building, Department of HEW, Washington, D.C., 20201.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1018

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

Basil A. Paterson

February 2, 1979

Mr. Douglas Miller
Schenectady Gazette
332-334 State Street
Schenectady, New York 12301

Dear Mr. Miller:

I have received your letter of January 29 regarding rights of access to a letter of complaint sent to the Town Supervisor of Clifton Park concerning Town officials.

In my opinion, the substance of a complaint is accessible.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, which includes a town, 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)]. Moreover, §86(4) of the Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency. Therefore, a letter of complaint in possession of a town is subject to rights of access granted by the Law.

Having reviewed the grounds for denial appearing in §87(2) of the Law, it appears that there is but one ground that may be cited. Specifically, §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. In terms of complaints, the Committee has consistently advised that the substance of complaints is available, but that an agency may withhold identifying details regarding the complainant if in its judgment disclosure would result in an unwarranted invasion of personal privacy.

It is noted that while a letter of complaint pertains to a public employee, the Committee has advised and the courts have upheld the notion that disclosure of a complaint would not result in an unwarranted invasion of the public employee's privacy, for a complaint is relevant to the manner in which the employee performs his or her duties.

Most recently, this stance was confirmed by the Court of Claims in Montes v. State [406 NYS 2d 664 (1978)]. In directing that complaints directed against a parole officer were accessible, the Court stated that:

> "[W]here malfeasance of a public officer is an issue - and the necessary confidentiality of criminal investigation will not be impaired thereby or national security threatened - maximum freedom of information must be provided - whether the proceeding is criminal or civil. 'Where darkness prevails there is greater opportunity for mistrust, misfeasance, malfeasance, or nonfeasance'" (id. at 667).

In view of the foregoing, I believe that the substance of a complaint in possession of the Town of Clifton Park regarding Town employees 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

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Charles McClosky

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1019

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

February 5, 1979

Mr. Daniel Jean Lipsman
[redacted]

Dear Mr. Lipsman:

I have received your letters of January 25 and January 29. I read the decision rendered by the Appellate Division, First Department, in the New York Law Journal and I congratulate you on your efforts.

Your correspondence of January 25 concerns a letter sent to you by Robert Goldstein, registrar of the CUNY Graduate School, which indicates that he has been "directed to forward all requests for information from you to the office of the Vice-Chancellor for Legal Affairs..."

As you are aware, the regulations promulgated by the Committee, which have the force of law, require the head or governing body of an agency to designate one or more records access officers to respond to requests under the Freedom of Information Law. The regulations do not specify who the records access officers should be. The regulations also require that an appeals person or body be designated to determine appeals following initial denials of access. Further, §1401.7(b) of the regulations (see attached) specifically provides that "[T]he records access officer shall not be the appeals officer." If an employee of the Vice-Chancellor for Legal Affairs is the records access officer and another person or body has been designated to determine appeals, there would be no violation of the regulations. However, if appeals are determined by the person to whom your initial requests are directed, there would be a violation, for such a practice would effectively nullify your ability to seek administrative review of a denial of access.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Mary Bass

Robert Goldstein

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1020

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

Basil A. Paterson

February 6, 1979

Mr. Jesse J. Gwyn
[redacted]

Dear Mr. Gwyn:

I have received your letter regarding rights of access to your presentence report.

Although presentence reports are generally confidential, §390.50 of the Criminal Procedure Law states that:

> "[T]he presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, or the defendant himself, if he has no attorney, in which event the prosecutor shall also be permitted to examine the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are 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, the court in possession of the presentence report must make the report available to you, except as otherwise provided. As such, it is suggested that you direct your request, citing §390.50 of the Criminal Procedure Law, to the clerk of the court that maintains custody of the report.

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-1021

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

February 6, 1979

Mr. Joel Alpert
Editor
The Brooklyn Times
108 West End Avenue
Brooklyn, New York 11235

Dear Mr. Alpert:

I have received your letter of January 5 regarding rights of access to police blotters and similar records, as well as rights of access to police records generally.

I have enclosed a copy of an Appellate Division decision which pertains to police blotters. In brief, it cited this Committee's contention that a police blotter is a record in the nature of a log or diary in which events reported by or to a police department are recorded. Further, the decision made clear that the contents of a police blotter are not investigative in nature and should be made available. In my view, the means by which a record is characterized is determinative of rights of access. In many cases, records in the nature of police blotters, for example, have been accorded other descriptions or "names." From my perspective, changing the title of a document has no effect upon rights of access.

In terms of rights of access generally, the Freedom of Information Law is based upon a presumption of access (see attached). Specifically, §87(2) of the Law 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. Further, if a denial of access is challenged in court, the agency has the burden of proving that the records withheld fall within one or more of the categories of deniable information.

Relevant to your inquiry, §87(2)(e) of the Law states that an agency may withhold records compiled for law enforcement purposes and which if disclosed would result in the

harmful effects described in subparagraphs (i) to (iv) of the cited provision.

Enclosed is a pamphlet entitled "The New Freedom of Information Law and How to Use It" which I believe will be useful to you. If you would like additional copies, please feel free to contact me.

I hope that I have been of some assistance,

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1022

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

February 6, 1979

Rev. Dr. Peter P. Merrill
[redacted]

Dear Reverend Merrill:

I have received your letter of January 26 as well as correspondence transmitted to the Committee by the Steuben County Board of Supervisors regarding your request for records.

Having reviewed the materials, it appears that you have unsuccessfully attempted to gain access to records in possession of the Steuben County District Attorney that relate to the death of a young man killed in an automobile accident.

It is noted at the outset that the Freedom of Information Law, a copy of which is attached, grants access to all records in possession of government, except those records or portions of records that fall within one or more among eight categories of deniable information enumerated in §87(2)(a) through (h) of the Law.

In my opinion, two of the grounds for denial may be relevant to your request.

First, §87(2)(b) of the Law states that an agency may withhold records or portions thereof the disclosure of which would result in "an unwarranted invasion of personal privacy." Under the circumstances, it is possible that disclosure of some of the records would constitute an unwarranted invasion of personal privacy. For example, disclosure of some of the materials might result in personal hardship to the parents of the young man. In addition, other records, such as witness statements, might at this juncture result in an unwarranted invasion of personal privacy.

It is emphasized that questions concerning privacy can be answered only on a case by case basis and must of necessity invólve subjective judgments. For example, while I might consider that disclosure of a particular document might result in an unwarranted invasion of personal privacy, you might believe that disclosure of the same document would result in a permissible invasion or personal privacy. In short, there are few hard and fast rules that may be used to determine questions pertaining to personal privacy.

A second ground for denial that might be applicable appears in §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;
>
> 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..."

Having contacted the District Attorney on your behalf, I was informed that the investigation involving the accident is ongoing. As such, it is possible that disclosure would interfere with the investigation or disclose the identity of confidential sources, for example. If, however, disclosure of records compiled for law enforcement purposes would not result in the harmful effects described above, §87(2)(e) could not justifiably be cited as a ground for denial.

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
Enc.
cc: John M. Finnerty
Samuel J. Knox, Jr.
Elroy H. Young

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1023

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

February 7, 1979

Mr. Daniel Jean Lipsman
[redacted]

Dear Mr. Lipsman:

I apologize for the delay in responding to your letter of January 22.

Your question concerns the ability to copy minutes of a meeting held on March 29, 1978 during which your application for admission to the Hunter College School of Social Work was reviewed and rejected. Both you and Mary Bass, General Counsel and Vice Chancellor of the Board of Higher Education, have cited the language of a settlement as the basis for your arguments. Specifically, the settlement states that you are permitted to "see a record of the March 29, 1978 meeting..." In her letter to you of January 8, Ms. Bass asserted that you have been offered an opportunity to "see" the record but that it may not be copied because it is not accessible to the general public under the Freedom of Information Law, and because the ability to "see" is not equated with the ability to copy.

In my opinion, you may not only "see" the record, but may also seek a copy.

Case law rendered as long as fifty years ago stated that the right to copy is a "necessary incident" to the right to inspect [see e.g. In re Becker, 200 AD 178 (1922); New York Post Corp. v. Moses, 12 AD 2d 243, reversed on other grounds, 10 NY 2d 199 (1961)]. Each of the cases that dealt with the ability to have copies of records subject to inspection were decided prior to the enactment of the Freedom of Information Law.

In addition, §89(5) of the Law states that:

> "[N]othing 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 my opinion, the document in which you are interested constitutes a "record" as defined by §86(4) of the Freedom of Information Law. The fact that it may be deniable to the general public is irrelevant; it remains a record. In this instance the right to inspect the record in question was agreed upon by both parties involved. To deny you the ability to copy would in my opinion appear to conflict with the right to copy granted by the Freedom of Information Law by means of its "grandfather clause" appearing in §89(5). As such, you may in my view copy the record.

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: Mary Bass

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1024

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

February 7, 1979

Ira M. Ball, Esq.
[redacted]

Dear Mr. Ball:

I have received your letter of January 20 regarding the cost of photocopying a transcript of minutes of a Workmen's Compensation hearing.

Your letter specifies that four copies of the transcript exist and that when a request was made for a copy of the transcript, you were "advised that arrangements would have to be made with the Workmen's Compensation Court reporters." In response, you were informed that it would cost $1.20 per page to obtain copies of the transcript.

It is noted that §87(1)(b)(iii) of the Freedom of Information Law states that a maximum of twenty-five cents per photocopy may be assessed, "except when a different fee is otherwise prescribed by law." In this instance, §122 of the Workmen's Compensation Law governs the fees that may be charged. The cited provision states that:

> "[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 of similar minutes in the Supreme Court."

In view of the foregoing, a copy of the transcript must be furnished to you at the same rate charged by the Supreme Court "for transcripts of similar minutes."

You asked whether I have dealt with this subject matter in the past. In this regard, a related issued has been brought to my attention and has been the subject of numerous and lengthy discussions. In brief, the Workmen's Compensation Board has for decades permitted its hearing reporters to provide copies of transcripts and keep the proceeds for themselves. In my opinion, a transcript constitutes a "record" as defined by §86(4) of the Freedom of Information Law. Although access may be restricted to persons having an "interest" in a transcript, the transcript remains a record in terms of the Freedom of Information Law. Most important, however, is that the transcript is in the legal custody of the Workmen's Compensation Board, not the hearing reporter who may have prepared it. As such, I have contended that any fees that may be assessed for copying must be paid to the Board and not the hearing reporter.

Enclosed for your consideration is a copy of a memorandum written some months ago regarding the problem.

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

Enc.

cc: Workmen's Compensation Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1025

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

February 7, 1979

Mr. R. Gagné
[redacted]

Dear Mr. Gagné:

I have received your letter of January 25 concerning malfeasance or nonfeasance on the part of a public employee in relation to compliance with the Freedom of Information Law.

First, I agree with the intimation made in your letter that complaints against public employees are generally accessible.

Second, your question is whether public employees in New York who fail to perform their ministerial duties lose whatever qualified immunity they may have. In terms of background, according to a legal dictionary, a ministerial duty is "[O]ne regarding which nothing is left to discretion - a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist." Further, "[I]t arises when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual" (see Black's Law Dictionary).

Relative to your question regarding qualified immunity, I assume that you are implicitly referring to the federal Freedom of Information Act, which contains provisions that require the U.S. Civil Service Commission to initiate a proceeding to determine whether disciplinary action is warranted against an officer or an employee following a judicial decision that questions whether the person who withheld records acted arbitrarily or capriciously. Please be advised that the New York Freedom of Information Law does not contain any provision analagous to that contained in the federal Act. In short, if a public officer

or an employee withholds records in violation of the New York Freedom of Information Law, the only penalty that may be imposed involves providing access to the records. There is no possibility that a person who improperly withholds records under the New York Law may be fined, imprisoned, or subject to any other sanction.

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

Sincerely,

Robert J. Freem

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1026

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

February 7, 1979

Mr. David Dudenhoefer
[redacted]

Dear Mr. Dudenhoefer:

I have received your letter of January 31 dealing with rights of access to a record of disposition.

Again, it is clear that court records are excluded from the coverage of the Freedom of Information Law. I have enclosed a copy of the Freedom of Information Law and have marked on page 2 the definitions of "judiciary" and "agency." "Judiciary" is defined to mean the courts, and "agency" is defined to mean any governmental entity "except the judiciary..." (see §86).

Nevertheless, also enclosed is a copy of §255 of the Judiciary Law, which in brief states that a court clerk must diligently search and make copies of any records in his possession. Perhaps if you present §255 of the Judiciary Law to the court clerk, the record in which you are interested will be provided. If it is not made available, there should be some specific statutory basis cited by the clerk as a ground for denial.

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 PUBL[illegible]CESS TO RECORDS FOIL-AO-1027

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

February 8, 1979

Ms. Sally Mendola
Staff Attorney
The Legal Aid Society
15 Park Row - 19th Floor
New York, New York 10038

Dear Ms. Mendola:

Thank you for your continued interest in compliance with the Freedom of Information Law. Your inquiry concerns the propriety of a provision contained in the regulations promulgated by the Division of Parole.

Specifically, 9 NYCRR §8000.5(d) states that "[A]ny record of the Division of Parole not made available pursuant to this section shall not be released, except by the chairmand upon good cause shown."

It is emphasized at the outset that in our discussion of the quoted provision, you made clear that your question does not pertain to access to case files or records that identify persons subject to the jurisdiction of the Division. On the contrary, you informed me that you are interested in records that relate to the policies and the operation of the Division.

Section 259-a(2) of the Executive Law, concerning the functions, powers and duties of the Board of Parole contains language similar to that appearing in the quoted provision of the regulations. In relevant part, §259-a(2) states that:

> "[T]he division shall cause complete records to be kept of every person on parole or conditional release. Such records shall contain the aliases and photograph of each such person, and the other information referred to in subdivision one of this section, as well as all reports of parole officers in relation to such persons. Such records shall be maintained by the

> division and may be made available as deemed appropriate by the chairman for use by the department of correctional services, the division, and the board of parole."

Although the Chairman has significant discretion to disclose or withhold, it is clear that the discretionary language is intended to be applicable only to records related to persons "on parole or conditional release." The discretionary authority to release or withhold under §259-a(2) does not in my view extend to records generally, but rather to a restricted class of records in possession of the Division. Therefore, I believe that §8000.5(d) is more restrictive than the statutory authority upon which it is apparently based and conflicts with rights of access granted by the Freedom of Information Law.

The use of the word "apparently" was by design, for the statutory basis for the regulations cited in the Code is erroneous. The Code states that Part 8000 is based upon Executive Law, §259(2), which grants a general authority to promulgate regulations, and §259-b(11). There is no subdivision 11 in §259-b. Further, the erroneous citation appears in the original papers transmitted to the Department of State.

It is further noted that I have discussed the regulations in question on several occasions with representatives of the Division and have transmitted copies of model regulations devised by this Committee to assist agencies in fulfilling the procedural requirements of the Freedom of Information Law. From my perspective, regulations promulgated under the Freedom of Information Law are intended to deal with the procedural implementation of the Freedom of Information Law, not with substance, i.e. rights of access. Moreover, §87(1)(b) of the Freedom of Information Law requires agencies to adopt regulations consistent with and no more restrictive than those promulgated by the Committee. In my view, the regulations adopted by the Board of Parole regarding access to its records are more restrictive in several respects than the Freedom of Information Law and the Committee's regulations. An example of another provision which in my view is unduly restrictive was described in an advisory opinion transmitted to you earlier. Specifically, the provision that was the subject of the earlier inquiry is §8000.5(c)(3) of the regulations, which states that "access by the division of parole shall not be granted to reports, documents and materials of other agencies."

In that opinion, it was advised that the amended Freedom of Information Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency [see §86(4)]. The fact that an agency may be a primary or a secondary custodian of records is irrelevant, for it is the nature and content of a record that determines rights of access, and the ability to withhold is based upon the categories of deniable information enumerated in §87(2)(a) through (h) of the Freedom of Information Law.

Finally, in a similar controversy concerning the Board of Parole prior to its separation from the Department of Correctional Services, it was held that regulations could not be more restrictive than a statute [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405]. As in the earlier controversy, I believe that the regulations of the Division are void to the extent that they exceed statutory authority and restrict 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Division of Parole

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-299
FOIL-AO-1028

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

February 8, 1979

Mr. Michael Fried
Producing Director
Roundabout Theatre Company
333 West 23rd Street
New York, New York 10011

Dear Mr. Fried:

I have received your letter and the attached materials regarding your inability to gain access to records in possession of the Council on the Arts.

In brief, the correspondence describes in some detail the means by which the Council on the Arts provides grants to cultural institutions. In addition, your letter indicates that determinations involving the grants are made in "strict secrecy" and that you have been unable to learn of the reasons for a denial of funding of the Roundabout Theatre Company, which employs you as its Producing Director.

Several questions have been raised concerning the interpretation of both the Freedom of Information Law and the Open Meetings Law.

Central to the controversy is the ability to gain access to minutes of meetings held by an advisory panel, and subcommittees of the Council on the Arts. According to your letter, staff recommendations regarding grants are transmitted to an advisory panel, which has the power to modify the staff's monetary recommendations and is required to act by means of a majority vote of its members. Representatives of the staff and the advisory panel then transmit the panel's recommendations to a subcommittee of the full Council consisting of gubernatorial appointees on the Council. The subcommittee has the power to increase or decrease the panel's recommendation. In turn, the subcommittee presents its recommendations to the Council at an open meeting "for a final vote and ratification." Although the

recommendations are considered at an open meeting, you have stated that the Council rarely considers or deliberates with respect to individual grant applications. On the contrary, subcommittee recommendations pertaining to specific disciplines, such as theater, dance, or visual, are accepted and ratified by the Council in the aggregate. Grant applications are in few instances reviewed individually by the full Council.

Both the advisory panel and the subcommittee, which have held closed meetings to date, are in my view public bodies subject to the Open Meetings Law. As such, they are required to convene their meetings in view of the public, comply with the notice provisions contained in §99 of the Open Meetings Law and prepare minutes reflective of any action taken during an open meeting or an executive session.

In my opinion, both committees and advisory bodies are public bodies subject to the Open Meetings Law. 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 committees and advisory bodies are public bodies subject to the Law. For the purpose of clarity, committees, subcommittees and advisory bodies will be described as a "committee" in the ensuing paragraphs.

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. In addition, the definitions of "public body" and "quorum" indicate that any group designated to act collectively falls within the definitions. For example, although a governing body may consist of nine members and therefore requires a quorum of five, a committee consisting of three of the nine members would itself be a public body with a quorum requirement of two.

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 Court of Appeals (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409; aff'd _____ NY 2d _____).

Third, the committees in question perform a governmental function for a state agency, the Council on the Arts.

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 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 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Nevertheless, a recent decision rendered by the Appellate Division, Third Department, held that a committee is not a public body because it has no power to "transact public business," but merely recommends to a governing body (Daily Gazette Co., Inc. v. North Colonie School District, January 25, 1978).

In this regard, your letter indicates that the subcommittee in question has the power to modify the recommendations submitted to it by an advisory panel. While the action of the subcommittee cannot be equated with a final determination, its activities in my view clearly constitute the transaction of public business. As stated by the Appellate Division, Second Department, in Orange County Publications v. Council of the City of Newburgh:

> "[W]e believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [60 AD 2d 409, 415; aff'd 45 NY 2d 947].

Further, in affirming the Appellate Division decision, the Court of Appeals cited the statement of legislative declaration in the Open Meetings Law as the basis for its determination.

In sum, despite the Daily Gazette decision, it is my contention that both the advisory panel and the subcommittee are subject to the Open Meetings Law and must, therefore, create and make available minutes of their meetings reflective of their determinations.

The remaining issues concern the Freedom of Information Law. In a letter addressed to you by Robert A. Mayer, Executive Director of the Council on the Arts, "staff papers are internal working documents and are not available under the Freedom of Information Act." In my view, Mr. Mayer's statement is overly broad.

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 fall within one or more enumerated categories of deniable information listed in §87(2)(a) through (h) of the Law.

Relevant to "internal working documents" is §87(2)(g), which 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 an agency may withhold inter-agency or intra-agency materials, it must provide access to portions of such materials that consist of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations. This contention is bolstered by the contents of the letter sent to me by Mark Siegel, the Assembly sponsor of the amendments of the Freedom of Information Law. After quoting §87(2)(g), Assemblyman Siegel 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."

In view of the foregoing, it is likely that portions of "internal working documents" or staff memoranda are accessible. Moreover, the Council on the Arts has an affirmative duty to provide access to those portions of the records in question that are available.

Finally, having reviewed the regulations adopted by the Council on the Arts in April, 1978, I believe that there are several provisions which fail to comply with the Freedom of Information Law and the regulations promulgated by this Committee, which have the force of law.

Section 6400.2(a) requires that an application for records be made in writing "on a form to be prescribed by a records access officer." 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 use a prescribed form cannot constitute a valid ground for a denial of access [see Freedom of Information Law, §89(3)].

Subdivision (b) of the same section states that the payroll record is only available to the news media. Although the original Freedom of Information Law made reference to the news media with respect to payroll information, §87(3)(b) of the amended Law states that each agency must compile a record consisting of the name, public office address, title and salary of every officer or employee of an agency. The Law makes no distinction among applicants; if a record is available, it must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368, NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Moreover, case law decided prior to the enactment of the Freedom of Information Law held that payroll information is available to any taxpayer [see Winston v. Mangan, 338 NYS 2d, 654, 661 (1972)].

Section 6400.3 concerning the list of records is consistent with both the regulations promulgated by the Committee and the Freedom of Information Law. However, Appendix W-1 indicates that the Council's subject matter

list makes reference only to available records. Section 87 (3)(c) of the Freedom of Information Law, however, states that each agency must 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."

The last portion of the rules following §6400.8 states that the Council will not, according to its policy, make available certain records, including information "solicited in confidence," general correspondence and internal memos that have no effect upon the public, audits, and reports by observers and investigators concerning grant applications. In my opinion, the foregoing provisions are void. It is clear that the Committee's regulations govern only the procedural aspects of the Freedom of Information Law. They do not deal with substance, i.e. rights of access. Further, §87(1)(b) requires agencies to adopt regulations in conformity with and no more restrictive than those promulgated by the Committee. In this instance, the Council's rules deal with rights of access and in my opinion are more restrictive than the Freedom of Information Law. It is noted that similar regulations that were more restrictive than the Law were held to be void to that extent [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405]. Moreover, as noted previously, portions of general correspondence and internal memoranda may be accessible, whether or not they have direct effect upon the public. In addition, audits are clearly available. Reports by observers and investigators may be deniable in whole or in part. As such, insistence upon confidentiality by means of a blanket statement of policy in my opinion conflicts with the limited grounds for denial appearing in §87(2) of the Freedom of Information Law.

Copies of this response, regulations and model regulations prepared by the Committee, will be sent to Mr. Mayer.

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: Robert Mayer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1029

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

February 9, 1979

Mrs. Katherine Q. Briaddy
[redacted]

Dear Mrs. Briaddy:

As requested by Ruth Hand, I am providing you with information regarding your ability to gain access to historical records in your capacity as Historian for the Town of Ballston. According to Mrs. Hand, you have been having difficulty obtaining the records in question from a former Town Historian.

First, although the historical records may be placed in the physical custody of a town historian, for example, §30 of the Town Law provides that the town clerk shall have legal custody of all town records. Therefore, in my opinion, the town clerk may seek to require the former town historian to return the records of which the clerk has legal custody to the town. In short, while the former historian may have possession of the records, they remain in the legal custody of the town clerk.

It is suggested that you contact Edmund Winslow, Senior Historian for the Education Department, at the Cultural Education Center, Empire State Plaza, Albany. Mr. Winslow deals with problems concerning local history and historians, and I am sure he will be able to provide assistance.

In addition, enclosed are copies of the Freedom of Information Law, an explanatory pamphlet on the subject and regulations adopted by the Committee, which govern the procedural aspects of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Ruth Hand

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1030

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

February 13, 1979

Mr. Martin Werblow
[redacted]

Dear Mr. Werblow:

I have received your letter of February 5 addressed to Elie Abel. Please be advised that Mr. Abel recently resigned from the Committee to accept a teaching position in California. In addition, as a general matter, I respond to correspondence addressed to the Committee.

Your inquiry concerns rights of access to "performance evaluations" of several of your co-workers, and any records relating to your "job performance and any possible disciplinary action" that may be taken against you.

Rights of access to the records in question are dependent upon their nature and contents. The Freedom of Information Law is based upon a presumption of access and states that all records in possession of an agency are available, except records or portions thereof that fall within one or more enumerated categories of deniable information listed in the Law [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Most relevant to your inquiry is §87(2)(g), which 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 an agency may withhold inter-agency and intra-agency materials, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy and determinations found within such materials. Under the circumstances that you have described, it appears that most of the records would constitute "intra-agency" materials. In terms of the specific records sought, I believe that performance evaluations of your co-workers would likely be deniable at least in part. For example, if an evaluation is a statement of opinion or impression, it would in my view be deniable. However, to the extent that is contains factual data, it is available. With regard to documents relating to your job performance, the same general principle would apply. If an evaluation is advisory, it would appear to be deniable. However, if, for example, you have been the subject of disciplinary proceeding, the determination following the proceeding would be available.

It is noted that many collective bargaining agreements involving public employees grant greater rights of access than the Freedom of Information Law. Therefore, it is suggested that you review your collective bargaining agreement to determine whether you may have rights of access under the agreement that exceed those granted by the Freedom of Information Law.

Further, if you are involved in a dispute, it is recommended that you contact your public employees union representative, who may be able to provide guidance.

You mentioned at the end of your letter that I might "overrule" Dr. Bernstein's decision. In this regard, this office has no authority to issue "rulings" or "overrule" agency determinations. The function of the Committee is to advise. Therefore, an agency official may be persuaded by an advisory opinion rendered by this office, but there is no compulsion to abide by 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:jm
Enc.
cc: Dr. Blanche Bernstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1031

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2513, 2791

February 13, 1979

Mr. Charles K. Scott
Executive Secretary
Municipal Civil Service Commission
Room 301, Watertown Municipal Building
245 Washington Street
Watertown, New York 13601

Dear Mr. Scott:

I have received your inquiry of February 6 regarding disclosure of eligible lists.

According to your letter, firefighters and police officers must engage in a series of examinations, including written, medical, and physical agility examinations to qualify for employment. Your question is whether the names of candidates are available in the form of an "eligible list" only after they have passed all phases of the examination process. Your letter indicates that it is your contention that a candidate's name should not be released as part of an eligible list until it is finally determined whether he is eligible for employment.

I concur with your contention. My opinion is based to a great extent upon §3.6 of the rules and regulations promulgated by the State Civil Service Commission. In relevant part, the cited provision states that:

> "[E]very candidate who attains a passing mark in an examination as a whole and who meets the standards prescribed, if any, for separate subjects or parts of subjects of the examination shall be eligible for appointment to the position for which he was examined and his name shall be entered on the eligible list in the order of his final rating..."

Although the quoted provision does not make reference to access to eligible lists, it does make clear that an eligible list may be established only after candidates have attained a passing mark in an examination "as a whole" and that the candidate must meet each of the standards prescribed separately to qualify for a position.

In view of the foregoing, it appears that the intent of §3.6 of the regulations is that an eligible list may be established only after the entire examination process has been completed. Consequently, I agree with your contention that the names of candidates need not be disclosed until they are fully qualified by means of passing each of the examinations required to be taken.

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-1032

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

February 13, 1979

Mr. Dean Mishoe
[redacted]

Dear Mr. Mishoe:

I have received your letter regarding release forms and other information pertinent to the Freedom of Information Law.

With respect to forms, this Committee has consistently advised that any request in writing that reasonably describes the records sought should suffice. Therefore, a failure to use a form prescribed by an agency cannot in my view constitute a valid ground for denial of access.

In sum, to make a request, you should reasonably describe the records in which you are interested in writing and transmit the request to the "records access officer" of the agency that maintains custody of the records.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee which govern the procedural aspects of the Law and with which all agencies in New York must comply, 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-1033

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

February 14, 1979

Mr. David P. Starna
Director
Municipal Records Center
City Hall
Oswego, New York 13126

Dear Mr. Starna:

I enjoyed our conversation of this afternoon and hope that our paths will someday cross.

As we discussed, I was informed by the Albany bureau of the United States Immigration and Naturalization Service that both the files of declaration of intention and oaths of affirmation are available and that copies of such documents may be reproduced. However, I was also informed that the records in question cannot be certified in a legal sense when copies are made.

Finally, as you requested, enclosed is a copy 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.

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:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1034

DEPARTMENT OF STATE, 162 WASHINGTON AVE., ALBANY, NEW YORK 12231
Basil A. Paterson
(518) 474-2518, 2791

February 14, 1979

Ms. Frances Zamnik
[redacted]

Dear Ms. Zamnik:

I have received your letter of February 9, which arrived at this office on February 13.

As you requested, enclosed are copies of all of the advisory opinions that you cited in your letter. As a matter of course, the Committee distributes its opinions free of charge. Consequently, there will be no charge assessed for providing the opinions to you.

Your first question deals with the status of the Mental Health Information Service of the Second Judicial Department. Since the Mental Health Information Service is part of the administrative arm of the court system, it is not a court, but rather is an "agency" as defined by §86.3 of the Freedom of Information Law. Consequently, records in possession of the Mental Health Information Service are not subject to the Judiciary Law, §255. Based upon a discussion of access to records in possession of Mental Health Information Service with directors from two judicial districts, it appears that records in possession of the Service are subject to the restrictions found in §33.13 of the Mental Hygiene Law. If that is the case, records are available after having received the consent of the Commissioner of Mental Hygiene or by means of a court order.

Your next question concerns the access officers at three agencies, one of which is the New York and New Jersey Port Authority. In this regard, please be advised that the Port Authority is not subject to the Freedom of Information Law because it is a bi-state agency. As such, due to constitutional barriers, the Port Authority is outside the scope of the Freedom of Information Law. Never-

theless, the Port Authority has established policies and procedures regarding access to its records, and your request should be directed to the Office of the Secretary, New York and New Jersey Port Authority, 67th Floor, 1 World Trade Center, New York, New York, 10048. The access officer of the New York City Department of Human Resources is Samuel Elber. Your request should be directed to him at 250 Church Street, New York, New York, 10013. With respect to the Mental Health Information Service, please direct your request to Alfred Besunder, Director, Mental Health Information Service, 170 Old Country Road, Mineola, New York, 11501.

Finally, I have made several inquiries regarding the Star Medical Clinic in Jamaica. Based upon the information that I have received, the clinic is private and is not a governmental entity 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1035

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

February 15, 1979

Mr. Arthur Friedman
Freedom of Information Appeals
City of New York
Department of Personnel
220 Church Street
New York, New York 10013

Dear Mr. Friedman:

Thank you for sending a copy of the appeal made by Charles J. Theophil under the Freedom of Information Law and the ensuing determination.

In terms of background, Mr. Theophil has asked whether a specific individual remains in the employ of the Office of the Queens borough president as an assistant civil engineer.

While I agree with the statements made in your determination, I disagree with the denial. The denial is based upon the notion that disclosure of employment histories would constitute an unwarranted invasion of personal privacy. I concur with that contention. Nevertheless, §87(3)(b) of the Freedom of Information Law requires each agency to maintain "a record setting forth the name, public office address, title and salary of every officer and employee of the agency."

It is noted that the payroll record provision represents one of the few instances in the Freedom of Information Law in which an agency is required to create a record. Moreover, it is clear that the contents of the payroll records are accessible to the general public.

Under the circumstances, by means of a review of a payroll record, Mr. Theophil should have the capacity to learn whether or not a specific individual is currently

employed. On that basis, I believe that Mr. Theophil should have been directed to inspect the appropriate payroll records to determine whether or not a specific individual remains in the employ of New York City or any of its component offices.

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: Charles J. Theophil

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1036

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

February 15, 1979

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:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry concerns rights of access to tape recordings of meetings of the East Ramapo School District.

I must reiterate the contents of an opinion rendered to you on September 29, 1978. In that letter, it was stated that the status of items such as tape recordings, microfilm, computer tapes and the like was questionable under the original Freedom of Information Law enacted in 1974. However, the amended Freedom of Information Law, effective January 1, 1978, removes any ambiguities that may have existed regarding such materials. Specifically, §86(4) of the amended 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 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"

within its scope, including tape recordings. 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.

Moreover, since my initial correspondence with you, a judicial interpretation of the Freedom of Information Law held that tape recordings in possession of a school board are indeed records that must be reproduced on request (see attached, Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). Although the school district objected that "to reproduce these records may be burdensome and involve personnel costs for which petitioner has not offered to pay," the Court stated that:

> "[T]here is no exemption provided in Public Officers Law, Section 87(2) for requests which may be burdensome and 21 NYCRR Section 1401.8(c)(3) specifically provides that the agency may not include personnel salaries in assessing reproduction costs. Accordingly, the court finds no merit to respondent's objections and directs that these records be produced..."

With respect to fees, it is my opinion that there should be no fee assessed for listening to tape recordings. If, however, copies of tape recordings are sought, the District may in my view charge on the basis of the actual cost of reproduction [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
Executive Director

RJF:nb
Enc.
cc: East Ramapo School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1037
OML-AO-300

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

February 23, 1979

Mr. Arthur A. Katz
Warshaw, Burstein, Cohen
Schlesinger & Kuh
555 Fifth Avenue
New York, New York 10017

Dear Mr. Katz:

I have received your letter of February 21. Your inquiry concerns the propriety of the activities of the Zoning Board of Appeals of the Town of Mamaroneck under the Open Meetings Law, and rights of access to minutes of its meetings under the Freedom of Information Law.

According to your letter, at a meeting held on November 22, the members of the Zoning Board of Appeals left the meeting for the purpose of discussing your application for a variance. After having convened privately, the Board voted unanimously to reject the application. In addition, you have stated the minutes of the meeting in question do not indicate the nature of the discussion during the closed session.

It is noted at the outset that numerous questions have arisen regarding the proceedings of zoning boards of appeals in relation to the Open Meetings Law, for §103(1) of the Law states that its provisions are not applicable to quasi-judicial proceedings. As such, it has been argued that zoning boards of appeals are exempt from the Law to the extent that they engage in quasi-judicial proceedings. Nevertheless, this Committee has consistently advised that the exemption for quasi-judicial proceedings is inapplicable with respect to proceedings of town zoning boards of appeals.

Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §267(1) of the Town Law has long provided that all gatherings of town zoning boards of appeals "shall be open to the public." Consequently, although a town zoning board of appeals might in some instances act in a quasi-judicial capacity, §267(1) of the Town Law, which, under the circumstances, is less restrictive than the Open Meetings Law, requires that such meetings be open to the public. Therefore, it is my view that the exemption for quasi-judicial proceedings is inapplicable with respect to town zoning boards of appeals.

Moreover, an informal opinion rendered by the Attorney General on October 18, 1977, arrived at the same conclusion and advised that the exemption in the Open Meetings Law regarding quasi-judicial proceedings cannot be invoked by a town zoning board of appeals.

In view of the foregoing, I believe that a zoning board of appeals may exclude the public from its proceedings only in accordance with the provisions for executive session appearing in §100 of the Open Meetings Law. Subdivision (1) of the cited provision requires that a procedure be followed prior to entry into executive session. Specifically, §100(1) 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..."

In addition, the Law limits the subject matter that may be discussed in an executive session in paragraphs (a) through (h) of §100(1).

Although the Board may have identified the subject matter for discussion in its closed session of November 22, there is no indication that the procedural steps required by the Open Meetings Law were followed. Moreover, in my

opinion, no ground for executive session could have appropriately been cited. As such, it appears that the Board did not have the capacity to discuss your application behind closed doors.

With regard to the minutes of executive session in question, §101(2) of the Open Meetings Law requires that minutes of executive sessions be compiled only when determinations are made behind closed doors. Therefore, when a determination is made during an open meeting that follows deliberation in executive session, minutes of the executive session need not be compiled. Nevertheless, as noted earlier, I believe that the Board should have deliberated in open session, for the discussion was not consistent with any of the grounds for executive session enumerated in the Law.

Your letter also makes reference to a meeting of the Zoning Board of Appeals held on January 24. During the meeting, the Board "physically left the meeting" for the purpose of discussing whether or not your application for re-hearing would be heard on the merits.

My response to this situation is essentially the same as that offered concerning the closed session held on November 22. In brief, the Zoning Board of Appeals may enter into executive session only to discuss those subjects enumerated in the Law as appropriate for executive session. Based upon the contents of your letter, there was no apparent ground for executive session regarding the meeting on January 24.

Your final question concerns minutes of meetings of the Board that are not made available until they are approved by the Board at the ensuing scheduled meeting. You have indicated that the meetings are usually held approximately a month apart, and on some occasions, are as much as two months apart. Further, you have stated that unapproved minutes have been denied to date due to the absence of formal approval by the Board.

Due to the substantial lapse of time that often exists between a meeting and the approval of minutes, the Committee has consistently advised that minutes are accessible as soon as they exist, whether or not they have been approved. This stance is based upon the notion that, while unapproved minutes may not be "official", they constitute a "record" within the scope of §86(4) of the Freedom of Information Law and therefore are subject to rights of access. However, it has also been advised that the clerk or whoever maintains custody of unapproved

minutes mark the minutes as "unapproved," "draft," or "non-final" when the minutes are disclosed. By so doing, the public is given an opportunity to learn of the general nature of events that transpired at a meeting; concurrently, the members of the Board to which the minutes relate are given a measure of protection.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Mamaroneck Zoning Board of Appeals
Dorothy Miller, Town Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1038

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

February 26, 1979

Mr. J.A. Weller
Wegmans Food Markets, Inc.
1500 Brooks Avenue
Rochester, NY 14603

Dear Mr. Weller:

I apologize for the delay in responding to your letter. Your inquiry concerns "the practice of the tax office of the City of Rochester to release upon telephone request the mailing addresses of real property tax payers which were listed on the City's tax roll records." Your letter also indicates that the tax office had made the mailing addresses available until 1977, when its policy changed on the basis that the release of such information would in its view constitute an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law.

Having reviewed the contentions made in your letter, there is little with which I can disagree. I have taken the liberty to discuss the matter with a representative of the Office of Corporation Counsel, and I was informed that one of the reasons for the change in policy is based upon an alteration of the information systems used by the City of Rochester. While the assessment roll continues to be clearly available, the City no longer maintains a single list that may be identified as a tax roll. Mailing addresses identifying tax payers are now contained on a computer tape in the Treasurer's Office.

In any event, as we have discussed in the past, the privacy provisions in the Freedom of Information Law are vague and any determinations regarding privacy must of necessity be made on a case by case basis, unless there is clear statutory or judicial direction. The problem essentially is that one "reasonable man" may contend that disclosure of a particular record would result in an unwarranted invasion of personal privacy, while a second equally reasonable man may contend that disclosure of the same records would result in a permissible invasion of personal privacy.

Under the circumstances, I do not feel that it would be appropriate for me to inject my subjective judgment in response to the specific questions raised. As you are aware, the Committee has no power to issue "rulings" and its authority is solely advisory. Further, while the Committee has the authority to issue guidelines regarding privacy pursuant to §89(2) of the Freedom of Information Law, it has not done so for the reason that was expressed earlier - the Committee does not believe that it can appropriately make subjective judgments due to the varying sensibilities of reasonable people.

In my view, a determination regarding your request can be made only by officials of the City of Rochester. Perhaps upon review of the situation it will be determined that disclosure would not result in an unwarranted invasion of personal privacy. I suggest that you attempt to reach the Office of Corporation Counsel in an effort to present your points of view.

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: Jeffrey Eichner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1039

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

February 26, 1979

Mr. Joseph Fournier
Clinton Correctional Facility
Box B 77-A-2575
Dannemora, New York 12929

Dear Mr. Fournier:

I have received your letter regarding your inability to obtain subject matter lists required to be compiled under the Freedom of Information Law. Your inquiry concerns the names and addresses of the records access and appeals officers of three agencies.

Please be advised that agencies are not required to inform the Committee of the identities of records access or appeals officers. Nevertheless, I can give you the following information.

The public information officer for the Division of Criminal Justice Services is Norma Sue Wolfe. I am sure that she will be happy to assist you after writing to her at the Department of Criminal Justice Services, 80 Centre Street, New York, New York, 10013.

With respect to the Committee on Character and Fitness of Applicants for Admission to the Bar, it is suggested that you direct your request to the clerk of the Appellate Division, Second Department, the custodian of records in possession of the Court. However, it is important to point out that §90(10) of the Judiciary Law requires the confidentiality of "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..." As such, records regarding the fitness of applicants for admission and those who have been admitted are confidential.

Finally, to request the subject matter list of the City of White Plains, it is suggested that you address your communication to the "records access officer" at the same address as that appearing on the letter from Corporation Counsel to you of January 24. It is also suggested that you mark the outside of the envelope "Freedom of Information 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1040

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

February 27, 1979

Mr. Louis D. Orazio
Assistant to the Superintendent
East Ramapo Central School District
50A South Main Street
Spring Valley, New York 10977

Dear Mr. Orazio:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of rules under consideration by the East Ramapo Board of Education.

Having reviewed the proposal, there are several comments I would like to make.

First, as you are aware, the regulations promulgated by the Committee govern the procedural aspects of the Freedom of Information Law; they do not deal with substance, i.e., rights of access. In this regard, virtually all of the language following Section I(C) pertains to rights of access, rather than the procedural implementation of the Law. The direction contained in subdivisions (C) through (F) reiterate statutory provisions and therefore are unnecessary and may in my view be misleading. For example, subdivision (C) attempts to list categories of accessible records. However, the list is apparently based upon §88(1) of the original Freedom of Information Law, which was repealed. Similarly, subdivision (F) seeks to reiterate categories of deniable information currently appearing in §87(2) of the Freedom of Information Law. Nevertheless, the proposed language may be misleading. For instance, subdivision (F)(2) requires the District to withhold information that "[F]alls into the category of trade secrets and other matters divulged to the Board, etc..." The scope of "other matters" is unclear. Once again, I suggest that subdivisions (C) through (F) be deleted.

Second, Section VIII concerning fees fails to comply with the Freedom of Information Law and the Committee's regulations. Specifically, §1401.8 of the Committee's regulations, a copy of which is attached, prohibits the assessment of fees for search and certification. Further, subdivision (B)(4) of Section VIII includes a $5 handling charge, which cannot in my opinion be charged.

Finally, with respect to tape recordings, I have enclosed a copy of a recent judicial determination on the subject which directed that a school board reproduce tape recordings on request, and precluded the board from including "personnel salaries in assessing reproduction costs." As such, I believe that an individual may listen to tape recordings free of charge, that copies of tape recordings must be reproduced on request and that an applicant can be charged for reproduction only on an actual cost basis.

In view of the foregoing, it is suggested that Section VIII be amended accordingly.

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-1041

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

February 27, 1979

Ms. Anne L. Stern
[redacted]

Dear Ms. Stern:

I have received your letter regarding your inability to gain access to hospital records pertaining to you.

It is noted at the outset that the Freedom of Information Law applies only to records in possession of government. Consequently, if a private hospital maintains custody of the records in which you are interested, the records would be beyond the scope of the Freedom of Information Law.

In any case, enclosed are copies of regulations adopted by the State Health Department concerning patient rights and Section 17 of the Public Health Law. Under Section 17, you may be able to gain access to records indirectly by means of a request made by another physician.

Also, as requested, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee, 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.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1042

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2513, 2791

February 27, 1979

Mr. Richard Blowes
Receiver of Taxes
Town Hall
Hampton Road
Southhampton
Long Island, NY 11968

Dear Mr. Blowes:

I have received your letter of February 16 concerning your inability to gain access to records in possession of the assessors of the Town of Southhampton.

Your letter indicates that, as Tax Receiver, you have a need to gain access to the records in question in order to perform your duties appropriately and to avoid unnecessary losses of revenue to the Town and other districts for which you collect taxes.

In my opinion, the records in which you are interested are accessible to you as Tax Receiver and, in addition, would be accessible even if you had no particular need to know.

As a general matter, the Freedom of Information Law grants access to all records in possession of government, 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. Under the circumstances, it is unlikely that any of the records that you are seeking would be deniable. Moreover, notwithstanding the Freedom of Information Law, judicial determinations rendered before its enactment held that records used by an assessor to arrive at assessments and similar documents are available (see e.g., Sanchez v. Papontas, 32 AD 2d 948; Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756). As such, I believe that the records are in great measure or perhaps in their entirety accessible to any person under the Freedom of Information Law.

However, as you have described the situation, it would appear that resort to the Freedom of Information Law should be unnecessary. As you are aware, the Freedom of Information Law is based upon a right to know, rather than a need to know. Nevertheless, as Tax Receiver, it would appear that you have a need to know the contents of the records in order to perform your official duties.

Although the Committee has no authority to compel compliance with the Freedom of Information Law, opinions rendered by this office have in some cases been persuasive and have been cited by the courts as the basis of their determinations. Copies of this opinion will be sent to the Town Assessor and the Town Supervisor in the hope that it will convince those officials who may be recalcitrant to disclose and permit you to perform 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:jm

cc: Town Assessor
Town Supervisor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1043

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

February 27, 1979

Mr. Harry Kursh
[redacted]

Dear Mr. Kursh:

I have received your letter of February 19, in which you have requested general information regarding the Freedom of Information Law and have raised questions regarding rights of access to applications for records made by the public directed to a school district.

First, enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law, an explanatory pamphlet on the subject, a pocket guide to the Law, and the Committee's first annual report to the Governor and the Legislature on the Freedom of Information Law.

Second, with respect to rights of access to applications made under the Freedom of Information Law, I believe that portions of the records are accessible, while the remainder may be denied.

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 of records fall within one or more categories of deniable information listed in §87(2)(a) through (h) of the Law. Relevant to your inquiry is §87(2)(b), which provides that an agency may withhold records or portions of records which if disclosed would result in an unwarranted invasion of personal privacy. Under the circumstances, I believe that the substance of applications for records should be available, but that identifying details regarding the applicants may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

This would be consistent with one of the basic principles of the Law, that records that are accessible should be made equally available to any person, without regard to status or interest. Stated differently, the identity of an individual who applies for records is irrelevant to rights of access.

In sum, an agency, such as a school district, must in my opinion provide access to applications for records, except to the extent that the identities of the applicants would be disclosed.

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

OML-AO-302
FOIL-AO-1044

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

February 27, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

Thank you for your continued interest in compliance with the Freedom of Information Law and the Open Meetings Law. Your inquiry concerns the status of collective bargaining negotiations under the Open Meetings Law and the propriety of by-laws adopted by the Jamestown Board of Education.

First, as you intimated, §100(1)(e) of the Open Meetings Law permits public bodies to discuss collective bargaining negotiations during executive session. I realize that collective bargaining is conducted in view of the public in Florida. However, I know of no instance in which collective bargaining agreements have been negotiated publicly in New York.

Second, with respect to the resolution passed by the Board on February 13 concerning the ability of the Superintendent of Schools to sign a contract between the Board and the Jamestown Principals' Association, I have no knowledge of any provision of law that would preclude such an agreement. Nevertheless, I have little expertise regarding the Education Law and you might want to contact the Office of Counsel of the Education Department to determine whether the resolution is valid.

Third, according to your letter, §9470 of the Board's by-laws states that a "[V]ote of the Board shall be upheld by the entire board after the decision is made." The intent of the quoted provision is unclear. As a general matter, the Open Meetings Law in conjunction with §1708 of the Education Law requires that boards of education act publicly. Consequently, it would appear that the intent of §9470 is to require all members of the Board of Education, including those who may have dissented with regard to a particular issue, to uphold determinations made by the Board as a body.

Fourth, §9320 of the by-laws states in part that "matters brought before the Board shall be considered absolutely confidential until they are made a matter of public record." In my opinion, the quoted provision is all but meaningless. 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... in any physical form whatsoever..." Therefore, any information in possession of a school district would be subject to rights of access whether or not the Board has dealt with the information or has made the information "a matter of public record." Further, all records in possession of an agency, such as a school district, are available, except to the extent that §87(2)(a) through (h) of the Freedom of Information Law permits a denial of a record or portion of a record. In view of the foregoing, §9320 of the by-laws is in my view of no effect, for the Freedom of Information Law prescribes and limits the grounds for denial that may be asserted by an agency, and a school has no authority to "legislate" in a manner that conflicts with a statute passed by the State Legislature.

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: Jamestown School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1045

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

February 28, 1979

Mr. Robert Gagné
[redacted]

Dear Mr. Gagné:

I apologize for the delay in response to your letter. Your inquiry concerns access to court records and the status of public utilities under the Freedom of Information Law.

First, with respect to court records, it is important to note that the definition of "agency" appearing in §86(3) of the Freedom of Information Law specifically excludes the "judiciary" from the coverage of the Law. Therefore, records in possession of the courts are not subject to rights of access granted by the Freedom of Information Law. Nevertheless, as a general matter, court records are available, for §255 of the Judiciary Law states in brief that a court clerk must upon request diligently search and provide copies of records in his or her possession.

Second, regarding public utilities, it is my opinion that such corporations do not fall within the definition of "agency." Please note that the definition includes reference to a "governmental entity" performing a "governmental" function. Although a public utility may perform a governmental function, public utilities in New York are not governmental entities. Consequently, I do not believe that records of public utilities in New York are 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

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1046

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

February 28, 1979

Mr. Joseph G. Zuckerman
[redacted]

Dear Mr. Zuckerman

I have received your letter of February 20 concerning a failure by the Office of Court Administration (OCA) to respond to a request made under the Freedom of Information Law. According to your letter, a request was directed to the Equal Employment Office of the Office of Court Administration on February 9, and to date you have received no reply.

It is important to note that OCA has in the past indicated that it is not subject to the Freedom of Information Law. I disagree with its stance. Section 86(3) of the Freedom of Information Law defines "agency" to include all governmental entities in New York performing a governmental function, "except the judiciary or the state legislature." Section 86(1) of the Law defines "judiciary" to mean "the courts of the state, including any municipal or district court, whether or not of record." In my opinion, OCA is not a court and therefore does not fall within the exclusion for the "judiciary." It is my contention that OCA is an "agency" subject to the Freedom of Information Law in all respects.

In view of the foregoing, I believe that the Office of Court Administration is required to comply with §89(3) of the Law (see attached), as well as the regulations promulgated by this Committee, which govern the procedural implementation of the Freedom of Information Law (see attached).

Relevant to your inquiry, both the Law and the regulations require that an agency respond to a request within five business days of its receipt. If the agency cannot make a determination to grant or deny access within five business days, it may acknowledge receipt of the request in writing and take ten additional business days to grant or

deny access to the records sought. In cases in which there is neither a grant nor a denial of access, nor an acknowledgment within five business days of receipt of the request, the request is considered denied and the applicant may appeal to the head of an agency. The head of the agency has seven business days from his or her receipt of an appeal to render a determination. In addition, the Law requires that an agency transmit to this Committee copies of appeals and the ensuing determinations.

Enclosed for your consideration is a 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Sarah Curry-Cobb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1047

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

March 5, 1979

Mr. Kevin McGraw
Program Analyst
Room 519
Legislative Office Building
Albany, New York

Dear Mr. McGraw:

Thank you for your continued interest in the Freedom of Information Law. You have asked for my opinion regarding A. 2217 introduced by Assemblyman Siegel.

The bill, if enacted, would amend the Freedom of Information Law by means of the addition of the following new §87-a:

> "[A]ccess to certain records of non-public schools. Notwithstanding any other provision of law, the provisions of this article shall be deemed to be applicable to a non-public elementary or secondary school which provides instruction in accordance with section thirty-two hundred four of the education law, and, for the purposes of this article, 'agency' shall include the governing board or body of such non-public elementary or secondary school."

I must emphasize at the outset that the ensuing comments are largely philosophical in nature and are based upon policy consideration rather than the goals sought to be attained by the legislation.

First, viewing the Freedom of Information Law in perspective, it is clear that the Law is intended to insure that government be accountable. As stated in the legislative declaration of the Freedom of Information Law, government must be "responsive and responsible," and the public must have the "right to know the process of governmental decision-making..." (see §84). The legislation in question would extend the Freedom of Information Law beyond government and

into records in possession of non-public schools, which are not governmental entities.

In my opinion, although the intent of the legislation may be laudable, it would be more appropriate to amend the Education Law, which is applicable to the educational process generally, rather than the Freedom of Information Law, which deals solely with the responsibilities and duties of government.

Second, while the general public might have an interest in knowing the processes of various governments within the state, it is likely that few would have an interest in the operations and policies of non-public schools. In this regard, one of the basic principles of the Freedom of Information Law is that the interest of an applicant for records is irrelevant. Stated differently, when records are accessible under the Law, they must be made equally available to any person, without regard to status or interest, (see e.g., Burke v. Yudelson, 368 NYS 779, affirmed 51 AD 2d 673, 378 NYS 2d 165).

If the legislation is enacted, any person would have the right to inspect and copy the records of non-public schools, which in many instances would have little or no bearing upon accountability in relation to the governmental process. As in the case of access to records of other non-governmental entities, rights of access to records of non-public schools might appropriately be based upon some showing of interest. The legislation, however, would remove the requirement that an interest be demonstrated and would grant rights of access to any person.

Lastly, although I am not a constitutional scholar, it is possible that questions could be raised regarding the legislation with respect to non-public schools that are religiously oriented in terms of the constitutional separation between church and state. While it would be inappropriate to conjecture as to the constitutionality of the legislation, it is suggested that a study be made to determine the existence of potential constitutional impediments.

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-1048

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

March 5, 1979

Mr. Robert Miraldi
Staten Island Advance
950 Fingerboard Road
Staten Island, New York 10305

Dear Mr. Miraldi:

I have received your letter of February 20 in which you have raised several questions concerning a denial of access to records by the New York City Police Department. Specifically, you have unsuccessfully attempted to gain access to reports or documents that the Police Department might have maintained or created during particular time periods regarding Malcolm X or Malcolm Little. Five reasons for denial were stated.

The first ground for denial is based upon the privacy provisions of the Freedom of Information Law. In my view, a denial of access to records regarding Malcolm X on the ground that disclosure would result in an unwarranted invasion of personal privacy is unfounded for the reason that you have expressed, that the subject of the records in which you are interested has been dead for years.

The second ground for denial is based upon the argument that the records sought were compiled for law enforcement purposes. The records in question may in fact have been compiled for law enforcement purposes; nevertheless, the Freedom of Information Law as amended limits the grounds for denial to specified circumstances. Section 87(2)(e) of the Law 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;
>
> 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 foregoing, it is clear that the grounds for denial regarding records compiled for law enforcement purposes are restricted to the harmful effects of disclosure enumerated in subparagraphs (i) through (iv) of §87(2)(e). Under the circumstances, perhaps portions of the records might be withheld on the ground that the identities of confidential sources might be disclosed or that the records may be reflective of non-routine criminal investigative techniques or procedures. However, a blanket assertion that records are compiled for law enforcement purposes is in my view insufficient to deny access in toto.

Moreover, as you stated, to the extent that the records contain the names or other identifying details regarding confidential informants, those portions of the records might be deleted, while the remainder would be available.

Similarly, while §87(2)(f) states that an agency may withhold records or portions of records which if disclosed would endanger the life or safety of any person, it is possible that portions of records might be withheld on that basis while the remainder would be made available.

The final ground for denial concerns inter-agency or intra-agency materials. In this regard, §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..."

It is important to point out that the quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency communications, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Therefore, if, for example, the inter-agency or intra-agency communications that have been denied contain factual data, or instructions to staff that affect the public, or are reflective of the policy of the Police Department, they would be available to that extent.

Finally, if a judicial challenge to the denial is initiated, §89(4)(b) requires an agency to prove that records withheld in fact fall within one or more of the grounds for denial listed in §87(2) of the Law. Stated differently, an agency cannot merely assert that records are "compiled for law enforcement purposes," for example, to justify a denial of access. As stated recently by the Court of Appeals:

> "[T]he record on appeal is wholly insufficient to sustain the refusal to disclose the materials sought by petitioner under the provisions of the Freedom of Information Act (Public Officers Law, Art. 6). In support of the denial of access the State officials have tendered only references to sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld. There is no tender of any factual basis on which to determine whether the materials sought either fell outside the scope of mandated disclosure under former section 88 (L 1974, ch 578, §2, ch 579, §2, ch 580, §1, effective September 1, 1974) or come within the exceptions specified in subdivision (2) of present section 87 of the Public Officers Law..." (Church of Scientology v. State of New York, decided February 15, 1979).

In sum, I believe that the grounds for denial offered by the Police Department in conjunction with your request are tenuous and that the broad grounds for denial may be

unsupportable in view of the fact that the subject of the records died several years ago. Further, it is clear that in a judicial proceeding the Police Department would have the burden of proving that the harmful effects of disclosure enumerated in the Law would indeed arise.

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: Kenneth Conboy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1049

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

March 5, 1979

Mr. Milton M. Korob
[redacted]

Dear Mr. Korob:

I have received your letter of February 25. Your inquiry concerns rights of access to records in possession of Consolidated Edison (Con Ed) under the Freedom of Information Law.

In my opinion, the definition of "agency" appearing in §86(3) of the Freedom of Information Law (see attached) does not include public utilities, such as Con Ed. Although it might be argued that public utilities perform a governmental or quasi-governmental function, they are not governmental entities and therefore are outside the scope of the Freedom of Information Law.

Nevertheless, since public utilities are regulated by the Public Service Commission, that agency would likely have a great deal of information regarding Consolidated Edison as well as other public utilities. As such, it is suggested that you direct your request for records concerning Con Ed to the Public Service Commission. The gentleman with whom I have dealt in the past is Williams Barnes, Director of Administration, Public Service Commission, Agency Building 3, Empire State Plaza, Albany, New York, 12233. It is suggested that you write to Mr. Barnes for the purpose of requesting information concerning Con Ed.

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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1050

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

March 5, 1979

Mr. Rocco Ferran
[redacted]

Dear Mr. Ferran:

I have received your letter regarding the fee assessed by Rensselaer County for reproducing tax maps.

According to your letter, a tax map is thirty inches by forty-two inches and is sold by the County for four dollars. The question is whether the fee of four dollars is proper.

In this regard, I direct your attention to §87(1)(b)(iii) of the Freedom of Information Law which states that an agency may assess a maximum of twenty-five cents per photocopy "not in access of nine inches by fourteen inches or the actual cost of reproducing any other record..." Due to the size of the tax maps, I believe that the fee assessed for producing copies of the maps should be based upon the actual cost of reproduction. Since I have no knowledge of the actual cost of reproducing the maps, it would be inappropriate to conjecture as to any fee that might be assessed. Nevertheless, it is clear that the fee must be based upon the actual cost of reproduction, whatever that might be.

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. Marvin Honig
Mr. William J. Murphy

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1051

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

March 5, 1979

Mr. Rocco Ferran
[redacted]

Dear Mr. Ferran:

I apologize for the delay in response to your letter. Your inquiry concerns a situation in which the appeals officer for the City of Albany has not responded to an appeal made several weeks ago.

As you are aware, both the Freedom of Information Law, §89(4)(a), as well as the regulations promulgated by the Committee, §1401.7, require the person or body designated to determine appeals to respond to an appeal within seven business days of its receipt. In addition, both the Law and the regulations require that appeals as well as the determinations that ensue be transmitted to this Committee. To date, the Committee has not received copies of either your appeal or any determination that may have been rendered. Under the circumstances, since no determination on appeal has been made, you have asked what your remedies might be.

First, a copy of this response will be sent to the records access and appeals officers for the City of Albany. Perhaps the contents will remind the appeals officer of the requirements of the Freedom of Information Law.

In the alternative, since you have been constructively denied access on appeal, you may initiate a judicial proceeding. As you are aware, §89(4)(b) of the Freedom of Information Law requires an agency to prove in a judicial proceeding that records withheld fall within one or more of the enumerated categories of deniable information appearing in §87(2) of the Law.

Short of initiating a judicial proceeding or seeking the advice of this Committee, there is little that I can recommend.

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: Mr. James F. Giblin
Mr. T. Garry Burns

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1052

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

March 6, 1979

Mrs. Marilyn D. Smith
[redacted]

Dear Mrs. Smith:

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

First, government in New York is not subject to the federal Freedom of Information Act, but rather to the New York Freedom of Information Law, a copy of which is attached.

Second, §87(1) of the Law requires all agencies to adopt regulations consistent with and no more restrictive than those promulgated by the Committee. The Committee's regulations, which are also attached, govern the procedural implementation of the Freedom of Information Law.

Third, with respect to fees, §87(1)(b)(iii) provides that no more than twenty-five cents per photocopy may be assessed, unless a different fee is otherwise prescribed by law. Similarly, search fees may not be assessed unless another provision of law specifically so provides.

Fourth, following an initial denial of access, you may appeal to the head or governing body of an agency, or whomever has been designated to determine appeals [see Freedom of Information Law, §89(4)(a) and regulations, §1401.7]. The person or body designated to determine appeals must do so within seven business days of receipt of the appeal. In addition, an agency must transmit to this Committee copies of appeals and the determinations that ensue. As such, the Committee has the capacity to

monitor compliance with the Law and intercede or mediate.

Fifth, §87(3)(a) specifically requires each agency to maintain a record of votes that identifies each member in every proceeding in which the member votes. Consequently, you have the right to inspect a record of the final vote of each member in every instance in which a vote is taken.

Finally, §89(3) of the Law and §1401.5 of the regulations prescribes time limits for responses to requests. An agency must respond to a request within five business days of its receipt. If no determination to grant or deny access can be made within that period, the agency may acknowledge receipt of a request in writing. From that point, the agency has ten additional business days to grant or deny access. If there is no response within five business days of a receipt of a request, the request is considered a denial that may be appealed.

Enclosed for your consideration is a 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Attorney General Abrams

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1053

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

March 8, 1979

Mr. James Martin
[redacted]

Dear Mr. Martin:

I apologize for the delay in response to your letter. Your inquiry concerns your inability to obtain records of correspondence between officials of the Village of Kensington and the Village of Great Neck Estates pertaining to telephones in the Estates' Police Booth.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law states that all records in possession of an agency, which includes a village, are accessible, except to the extent that records or portions of records fall within one or more enumerated categories of deniable records appearing in paragraphs (a) through (h) of the cited provision.

Relevant to your inquiry is §87(2)(g), which 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..."

The quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency materials (materials transmitted from one agency to another)

and intra-agency materials (materials transmitted between or among officers of the same agency), the agency must provide access to statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations found within such materials.

Even though the Village of Kensington may not yet have reached a final determination with respect to the use of telephones, it is still required to provide access to statistical or factual data, instructions to staff, or statements of policy appearing in the records. Moreover, as noted earlier, the Law states that an agency may withhold records "or portions thereof." Therefore, an agency is obliged to review the records in question to determine which portions, if any, may justifiably be denied. Based upon the correspondence appended to your letter, it would appear that the records in question might contain substantial amounts of "statistical or factual tabulations or data," for example, that should be made available. If that is the case, such information must be made available to you, while the remaining deniable information found with the records may be deleted prior to providing access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Florman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1054

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

March 8, 1979

Mr. Alfred O. Kuhnle
[redacted]

Dear Mr. Kuhnle:

I have received your letter of February 23 concerning access to a tape recording in possession of the New York City Police Department.

Having reviewed the materials attached to your letter, I took the liberty of contacting the Office of Corporation Counsel of New York City. Based upon our conversation, I believe that a solution can be reached.

The tape recording in which you are interested is part of a larger reel that contains information unrelated to your request. According to Corporation Counsel, much of the unrelated information could be denied under the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy. Consequently, it would not be feasible to provide access to the entire tape recording. As an alternative, Corporation Counsel informed me that the Police Department is willing to accept a blank tape from you, and that it will record the portion of the tape that you have requested. In the alternative, the Police Department will record the portion of the tape that you requested and charge you for the cost of a new tape and other mechanical costs that may arise.

In view of the foregoing, it is suggested that you contact the Police Department once again. A copy of this response will be sent to the Police Department and Corporation Counsel.

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: Kenneth Conboy
Kenneth Fiorella
Richard Olpe

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1055

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

March 9, 1979

Mr. Erwin van Swol
[redacted]

Dear Mr. van Swol:

I have received your letter, which questions the Delaware Valley Central School District's policy of refusing to mail minutes of School Board meetings to you. Your letter specifies that you have offered to pay for photocopying and postage.

Although there is no provision in either the Freedom of Information Law or the regulations promulgated by the Committee (see attached) that specifically refers to a requirement that records be mailed to an applicant, I believe that a failure to mail accessible records to an applicant who has paid appropriate fees for copying and postage would constitute a constructive denial of access.

In many instances, applicants live hundreds of miles from the office of government that maintains custody of records. In such cases, to require the applicants to present themselves physically at the location where the records are maintained would effectively preclude those individuals from gaining access to records. Consequently, I believe that a denial of access based upon a failure to make a physical appearance at an office where records are kept would result in unreasonable or "constructive" denials of access.

It is noted, however, that a request must reasonably describe the records sought. Consequently, if the agency cannot determine the nature of records requested, greater specificity may be required. In the circumstances described in your letter, however, clearly identifiable records were sought. As such, I believe that the School District should mail the records to you, so long as any costs of copying and postage are paid in advance.

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: Dr. Joseph Hembrooke

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1056

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

March 9, 1979

J. Mozh
[redacted]

Dear Mr./Ms. Mozh:

I have received your note of March 4 concerning your ability to gain access to welfare records.

It is noted at the outset that records identifiable to applicants for and recipients of public assistance are confidential under §136 of the Social Services Law. As such, the records in question are outside the scope of the Freedom of Information Law.

However, regulations adopted by the New York State Department of Social Services indicate that public assistance records may in some circumstances be disclosed to a recipient of public assistance. Specifically, §357.3(c) of the regulations, entitled "[D]isclosure to applicant, recipient, or person acting in his behalf," states that:

> "(1) [T]he 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 of 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 view of the foregoing, there is no "right" to review public assistance records, and access is largely a matter of discretion on the part of a social services 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-304
FOIL-AO-1057

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

March 9, 1979

Gregory J. Guercio, Esq.
Campanella, Zolotorofe & Guercio
980 Old Country Road
Plainview, New York 11803

Dear Mr. Guercio:

I have received your letter regarding "the applicability of the Freedom of Information Law to Executive Sessions conducted pursuant to Education Law Section 3020(a)..." (sic. §3020-a). Despite our conversations, I am not sure what your question is. Consequently, the ensuing paragraphs will deal with §3020-a of the Education Law in relation to both the Freedom of Information Law and the Open Meetings Law.

First, with respect to the Open Meetings Law, a school board must discuss charges made against a person enjoying the benefits of tenure in executive session under §3020-a of the Education Law. In addition, it is clear that a vote regarding probable cause must be taken by a board during executive session. This differs from the manner in which votes generally may be taken by a school district. Specifically, although the Open Meetings Law permits public bodies to vote during a properly convened executive session, except when the vote concerns the appropriation of public monies, the Committee has advised that school boards may vote only during open meetings, except in accordance with §3020-a. This advice has been provided due to the language of §1708(3) of the Education Law, which has been judicially interpreted to require public voting by school boards in all instances, except in the case of §3020-a [see Kursch et al v. Board of Education, Union Free School District #1, Town of North Humpstead, Nassau County, 7 AD 2nd 922 (1959); United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, school boards may vote during an executive session regarding a determination as to whether probable cause exists.

The next step would involve a hearing held in accordance with subdivision (3) of §3020-a. Having reviewed the cited provision, it appears that the hearing would be quasi-judicial in nature and consequently would be outside the scope of the Open Meetings Law.

As you are aware, §101(2) of the Open Meetings Law requires that minutes be taken at executive sessions in which action is taken. Consequently, I believe that minutes must be compiled and made available within one week of an executive session when there is a finding of probable cause.

The minutes requirement would not apply to a hearing held under subdivision (3), however, because the requirements of the Open Meetings Law would be eradicated when an entity engages in a quasi-judicial proceeding.

Under the Freedom of Information Law, I believe that the minutes of executive session held under subdivision (2) would be available. Although the Law provides that an agency may withhold records or portions of records when disclosure would result in an unwarranted invasion of personal privacy, 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 would constitute a permissible as opposed to an unwarranted invasion of personal privacy.

Since a finding of probable cause would in my view be relevant to the performance of the official duties of the subject of the record, I believe that minutes containing a reference to the subject of the record are accessible.

Further, the Freedom of Information Law specifically states that each agency shall maintain a record of votes identifiable to each member in every instance in which a vote is taken [see §87(3)(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:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1058

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

March 12, 1979

Ms. Mildred Fielden
[redacted]

Dear Ms. Fielden:

Your letter addressed to Lieutenant Governor Cuomo has been transmitted to the Committee on Public Access to Records, of which the Lieutenant Governor is a member, and which is responsible for giving advice regarding the Freedom of Information Law.

I have reviewed your letter and the materials appended to it and have contacted the State Education Department on your behalf. Based upon my knowledge of the situation, the response by the Education Department was likely proper.

Although the Freedom of Information Law is based upon a presumption of access, the Education Department has the capacity to deny access to records or portions of records that fall within one or more among eight enumerated categories of deniable information appearing in §87(2)(a) through (h) of the Freedom of Information Law. Stated differently, all records in possession of government are available, except those records or portions of records falling within the categories of deniable records listed in the Law.

Based upon my contacts with the Education Department, I believe that certain records or portions of records among those requested may likely be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Therefore, as Mr. Stone suggested, by narrowing or attempting to specify the records in which you are interested, perhaps you can obtain the information that

you are seeking. It is also noted that the Freedom of Information Law does not require an agency to create a record in response to 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

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1059

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

March 12, 1979

Reverend Stephen H. Gratto
Chairman
Association for Neighborhood
Rehabilitation, Inc.
4 Wall Street
Ogdensburg, New York 13669

Dear Reverend Gratto:

I have received your letter of February 23, in which you have raised questions regarding the ability of the Association for Neighborhood Rehabilitation, Inc. (ANR) to keep its clients' names and records regarding assitance confidential.

When we spoke approximately two weeks ago, I must admit that I was under the impression that the records sought were in possession of government. However, based upon your letter, it is clear that Watertown Daily Times has requested the information from ANR, which is a not-for-profit corporation.

In view of the status of ANR as a not-for-profit corporation, I believe that its records are outside the scope of the Freedom of Information of Law.

Specifically, the coverage of the Law is determined by the definition of "agency" which appears in §86(3) of the Law. The cited provision states that "agency" means:

> "...any state or municipal department, board, bureau, division, commission, 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."

Although it might be argued that ANR performs what traditionally may be considered a governmental function, it is clear that ANR is not a governmental entity. Therefore, I believe that ANR is not an agency as defined by the Freedom of Information Law, and that there are no rights of access to its records.

The materials appended to your letter indicate that the Daily Times has obtained specific information regarding the recipients of assistance from ANR by means of a review of records in possession of the City of Ogdensburg. In this regard, all records in possession of the City are subject to rights of access granted by the Law. Further, all records are available, except to the extent that records or portions thereof fall within one or more categories of deniable information. Most relevant under the circumstances is §87(2)(b) of the Law, which permits an agency to withhold records or portions or records when disclosure would result in an unwarranted invasion of personal privacy. Having reviewed the newspaper articles, it appears that the Daily Times obtained accessible information, for none of the information that was published indicates the income level of those helped by ANR. Similarly, the information published does not distinguish between those who obtained grants or loans.

Consequently, based upon the information provided, it would appear that the Daily Times appropriately asserted its rights under the Freedom of Information Law with respect to records in custody of the City.

It is noted that the provision that you underlined concerning the confidentiality of records transferred from ANR to the Mayor and the City Manager contains a proviso that those public officials shall not disclose the records, "except as may be required by law." Under the circumstances, receipt of records from ANR by public officials would bring records within the scope of access granted by the Freedom of Information Law.

In sum, although ANR may not be subject to the Freedom of Information Law, records relevant to the duties performed by ANR that are in possession of government are 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
Executive Director

RJF:jm

cc: Larry Dietrich

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1060

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

March 13, 1979

Jennifer L. Van Tuyl, Esq.
Village Attorney
Fair Street
Cold Spring, New York 10516

Dear Ms. Van Tuyl:

I have received your letter of March 1 concerning rights of access to tape recordings under the Freedom of Information Law, as well as related issues. Enclosed is a copy of the Zaleski decision to which you made reference, and which is the only decision of which I am aware concerning access to tape recordings.

Your question concerns whether the Village must keep tape recordings used by a stenographer to assist her in compiling minutes of meetings. In this regard, §65-b of the Public Officers Law states in brief that a municipality cannot destroy records without the consent of the Commissioner of Education. As you are likely aware, the Commissioner of Education issues retention and disposal schedules for numerous records generally used by villages, for example. Since I have no personal knowledge regarding the issuance of schedules of the length of time that tape recordings must be maintained, it is suggested that you contact the Education Department to determine the existence of any schedules concerning the maintenance of tape recordings. In the alternative, you might seek permission from the Commissioner of Education to destroy or erase the tape recordings.

I have also enclosed a decision that deals with rights of access to notes compiled by the Secretary to the Board of Regents used in preparation of the minutes. In that decision, the court held that the notes are records

subject to rights of access granted by the Freedom of Information Law. Due to the similarity between notes and tapes compiled for the same purpose, the opinion may be of interest 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.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1061

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

March 13, 1979

Ms. Sally Mendola
Staff Attorney
The Legal Aid Society
Criminal Appeals Bureau
Parole Revocation Defense Unit
15 Park Row - 20th Floor
New York, New York 10038

Dear Ms. Mendola:

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

Your inquiry concerns the propriety of a denial of access by the Division of Parole to a memorandum that "sets forth the dispositional options of a hearing officer at a final parole revocation hearing." Stated differently, the memorandum apparently directs that hearing officers may make one among four types of dispositions at a hearing.

As you are aware, the Freedom of Information Law is based upon a presumption of access. All records are available, except to the extent that records or portions or records fall within one or more enumerated categories of deniable information appearing in §87(a) through (h).

Relevant to your inquiry is §87(2)(g), which 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..."

It is emphasized that the quoted provision contains what in effect is a double negative. Although 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 must be made available.

The memorandum that you are seeking is clearly an intra-agency document. Nevertheless, it appears that the direction to hearing officers concerning dispositional options within the memorandum constitutes both the policy of the Division of Parole and an instruction to hearing officers that indirectly affects the public. Consequently, based upon your description of the memorandum, I believe that it is accessible to the extent that it contains information falling within subparagraphs i, ii and iii of §87(2)(g).

This contention is bolstered by a letter written to my by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law. In his discussion of §87(2)(g), Mr. Siegel wrote:

> "[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 offical 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 appears that the contents of the memorandum are reflective of the "secret law" of the Division of Parole, and that the hearing officers rely upon the memorandum in carrying out their official duties. If that is the case, I believe that the memorandum is available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William K. Altschuller, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-307
FOIL-AO-1062

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

March 13, 1979

Mr. Harry G. Gutheil, Jr.
Trustee
Village of South Glens Falls
21 Spring Street
So. Glens Falls, New York 12801

Dear Mr. Gutheil:

I have received your letter of March 5, in which several questions concerning both the Freedom of Information Law and the Open Meetings Law have been raised.

Your first question is whether it is permissible "to show copies of treasurer's reports, bank statements and village budgets to residents during an election campaign." In my opinion, it is not only permissible to provide access to the records in question, but it is required to provide access to any person under the Freedom of Information Law.

It is noted at this juncture that 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 of records fall within one or more specified categories of deniable information appearing in §87(2)(a) through (h) of the Law (see attached).

Treasurer's reports, bank statements and budgets constitute "statistical or factual tabulations or data" and may be reflective of final determinations. Therefore, they are in my opinion clearly accessible [see §87(2)(g)].

Your second question concerns situations in which a consensus is reached regarding specific line items in a budget during budget workshops, and whether minutes and a record of each board member's position must be recorded. The question in this instance can be answered by means of a review of the Open Meetings Law. First, budget workshops are meetings within the scope of the Open Meetings Law that must be open to the public. Recently, the Court of Appeals,

the state's highest court, affirmed an Appellate Division decision which held that any gathering of a quorum of a public body, on notice to the members, for the purpose of discussing public business is a meeting, regardless of the manner in which it is characterized (see Orange County Publications v. Council of the City of Newburgh, 60 AD 409, aff'd 45 NY 2d 947).

Next, §101 of the Open Meetings Law requires that minutes be taken at all meetings "which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Although questions have arisen regarding the sense of the word "formally," I believe that a consensus is the equivalent of a formal vote when a public body relies upon a consensus in the performance of its duties. In addition, §87(3)(a) of the Freedom of Information Law requires that a public body compile a voting record that identifies each member in every instance in which a member votes.

Your third question pertains to a discussion of proposals to be offered to a negotiating unit during an executive session and whether the positions of the members must be recorded. While §101(2) of the Open Meetings Law requires that minutes of action taken during executive session be recorded and made available within a week of the executive session, it is likely that the substance of the action taken may be deniable under the Freedom of Information Law, for the substance concerns collective bargaining negotiations. The Freedom of Information Law permits an agency to withhold records or portions thereof which "if disclosed would impair present of imminent contract awards or collective bargaining negotiations." Depending upon the circumstances, it is possible that premature disclosure of records relative to the collective bargaining process could impair the progress of the negotiations and place government in a disadvantageous position. To that extent, the records may be withheld.

Your last question deals with a decision made by a village board of trustees regarding streets that should be resurfaced. In my opinion, a discussion of resurfacing streets must be discussed during an open meeting, for there would be no appropriate ground for discussion in executive session [see attached Open Meetings Law, §100(1)]. Further, as indicated previously, a public body is required to compile minutes that indicate the nature of action taken, as well as the vote of each member who voted.

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

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-308
FOIL-AO-1063

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

March 14, 1979

Mr. Arthur G. Becker
Superintendent of Schools
South Country Central School District
Administrative Offices
189 North Dunton Avenue
East Patchogue, New York 11772

Dear Mr. Becker:

Thank you for your thoughtful letter of March 7, in which you have raised questions regarding both the Freedom of Information Law and the Open Meetings Law.

Your first question concerns a contention made by a citizen that the School Board must read personnel recommendations "item by item, to the public" during a meeting. Contrarily, you have stated that your attorney has advised that it is sufficient merely to say "[M]ove personnel changes as recommended by the administration." Further, you have indicated that you believe that the Board may vote on personnel items during an executive session and withhold the results until a week after the executive session.

There is no requirement in the Open Meetings Law or any other provision of law of which I am aware that requires that a board read the recommendations in question "item by item."

Second, as you have stated, a public body, such as a school board, 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, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation" [see attached Open Meetings Law, §100(1)(f)].

It is noted, however, that the quoted provision has been cited throughout the state to discuss matters of policy that deal generally or tangentially with "personnel." In this regard, the Committee has consistently advised that §100(1)(f) is intended to protect privacy, not to shield discussions regarding policy under the guise of privacy. Consequently, a discussion regarding specific individuals could in my view justifiably be held in executive session. Contrarily, a discussion concerning personnel generally or as a group would be required to be discussed during an open meeting.

Based upon the materials appended to your letter, it appears that the discussion in executive session dealt with a number of specific individuals and specific aspects of their employment. As such, I believe that an executive session would be proper. Further, I believe that a single motion to discuss several public employees would be proper, so long as the discussion behind closed doors is consistent with the subject matter identified in the motion to enter into executive session.

With respect to voting, the Open Meetings Law permits voting during executive session, except when a vote concerns the appropriation of public monies. Nevertheless, I believe that school boards are required to vote in public in all instances, except in accordance with §3020-a of the Education Law. 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 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 act only during an open meeting.

In addition, it is noted that §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, if a school board is precluded from voting during an executive session, minutes of an executive session need not be compiled, and action must be taken during an open meeting.

Your second question concerns rights of access to tape recordings of meetings. A recent decision rendered by the Supreme Court, Nassau County, held that a tape recording of a school board meeting constitutes a "record" subject to rights of access granted by the Freedom of Information Law [see §86(4)] and that the tape recording is available and must be reproduced on request (see attached, Zaleski v. Hicksville Union Free School District).

Ancillary to your question is the ability to erase or otherwise destroy the tape recording. As you are aware, the State Education Department has promulgated numerous schedules regarding the retention and disposal of records pursuant to §65-b of the Public Officers Law. If destruction or disposal of a record is not covered by a specific schedule, which is likely the case with respect to tape recordings, a record cannot be destroyed without the consent of the Commissioner of Education. It is suggested that you contact the Department of Education to obtain permission to dispose

of or erase tape recordings and perhaps seek the issuance of a schedule that permits you and other school boards to erase tape recordings as soon as minutes are compiled.

The third question also concerns a demand by a citizen that a school board read a list identifiable to some 150 teachers containing information regarding class size. Again, I know of no provision of law that requires any public body to read or detail all of the information that is considered at an open meeting. As such, I agree with your contention that items before the Board need not be read in their entirety at a meeting.

Lastly, you have discussed your policy concerning public participation at meetings. In this regard, the Open Meetings Law is silent with respect to public participation; it merely grants the public the right to attend and listen to the deliberations and the decision making process of public bodies. As a general matter, the courts have long held that a public body may adopt reasonable rules to govern its own proceedings. Therefore, so long as your rules or policies concerning public participation are reasonable, they are in my view proper. Further, you have indicated that no time limit has been placed upon the length of time that a person may speak. In my view, it would not be unreasonable to adopt a rule that specifies a time limit, as long as this limitation is applied equally to all persons who wish to speak.

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-1064

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

March 14, 1979

Ms. Myrna Luster
[redacted]

Dear Ms. Luster:

I have received your letter of February 25, which arrived at this office on March 8. Your question concerns the "steps" that you may take if you do not obtain records you have requested.

As stated in the Freedom of Information Law and the regulations, an individual may commence an Article 78 proceeding to challenge a denial of access. Article 78 appears in the Civil Practice Law and Rules, and I have copied each section for your consideration. In brief, Article 78 involves a review of action or the lack of action of a public officer. Generally speaking, an Article 78 proceeding requires a petitioner, the person challenging the action of a public officer, to prove that action taken was unreasonable, or "arbitrary and capricious." Although the Freedom of Information Law states that Article 78 is the vehicle used to challenge a denial of access, the burden of proof differs from the usual Article 78 proceeding. Specifically, §89(4)(b) of the Freedom of Information Law states that the agency has the burden of proving that the records withheld fall within one or more of the categories of deniable information appearing in §87(2)(a) through (h) of the Freedom of Information Law.

If you wish to initiate an Article 78 proceeding, it is suggested that you contact an attorney. In the alternative, if you want to argue the case on your own, or pro se, it is suggested that you visit a law library and review "McKinney's Forms" so that the proper papers can be submitted.

I would like to point out that the Committee has proposed that the Freedom of Information Law be amended by adding a provision which would if enacted permit a court to award reasonable attorney fees to a member of the public who substantially prevails in a judicial challenge to a denial of

access. Legislation based upon this proposal has been introduced, and I am hopeful that it will pass this session. Therefore, although there would be no possibility of being reimbursed following a successful challenge to a denial of access now, the possibility may exist within a few months.

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

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1065

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

March 14, 1979

Charles J. Macellaro, Esq.
Bongiorno & Macellaro
3648 White Plains Road
New York, New York 10467

Dear Mr. Macellaro:

As I indicated in our conversation this morning, your letter of February 26 addressed to the Attorney General has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

Your inquiry concerns a request for information directed to your client, the Municipal Housing Authority for the City of Yonkers, from the Westchester County Department of Social Services. The request by the Department of Social Services indicates that the information has been sought pursuant to §372-a of the Social Services Law. The cited provision concerns information used by the Department of Social Services to locate "deserting parents and fathers of children born out of wedlock." The last paragraph of §372-a states that the Commissioner of Social Services "shall receive from departments, boards, bureaus, or other agencies of the state, or any of its political subdivisions, and the same are authorized...to provide, such assistance and data as will enable the department and social services districts properly to carry out their powers and duties to locate such parents..."

The problem under the circumstances concerns the responsibilities of the Housing Authority under §159 of the Public Housing Law, which prohibits the disclosure of information acquired by an authority from applicants for or tenants of dwellings that are administered pursuant to the provisions of the Public Housing Law.

In my opinion, the Housing Authority need not provide the information sought by the Social Services Department.

A review of the Social Services Law indicates that §372-a, the statutory basis for the request, was repealed and replaced by §111-b(4) of the Social Services Law. While the last paragraph of §111-b(4) also refers to cooperative efforts with agencies maintaining information that may be relevant to a department of social services, there is a proviso at the end of the cited provision which states that "...no department, board, bureau or other agency of the state need make available any data or information which is otherwise required by statute to be maintained in a confidential manner."

In view of the provisions of §159 of the Public Housing Law, the information requested may in my opinion justifiably be denied. While it is possible that the request may have been granted under §372-a of the Social Services Law, I believe that the proviso appearing in §111-b(4) of the Social Services Law, when read in conjunction with §159 of the Public Housing Law, precludes disclosure.

It is noted that I have discussed the problem with representatives of the State Department of Social Services and other housing authorities. None has dealt with the apparent conflict in statutory direction or is aware of case law construing the relationship between the two statutes. If the Department of Social Services continues to seek the information in question, perhaps it would be appropriate to employ a judicial subpoena.

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: Attorney General Abrams
Mr. Michael P. Wimbert

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1066

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

March 14, 1979

Mrs. Pearl Michaels
[redacted]

Dear Mrs. Michaels:

I have received your letter of March 10 and reviewed your previous correspondence. Although you have obtained the records sought, your latest letter indicates that you would appreciate an advisory opinion "for the record" in response to your letter of February 22.

The focal point of your inquiry concerns time limitations for response to requests made under the Freedom of Information Law. In this regard, enclosed are copies of the Freedom of Information Law and 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. Both documents make reference to time limits for response to a request.

Section 89(3) of the Law and §1401.5 of the regulations require that a response to a request be given within five business days of its receipt. If the agency is unable to grant or deny access to the request within that period, the records access officer must acknowledge receipt of the request in writing and provide an approximate date of the response, which must be made within ten business days of the acknowledgment of receipt of the request. Stated differently, if an agency acknowledges receipt of a request on the fifth business day after its receipt of a request, it has a maximum of fifteen business days from its initial receipt of a request to grant or deny access. If the agency neither grants, denies nor acknowledges receipt of a request within five business days of receipt of the request, the request is considered denied [see regulations, §1401.7(c)].

When an agency denies access, §1401.7 of the regulations requires that the denial be in writing, stating the reasons therefor, and that the applicant be apprised of his or her right to appeal and the name of the person or body to whom an appeal should be directed. The applicant has thirty days to appeal. The person or body designated to determine appeals has seven business days from the receipt of an appeal to make a determination. In addition, both the Law and the regulations require that appeals and the determinations that ensue be transmitted to this Committee.

With respect to the substance of your request, I believe that several points should be made. First, although an agency may withhold intra-agency or inter-agency materials pursuant to §87(2)(g) of the Freedom of Information Law, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Moreover, the introductory language of §87(2) indicates a recognition on the part of the Legislature that there may be some instances in which portions of records may be denied, while the remainder would be available. As such, an agency is obliged to review records to determine which portions, if any, may be withheld.

Next, one of your requests concerns minutes of a staff meeting. Since the gathering consisted of staff rather than a public body, there would be no requirement that minutes be kept. While public bodies subject to the Open Meetings Law (see attached) must maintain minutes pursuant to §101 of that statute, minutes of other gatherings need not be compiled. However, to the extent that minutes exist, they fall within the definition of "record" under §86(4) of the Freedom of Information Law and therefore would be subject to rights of access.

Finally, in a letter addressed to you by Oliver Gibson, the Community Superintendent of District #19, your request was denied on the basis that the records sought were not "relevant to your present assignment." Rights of access granted by the Freedom of Information Law are not grounded upon status or the purpose of a request. On the contrary, the Committee has advised and the courts have held that accessible records should be made equally available to any person, without regard to status or 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

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Secretary Paterson

Chancellor Macchiarola

Superintendent Gibson

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1067

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

March 15, 1979

Mr. Jeb Stuart Fries
#75-B-1422
Box 149
Attica, New York 14011

Dear Mr. Fries:

I have received your letter of March 2 concerning your inability to gain access to records pertaining to you in possession of the Department of Correctional Services.

Please be advised that each agency is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee on Public Access to Records (see attached). Both the regulations and the Law contain provisions regarding the ability to appeal a denial of access to records. In short, if a person is denied access, the denial must be in writing stating the reason therefor, and he or she must be apprised of the right to appeal and be given the name of the person or body to whom an appeal should be directed.

The appeals officer for the Department of Correctional Services is Patrick Fish, Counsel to the Department. In the future, you should appeal denials of access to Mr. Fish at the Correctional Services Building, State Campus, Albany, New York, 12226.

Based upon personal experience, I believe that Mr. Fish and his assistants have been quite responsive and have made substantial efforts to comply with the Freedom of Information Law. Therefore, to reiterate, if you feel that records have been denied without justification, it is suggested that you appeal to Mr. Fish.

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-1068

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

March 16, 1979

Mr. Samuel A. Weissmandl
Executive Director
Yeshiva of New Square
New Square, New York 10977

Dear Mr. Weissmandl:

I have received your letter of March 12. Your question is whether a school board that has set "a policy of charging everybody 25¢ per photocopy" is permitted "to make exceptions by not charging some people..."

As you are aware, the Freedom of Information Law requires the Committee on Public Access to Records to promulgate rules and regulations concerning the procedural implementation of the Law, as well as fees. The Law and the regulations provide that an agency may assess a fee of up to twenty-five cents per photocopy, unless another provision of law specifically provides otherwise. Further, each agency, which includes a school board, must adopt regulations consistent with and no more restrictive than those promulgated by the Committee.

In my opinion, if a school board has established a fee for photocopies, that fee should be assessed in every instance in which records are requested and copied by means of rights granted by the Freedom of Information Law. I do not believe that exceptions can be made on a case by case basis.

To distinguish among applicants for the records is contrary to one of the basic principles in the Freedom of Information Law. Very simply, the Law treats all people in a like manner. This Committee has 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, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. As such, the only question that should be raised by an agency when a request is received is the extent to which records may be withheld, if any. The identity or status of an applicant or the purpose for which a request is made should be irrelevant.

It is also noted that there may be situations in which a particular document is produced or published in substantial quantity, and that fees for the document are waived. In such cases, I believe that any such waiver should be general, rather than selective.

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-1069

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

March 19, 1979

Mrs. Blanche Block
[redacted]

Dear Mrs. Block:

Your letter addressed to Mario 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.

It is noted at the outset that Mr. Cuomo is no longer the Secretary of State; he is now the Lieutenant Governor. His successor as Secretary of State is Basil A. Paterson.

Your inquiry concerns unsuccessful attempts to obtain medical records pertaining to your father from Brooklyn Lutheran Hospital.

The Freedom of Information Law grants access to records in possession of government. Since Brooklyn Lutheran Hospital is private, rather than governmental, the records in question are outside the scope of the Freedom of Information Law.

Nevertheless, you may obtain a copy of the death certificate identifiable to your father. The death certificate will include the cause of death as well as the name of the attending physician. Consequently, by reviewing the death certificate, you will have the ability to learn of the cause of death and contact the physician who is most likely to have knowledge concerning the cause of your father's death. To obtain the death certificate, please call the New York City Health Department at 247-0130, which is located at 125 Worth Street in New York City. In addition, if there was as autopsy performed, the autopsy report is available to you as the next of kin from the Office of the Medical Examiner which is located at 520 First Avenue and which may be contacted at 684-1600. If you have reason to believe that the

death was the result of a [redacted] after viewing the death certificate and discussing the matter with the attanding physician, you might want to contact the [redacted], which is found in the New York State Health Department, Health Laboratory, Empire State Plaza, Albany, New York, 12201.

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-1070

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

March 19, 1979

Mr. Harry Kursh
[redacted]

Dear Mr. Kursh:

Thank you for your kind letter of March 14. Your inquiry once again concerns the ability to gain access to a record indicating the name of an applicant for records.

According to your letter, a list of all teachers in the school district and their salaries was reproduced and distributed to the public "in a surreptitious manner by having them placed in mail boxes" during the night. However, you stated that you have reason to believe that the list was obtained by a school district employee who used "public time and facilities" to reproduce and distribute the list. Consequently, you have questioned whether the information was obtained by means of a Freedom of Information application, and whether the person charged with the duty of responding to requests "fulfilled the request by a legitimate application." Finally, you have stated that if you can determine that a legitimate application has not been made, you might conclude that the records were improperly disclosed in order to "impair present or imminent contract awards or collective bargaining negotiations," which constitutes one of the grounds for denial of access listed in the Freedom of Information Law [§87(2)(c)].

In response to your questions, there are three initial points that I would like to make.

First, the Freedom of Information Law is permissive. Please note that §87(2), which lists categories of deniable information, states that an agency may withhold certain records or portions of records; however, there is nothing in the Law that requires that an agency withhold records. As such, there is nothing in the Law that requires an agency to deny access to records which if disclosed would impair collective bargaining negotiations, for example. Therefore, I do not believe that disclosure of the information in question would have been improper.

Second, as you are likely aware, the Freedom of Information Law requires each agency to maintain a payroll record, consisting of the names, public office addresses, titles and salaries of every officer or employee of an agency, which includes a school district [see §87(3)(b)]. The payroll record provision represents an exception in the Freedom of Information Law, for it requires an agency to create and maintain a particular record, presumably on an ongoing basis. Since the payroll record is available constantly or on an ongoing basis, I doubt that its disclosure could ever be construed to impair collective bargaining negotiations. In this regard, I would like to raise a rhetorical question: What if an individual, whether a teacher, a union member, or member of the public, requested and obtained the payroll information six months ago? Clearly it would have been accessible. Further, it could have been preserved and used for the purpose that you described. Essentially, I contend that the payroll record provision under the Freedom of Information Law grants access to the information in question on an ongoing basis and that, therefore, it could never be proven that disclosure of the payroll record would result in impairment of the collective bargaining process, for the list is constantly available.

Third, although the Freedom of Information Law and the regulations state that an agency may require that a request be made in writing, an agency may accept and respond to an oral request [see attached regulations, §1401,5(a)]. As such, if an oral application was made and granted, there may be no record in existence that indicates that a request was made.

With respect to the review of an application, it is again emphasized that the Law is permissive. While an agency has the capacity to withhold records or portions of records which if disclosed would result in an unwarranted invasion of personal privacy, it need not. Consequently, the school district may provide access to the application in its entirety. In the alternative, if an application was made, the school district may in my view delete identifying details regarding the applicant, so that the substance of a request and the date of the request, for instance, would be available.

There may be another means of discovering whether or not an application was made. You may request applications made during a specific time period for lists of teachers and their salaries. Further, under the regulations promulgated by the Committee, §1401,2(b)(6) and §89(3) of the Law, you may seek a certification in which the records access officer would assert that the district does not have possession of such records or that it does have possession of the records, but cannot locate them after having made a diligent search.

There may be another method of determining whether the records were copied on school time. As an employee of the Department of State, I must indicate on a log the number of photocopies I make in every instance in which a photocopy is made. If the school district has similar controls, you may be able to review records that identify those who made copies, the number of copies made, and perhaps the purpose of reproducing records. You may also be able to compare logs regarding copies made against the number actually made by means of billing information, for example. In short, you may be able to determine indirectly whether the payroll records were duplicated on school district property and at taxpayers' expense for a "private" 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:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1071

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

March 20, 1979

Eric Lane, Esq.
Counsel
New York State Sports
Authority
Room 5448
Two World Trade Center
New York, New York 10047

Dear Mr. Lane:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of the requlations promulgated by the Sports Authority.

Having reviewed the regulations, I believe that they are in full compliance with the Law and the regulations promulgated by the Committee on Public Access to Records.

It is noted that the Committee's regulations contain language having the same effect as that which you have added to §5(d) [see attached, §1401.7(c)].

Once again, I thank you for sending the materials. If I can be of assistance to you in the course of your duties, 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-1072

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

March 21, 1979

Mr. A.J. Samaritan
[redacted]

Dear Mr. Samaritan:

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

As requested, I have enclosed several documents, including the Freedom of Information Law, two explanatory pamphlets on the subject, and an index to advisory opinions. The index identifies opinions by key phrase. If there are any of particular interest, please identify them by key phrase or by number and I will be happy to send them to you.

In terms of the specific areas of inquiry raised in your letter, it is noted that 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 among eight enumerated categories of deniable information appearing in §87(2)(a) through (h).

Since school districts are agencies subject to the Freedom of Information Law, school records may be denied only in accordance with the categories of deniable information mentioned earlier. If, however, you are referring to student records, such records are generally confidential with respect to all but the parents of students. In addition, the students acquire the rights of their parents when they reach the age of 18.

With regard to personnel files, the most important exception is found in §87(2)(g), which 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, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records. As such, portions of personnel records are likely available. Further, there may be situations in which disclosure would result in an unwarranted invasion of personal privacy [see §87(2)(b)]. To that extent, information may be denied on that basis.

Access to records in possession of police departments is determined largely by §87(2)(e), which states that records compiled for law enforcement purposes may be withheld when the harmful effects described in §87(2)(e)(i) through (iv) would arise. Further, §87(2)(f) states that an agency may withhold records or portions of records which if disclosed would endanger the life or safety of any person.

Finally, public contracts are accessible, for they are reflective of final determinations made by an agency.

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-1073

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

March 22, 1979

Mrs. Ellen C. Emery
[redacted]

Dear Mrs. Emery:

Thank you for your letter of March 20. Your inquiry pertains to rights of access to records in possession of local justices regarding "DWI" arrests.

As you intimated in your letter, there are general "stipulations and limitations" upon public rights to records in possession of government. For example, the Freedom of Information Law, which is applicable to agencies [see definition of "agency", Freedom of Information Law, §86(3)], states that all records in possession of agencies are available, except to the extent that records or portions of records fall within one or more among eight categories of deniable information enumerated in §87(2)(a) through (h) of the Law. Consequently, although it is accurate to presume that records in possession of government are available, there are indeed limitations upon rights of access.

It is noted that courts and court records are outside the scope of the Freedom of Information Law, for courts are subject to the definition of "judiciary" [see §87(1)], rather than "agency." Nevertheless, most records in possession of courts are available pursuant to other provisions of law. For example, §2019-a of the Uniform Justice Court Act, states in relevant part that "[T]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

In view of the foregoing, the records in which you are interested concerning DWI arrests are available to any person, unless another provision of law specifically prohibits disclosure. An instance in which records might be withheld would involve the case in which records are identifiable to a juvenile or a person adjudicated as a youthful offender.

In sum, I believe that the friends to whom you referred in your letter are generally correct in their assertion that records in possession of a justice court are accessible.

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject, as well as the cited provision of the Uniform Justice Court Act.

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.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1074

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231

March 22, 1979

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

Your letter addressed to Secretary of State Paterson has been transmitted to this office for response. As you are aware, the Committee on Public Access to Records, of which Secretary Paterson is a member, is responsible for advising with respect to the Freedom of Information Law.

I have reviewed all of the correspondence sent to this office and believe that I responded as adequately as possible to your inquiries. As Secretary Paterson explained in his letter, agencies in many instances have failed to send copies of appeals and the determinations that ensue to the Committee, thereby violating the Law. The appeals to denials to which you referred in earlier correspondence were not received by this office, and, as I indicated in my letter of January 9, all communications sent to this office by the Town of Southold were sent to you.

Further, while the Freedom of Information Law requires that a request for records be answered by means of a grant or denial of access, or an acknowledgment of receipt of a request within five business days of its receipt, your correspondence was not in my opinion reflective of requests for records. On the contrary, I view your correspondence as requests for advice regarding the interpretation of the Freedom of Information Law. In this regard, the Law does not require that opinions be furnished within a specific period of time. As a matter of course, I write advisory opinions as soon as possible and in most instances within a week of their receipt.

Your second area of inquiry concerns procedures for the implementation of the Freedom of Information Law by the Department of State. The Department consists of several divisions or components. Since the Committee's regulations state that the head of an agency shall designate one or more records access officers, the Secretary of State has designated the heads of various units within the Department as records access officers responsible for responding to requests directed to their respective offices. Consequently, I am not the records access officer for the Department of State. To assist you in asserting your rights of access to records in possession of the Department of State, I have enclosed a copy of the Department's regulations. In all instances, appeals are directed to the Secretary of State, or whomever is designated to act on his behalf.

As noted in earlier letters, the Committee has no authority to enforce the Freedom of Information Law or compel compliance with its provisions. However, advisory opinions prepared by the office have often resulted in compliance, and the courts have cited opinions as the basis for their determinations. Nevertheless, at this juncture, the individual who is denied access has the burden of seeking judicial review of denials of access. Further, as you are aware, the Committee has requested that the Law be amended to enable a court to award reasonable attorney fees to a complainant who substantially prevails in a judicial challenge to a denial of access. I am hopeful that the proposal will be enacted and that its existence will deter unreasonable denials be government.

Finally, with respect to fees, the Committee's report to the Governor and the Legislature indicates cognizance of the fact that agencies may be assessing fees greater than those permitted by the Freedom of Information Law. The report also suggests a change in the Law that would preclude agencies from charging in excess of twenty-five cents per photocopy unless an act of the state Legislature specifically permits a higher fee to be charged.

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
Enc.
cc: Secretary Paterson

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1075

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

March 22, 1979

Mr. Louis Goldberg
[redacted]

Dear Mr. Goldberg:

I have reviewed your letter of March 15 and contacted officials of the New York State Department of Social Services on your behalf.

At this juncture, it appears that the problems you faced regarding the ability to photocopy records have been solved. I would like to emphasize that my efforts have been enhanced by those of Ms. Mary Scanlon of the Department of Social Services. According to Ms. Scanlon, arrangements have been made to photocopy the records that you inspected.

It is noted that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are available, except those records or portions of records that fall within one or more enumerated categories of deniable information listed in §87(2)(a) through (h) of the Law (see attached). Further, designating records as "classified" or "confidential" without more has long been viewed by the courts as an insufficient basis to withhold information.

Finally, the courts since 1922 have held that the right to copy is concurrent with the right to inspect (see e.g., Re Becker, 200 AD 178).

Once again, I hope that I have been of some assistance and that you will have obtained copies of the records sought by the time you receive this response.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Enc.
cc: Mary Scanlon
Elizabeth Dinehart

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1076

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

March 22, 1979

Mr. Julius F. Klein
#68 A 0140
354 Hunter Street
Ossining, New York 10562

Dear Mr. Klein:

I have received your letter of March 19 in which you requested rules and regulations filed pursuant to the Freedom of Information Law by the Nassau County Police Department.

Although each agency in the state is required to adopt rules and regulations consistent with and no more restrictive than those promulgated by the Committee, there is no requirement that agencies transmit or otherwise file their regulations with this office. Further, the Law specifies that the governing body of a public corporation must adopt uniform rules for all agencies operating within a public corporation. Consequently, the implementation of the Freedom of Information Law by the Nassau County Police Department should be governed by rules and regulations adopted by the Nassau County Board of Supervisors.

Since each agency must adopt regulations in accordance with those promulgated by the Committee, I have enclosed copies of the Committee's regulations, 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:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1077

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

March 27, 1979

Ms. Margaret G. Green
Vice President
League of Women Voters
of Cattaraugus County
17 North 6th Street
Allegany, New York 14706

Dear Ms. Green:

Thank you for your letter of February 27, which for reasons unknown was only recently received by this office.

Your questions deal with the affects of the Freedom of Information Law as well as specific aspects of access to records.

First, you have asked whether the Law works well and whether people are aware of the Law and taking advantage of it. In my opinion, the number of people who avail themselves of rights granted by the Freedom of Information Law increases constantly. This office receives approximately three times as many oral and written inquiries as it received two years ago. More than 30,000 copies of each of the two pamphlets enclosed have been distributed since January, 1978. Most are requested by members of the public. Further, many of the fears of government associated with the Law have dissipated with time. Many agencies now realize that the Freedom of Information Law provides a right, and that disclosure is more helpful than harmful.

It is also important to emphasize that the Freedom of Information Law was significantly altered in 1978. While the original Law listed categories of accessible records to the exclusion of all others, the new Law (see attached) provides that all records are available, except those records or portions of records which fall within one or more enumerated categories of deniable information.

Your second area of inquiry concerns records kept by judges and justices of the peace. As a general matter, §255 of the Judiciary Law provides that a clerk of a court must diligently search for and provide access to all records in his or her possession. Similarly, §2019-a of the Uniform Justice Court Act provides that all records and dockets in possession of a justice are available during all reasonable hours. Consequently, unless court records are specifically deemed confidential by statute, they should be made available.

Information regarding traffic tickets and other infractions of the law are generally available to any person from either the State Department of Motor Vehicles or municipal traffic violations bureaus. It is emphasized that one of the central 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.

Lastly, you have asked whether there is a clear definition of what is meant by "invasion of personal privacy." The Freedom of Information Law provides that an agency may withhold records or portions of records which if disclosed would result in an "unwarranted invasion of personal privacy." Since there may be "unwarranted" invasions of personal privacy, it is clear that there are also permissible invasions of personal privacy. Often the custodians of records must make subjective judgments to determine whether disclosure would in their opinion result in a permissible as opposed to an unwarranted invasion of personal privacy. There is, however, some judicial direction on the subject. Several cases have dealt with records concerning public employees. The courts have generally held that records concerning public employees that relate to the performance of their official duties are available, for disclosure would result in a permissible invasion of personal privacy. Contrarily, records concerning public employees that have no relevance to the performance of their official duties may be withheld. With regard to records in possession of government that identify members of the public, the case that most often arises concerns complaints submitted to an agency by a member of the public. In such cases, the Committee has advised that the courts have upheld the notion that the substance of a complaint, which is relevant to an agency, is available, but that identifying details regarding the complainant may justifiably be withheld. The same principle may be applied in other situations.

As noted earlier, the pamphlets have been widely disseminated. In addition, I have prepared other materials to assist the public in using the Freedom of Information Law. For example, enclosed are copies of an index to advisory opinions. If a member of the public has an inquiry regarding specific records, he or she may review the index and request opinions that are identified by number or key phrase. Also enclosed is a summary of judicial determinations rendered under the Freedom of Information Law. Finally, you will also find the Committee's report to the Governor and the Legislature on the Freedom of Information Law which contains, among other items, a lengthy discussion of privacy. If you would like additional copies of any of the materials, I will be happy to send them to you.

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
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1078

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

March 28, 1979

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

Your inquiry concerns a change in policy by the Police Department of the City of Binghamton. Until recently, telephone requests for accident reports had been honored. However, the new policy requires that requests be made in writing.

In my opinion, an agency may accept oral requests for records. Nevertheless, both the Freedom of Information Law and the regulations promulgated by the Committee state that an agency may require that a request be made in writing. Specifically, §89(3) of the Law states that an agency must respond upon "the receipt of a written request for a record reasonably described..." Further, §1401.5(a) of the Committee's regulations states that "[A]n agency may require that a request be made in writing or may make records available upon oral request."

In view of the foregoing, it appears that the change in policy by the City of Binghamton is clearly legal.

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-1079

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

March 28, 1979

Mr. Lionel Gorsline
Chairman
Columbia County Taxpayers
Council, Inc.
P.O. Box 100
Philmont, New York 12565

Dear Mr. Gorsline:

Your letter addressed to Attorney General Abrams 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 rights of access to records reflective of a settlement between the Taconic Hills Central School District and a member of the Board, who initiated suit on behalf of his daughter who was involved in an accident. In addition, you are interested in obtaining records of the cost of the suit to the District.

The issues raised concern both the Freedom of Information Law, which is applicable to records in possession of government in New York, and the Family Educational Rights and Privacy Act, an act of Congress that governs access to student records.

It is emphasized that I have discussed your inquiry with a representative of the United States Department of Health, Education and Welfare, which administers the Family Educational Rights and Privacy Act and has issued regulations with which every educational agency or institution in receipt of funds from the U.S. Commission of Education must comply. The representative with whom I spoke, Ms. Patricia Ballinger, informed me that papers concerning the settlement in possession of the School District are "education records" that are subject to the Act, for they identify a particular student. Nevertheless, she also

stated that the record or records may be made available if identifying details regarding the student are deleted.

In view of the foregoing, when the Freedom of Information Law is read in conjunction with the Family Educational Rights and Privacy Act, records of the settlement are in my view available after having deleted any identifying details pertaining to the student.

Further, records indicating the other costs to the School District incurred in the defense of the suit are also available. Although a school board engages in an attorney-client relationship with its attorney, it has been established in case law that records of the monies billed and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. Moreover, the bills and receipts concerning services rendered by the Board's attorney are reflective of factual data and as such are in my opinion available under §87(2)(g)(i) 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: Attorney General Abrams

School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1080

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

March 28, 1979

Mr. Gary F. Taibbi
[redacted]

Dear Mr. Taibbi:

I have received your letter of March 20 regarding a request to review applications of specific individuals who passed an examination for Highway Zone Foreman.

In my opinion, the applications may be withheld on two grounds. First, the Freedom of Information Law permits an agency to withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy" [see attached, Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. Although you have suggested that the names or other identifying details be deleted, it appears that the number of applications that you have requested is so small that the identities of the applicants would effectively be disclosed.

Second, §71.1 of the rules and regulations promulgated by the Civil Service Commission prohibits the disclosure of a candidate's application for an examination, except in the case of the appointing officer, who is permitted to review the application.

Nevertheless, I believe that you may gain access to other records that could in great measure provide you with the information that you are seeking. For example, you may request records indicating the descriptions of duties for persons now holding specific job titles. The handwritten notes that you made on the eligible list appended to your letter includes the job titles of several of the individuals in whose applications you are interested. If those individuals are employed by government, you may request and obtain the descriptions of the duties currently performed. In addition, you may inspect a payroll record that lists the

the names, public office addresses, titles and salaries of all officers and employees of an agency, such as Suffolk County.

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

Enc.

cc: Paul H. Greenberg, Jr.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1081

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

March 28, 1979

Mr. David L. Kushner
New York State United Teachers
2521 Vestal Parkway
Vestal, New York 13850

Dear Mr. Kushner:

I have received your letter of March 19 in which questions have been raised regarding rights of access to records in possession of the New Berlin Central School District.

The first area of inquiry concerns rights of access by employees to personnel files identifiable to them. According to your letter, the Superintendent requires teachers to make an appointment to review their files before or after school hours. Further, your letter indicates that a teacher "is not allowed to personally touch, review, or actually read the file." On the contrary, the Superintendent reads the teacher the contents.

Although portions of a personnel file might justifiably be withheld, the remainder should in my view be subject to inspection and copying.

The Freedom of Information Law is based upon a presumption of access. Specifically, all records in possession of an agency, such as a school district, are available, except to the extent that records or portions of records fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h) of the Law (see attached). Further, §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...when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him." Stated differently, an individual may inspect and copy records pertaining to him or her, unless there are other grounds for denial.

Under the circumstances, the only ground for denial is §87(2)(g), which 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 an agency may deny access to inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. Since the personnel files constitute intra-agency materials, the subjects of the records may inspect and copy statistical or factual data, instructions to staff that affect the public, and final statements of policy or determinations found within the materials.

It is also emphasized that the introductory language of §87(2) indicates a recognition on the part of the Legislature that there may be situations in which a single record might contain both accessible and deniable information. In such cases, the agency is required to provide access to those portions of records that are accessible, while deleting the remainder.

Further, §89(3) of the Law clearly requires an agency to make accessible records available and provide copies on request on payment of the appropriate fees.

With respect to the hours during which records are to be made available, I believe that teachers invoking their rights under the Freedom of Information Law must be treated in the same fashion as members of the public. In this regard, regulations promulgated by the Committee, which have the force and effect of law (see attached), state that agencies "shall accept requests for public access to records and produce records during all hours they are regularly open for business." As such, I do not believe that the ability of a teacher to request records can be restricted to hours before or after duty hours.

Your letter indicates that teachers can no longer inspect files pertaining to them because the files are "district property," and that the inability to inspect is based upon the charge that a teacher had "defaced a file." It is true that the records in question are district property. Nevertheless, §2116 of the Education Law, which was enacted in 1947, states that:

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

While I believe that the provision quoted above is extremely broad and does not mean what it says (i.e., it is inconceivable that all records, including student records, for example, are available to the public) I feel that it is irrelevant under the circumstances. Further, if the District officials contend that a person has illegally defaced a record, a complaint may be filed with a district attorney under §175 of the Penal Law, which concerns tampering with public records.

According to your letter, teachers who have requested copies of their files in preparation of a hearing have been assessed fees of approximately thirty dollars and have been given copies of "each and every piece of paper in the file," including records which have no bearing upon the hearing. In this regard, I refer to advice contained in earlier paragraphs. Specifically, an individual may inspect accessible information and seek copies of that information upon payment of the requisite fee, which cannot exceed twenty-five cents per photocopy. As such, an individual may initially review a file, and then specify records which should or should not be copied. By reviewing accessible records before requesting copies, it is likely that the fees for copying could be reduced.

Your last question concerns access to minutes of meetings of the Board of Education, which are available "five days after they have been 'approved.'" Moreover, you have indicated that the approval often occurs after a subsequent board meeting. In my opinion, minutes are available as soon as they exist, whether or not they have been approved. This contention is based upon the definition of "record" appearing in §86(4) of the Freedom of Information

Law. In brief, "record" is defined to include any information in any physical form whatsoever in possession of an agency. Therefore, unapproved minutes are records subject to rights of access. If there are no grounds for denial, the unapproved minutes must in my view be made available in their entirety.

It is noted that it has consistently been advised that the clerk who prepares the minutes or the records access officer may stamp or mark unapproved minutes as "draft," "non-final," or "unapproved." By so doing, the public may gain access to a record that generally indicates events that transpired at a meeting. Concurrently, the public is given notice that the minutes are subject to change, and board members are given a measure of protection.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: James McAuliffe, Superintendent

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1082

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

March 28, 1979

Mr. Julius F. Klein
68 A 0140
354 Hunter Street
Ossining, New York 10562

Dear Mr. Klein:

I have received your letters of March 24 and March 19. I believe that the earlier letter was answered by my response of March 19.

Two questions have been raised regarding access to records compiled for law enforcement purposes.

First, you have asked whether the Committee interprets the Freedom of Information Law as extending a "blanket exemption" with respect to records of law enforcement agencies or whether law enforcement agencies must grant access unless the grounds for denial appearing in §87(2) may appropriately be raised. In this regard, it has been consistently advised that all records in possession of an agency are available, except to the extent that records or portions of records fall within the categories of deniable information listed in §87(2)(a) through (h). In terms of records compiled for law enforcement purposes, §87(2)(e) permits an agency to withhold such records only when disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e). Consequently, there is no "blanket exemption" for records in possession of law enforcement agencies; contrarily, records compiled for law enforcement purposes may be withheld only in accordance with the grounds for denial appearing in the Law.

Second, you have asked whether an agency is required to support a claim that records are deniable with respect to "each and every document" that is denied. As you are aware, §89(4)(b) of the Law states that any person denied access may seek judicial review of the denial by initiating an Article 78 proceeding. However, the cited provision also

states that "the agency involved shall have the burden of proving" that the records withheld in fact fall within one or more of the grounds for denial listed in the Law. Further, there have been several instances in which the courts have made in camera or closed door inspections of records to determine which portions of the records, if any, may justifiably be withheld. In addition, a recent Court of Appeals decision held that an agency cannot merely cite grounds for denial to withhold records. Rather, an agency must provide some "factual basis" for denial based upon the grounds for denial enumerated in the Law in order to withhold records (Church of Scientology v. State of New York, decided February 15, 1979).

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-1083

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

March 29, 1979

Mr. Crispin Serrano Rivera
#78-A-0730
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Rivera:

I have received your letter of March 22. Your inquiry concerns a response that you received from the Supreme Court Clerk of Bronx County indicating that the cost of producing a certified copy of your indictment as well as a certificate of disposition would be $24.00.

In my opinion, the fees required by the clerk are proper.

Please be advised that the Freedom of Information Law includes only agencies within its scope. "Agency" is defined by §86(3) of the Law, and the cited provision clearly excludes the "judiciary," i.e. courts and court records [see attached, Freedom of Information Law, §86]. Consequently, records in which you are interested are not subject to the Freedom of Information Law.

Moreover, even if court records were subject to the Freedom of Information Law, I believe that the fees required by the clerk would be appropriate. Section 87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge no more than twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by law." In this case, fees are prescribed by the Civil Practice Law and Rules.

Specifically, §8020(f)(2) states that a clerk may charge "for certifying a prepared copy of any order, record or other paper entered or filed in his office, in the counties within the city of New York, four dollars..." Since you requested certified copies of five pages, the twenty dollar fee would be appropriate. In addition, under §8020(f)(4) of the

Civil Practice Law and Rules, the clerk may charge "[F]or certifying a prepared copy of any order, record or other paper entered or filed in his office, in the counties within the city of New York, four dollars..." Since you requested that a certificate of disposition be prepared, again, the fee appears to have been proper.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1084

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

March 29, 1979

Mr. D. Vega
[redacted]

Dear Mr. Vega:

I have received your letter of March 22, in which you have compared the original Freedom of Information Law with the amended statute and have raised questions regarding rights of access.

First, you characterized the distinctions between the original statute and the amended statute as "slight." I disagree with the characterization. As you mentioned, the original Freedom of Information Law specified that categories of records were available to the exclusion of all others. Stated differently, it could be assumed that records were deniable unless an applicant could conform his or her request to one or more of the categories of accessible records. Contrarily, the amended Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) 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 categories of deniable information enumerated in paragraphs (a) through (h) of the cited provision. Consequently, the change in the presumption is in my view significant.

In addition, if a person denied access under the original Law opted to challenge the denial in court, he or she had the burden of proving that the denial was unreasonable. Section 89(4)(b) of the amended Law, however, requires that agencies prove that the records withheld in fact fall within one or more of the categories of deniable records listed in §87(2).

Second, you have asked whether a determination by a court to disclose to a particular litigant should be interpreted to mean that only the litigant has a right to inspect and copy the records in question. In this regard,

one of the central 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 (see e.g., Burke v. Yudelson, 368, NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165). Therefore, although you may not have an interest in a fire that occurred three houses away from your residence, or an accident, for example, you may in my view inspect and copy the reports. Although you may have no "interest" in the records sought, in Application of Dwyer or Pooler v. Nyquist, the records granted to petitioners in those cases would be available to you. Stated differently, the identity of an applicant or the purpose of a request is irrelevant; and under the new Freedom of Information Law, the only question that an agency should ask upon receipt of a request is the extent to which records may be withheld, if any.

With regard to the precedential effects of judicial determinations in which access has been granted, a great deal depends upon which court rendered the decision and where the court is situated. For example, a decision by the state's lowest court, the Supreme Court, may be cited as precedent for the purpose of persuasion it may not be binding. However, if it is affirmed by appellate courts, including the Court of Appeals, the decision essentially becomes the law of the state. In other situations, however, the value of specific decisions is questionable, for decisions of Supreme Courts throughout the state or Appellate Divisions may conflict. Therefore, the extent to which a particular decision may have precedential effect varies and is difficult to judge.

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-1085

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

March 29, 1979

[redacted]

Dear [redacted]:

I have received your inquiry regarding your inability to gain access to records from the Broome County District Attorney and Department of Probation. Your letter indicates that you were assaulted, and that you are seeking records pertaining to the District Attorney's investigation, as well as records identifiable to the alleged assailant from the Department of Probation.

It is noted at the outset that the Freedom of Information Law grants access to all records in possession of government in New York, except those records or portions thereof that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law (see attached).

With respect to records in possession of the District Attorney, the most relevant exception 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;
>
> 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 grounds for denial appearing in the quoted provision are based upon the effects of disclosure. Therefore, if the investigation is ongoing, it is likely that there would be adequate grounds for denial. Even if the investigation is closed, at least two of the grounds for denial might appropriately be cited.

In addition, §87(2)(b) states that an agency may withhold records or portions of records which if disclosed would result in "an unwarranted invasion of personal privacy." If, for example, the records identify others, it is possible that they may be denied to that extent.

The records in possession of the Department of Probation are in my opinion deniable pursuant to statutory provisions and regulations promulgated by the Department of Probation. The Criminal Procedure Law, §390.50, requires that pre-sentence reports and memoranda in possession of a department of probation be kept confidential. Further, Family Court records concerning probation may be withheld under §166 of the Family Court Act. Finally, §348.4(k) of the regulations promulgated by the State Division of Probation provides that case records are available only to those authorized by law or court order. In sum, the records in which you are interested in possession of the Department of Probation may justifiably be withheld.

Your letter also indicates that responses were given by neither the District Attorney nor the Department of Probation following your requests. In this regard, whether or not records are accessible, the Freedom of Information Law requires that an agency respond within five business days of its receipt of a request. Moreover, the regulations promulgated by the Committee require that a denial of access by an agency be stated in writing, provide the reasons for the denial, and inform the applicant of his or her right to appeal the denial. To reiterate, although the records in which you are interested may be withheld at least in part, the agencies in receipt of the requests are required to respond in accordance with the provisions of the Freedom of Information Law and the Committee's regulations.

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
Enc.

cc: Broome County District Attorney
Department of Probation

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1086

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

March 30, 1979

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

I have received your letter of March 25, in which you have requested materials sent to this office by the Town of Southold and questioned the statutory basis of fees adopted by the Department of State pursuant to §144.16 of its regulations.

First, I have enclosed copies of all of the correspondence that I have received from the Town of Southold that in any way pertains to you. Although copies of appeals were sent, the ensuing determinations apparently were never transmitted to this office.

Second, also enclosed is §96 of the Executive Law. The cited provision states in relevant part that the Department of State shall collect fifty cents per page "[F]or a copy of any paper or record not required to be certified or otherwise authenticated" [§96(3)]. Section 96(4) requires the Department to assess a fee of one dollar per page for a certified or exemplified copy of a record.

In addition, enclosed is a copy of the Freedom of Information Law as enacted in 1974.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1087

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

March 30, 1979

Mr. Juan S. Cockburn
Webster & Sheffield
1 Rockefeller Plaza
New York, New York 10020

Dear Mr. Cockburn:

I have received your letter of February 28. Your letter was delivered only recently due to the change in the Committee's address since our last written communication.

Having reviewed the revised regulations promulgated under the Freedom of Information Law by the United Nations Development Corporation ("UNDC"), I believe that they comply in great measure with those promulgated by the Committee. At the risk of being overly technical, it is noted that §5(c) of UNDC's regulations requires that a request "shall be sufficiently detailed to identify the records." In this regard, please be advised that §89(3) of the Freedom of Information Law and §1401.5(b) of the Committee's regulations merely require that a request "reasonably describe" the records sought. Certainly the distinction between the provisions is minimal. Nevertheless, I would feel remiss by failing to bring it to your attention.

Thank you for your cooperation. If I can be of assistance to you in the course of your duties, 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-1088

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

March 30, 1979

Mr. Arthur J. Brewster
[redacted]

Dear Mr. Brewster:

I have received your letter of March 26, which raises two questions.

First, according to your letter, Dr. William D. Bradt, Acting Superintendent of Schools of the Little Falls Central School District, has informed you that you must provide the District with copies of any notes that you make while reviewing District records. The question is whether you are required to do so.

Although the Freedom of Information Law requires agencies of government to grant access to the public to their records, the reverse is not the case. Very simply, there is no provision of any law of which I am aware that would require an individual, such as yourself, to furnish notes regarding a review of accessible records to the agency maintaining the records. Consequently, in my opinion you need not furnish the Acting Superintendent with any notes or similar materials that you may have taken during your review of district records.

The second question concerns correspondence surrounding your request made on February 24, 1978, for "all bills from Raymond G. Kuntz for the period of January 1, 1976, to June 30, 1976." In a letter to me dated April 5, Mr. Kuntz indicated that the School District did not have possession of records indicating the time or dollar amount allocable to particular charges. Consequently, my response to Mr. Kuntz stated that if records had not been compiled reflective of the records sought, the District had no obligation to create the records on your behalf. However, based upon the language of your initial request, it is clear that you merely requested "all bills from Raymond G. Kuntz" for a specific period of time. I must reiterate what had been stated a year ago: to the extent that records exist in the nature of bills from Mr. Kuntz, they are accessible.

It is also noted that although a school board may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies billed and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. Moreover, the bills and receipts concerning services rendered by the Board's attorney are reflective of factual data and as such are in my opinion available under §87(2)(g)(i) of the Freedom of Information Law. Therefore, any bills that may have been received by the School District from its attorney are in my view accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. William D. Bradt

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1089

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

April 2, 1979

Ms. Mildred Fielden
Speech Pathologist
74 Roosevelt Road
Hyde Park, NY 12538

Dear Ms. Fielden:

I have received your letter of March 19, which pertains once again to records regarding persons issued licenses in speech pathology.

It is noted at the outset that this Committee does not have possession or custody of records generally, but rather has only the power to advise. Consequently, your request must be directed to the custodian of the records in which you are interested, the State Education Department.

In an effort to assist in providing you with the information, I have contacted James Blendell, records access officer for the State Education Department, on your behalf. As noted in previous letters, the problem faced by the Education Department is that it has no way of separating licenses issued by means of a "grandfather clause" from the remainder of licenses. Moreover, portions of licenses contain information that is likely deniable. As a consequence, the licenses cannot in the opinion of the Education Department be provided for inspection or copying in toto.

Nevertheless, having discussed the matter with Mr. Blendell, perhaps an agreement can be reached to provide access to copies of licenses on a piecemeal basis, with portions of the licenses deleted. Under such an agreement, the Education Department would furnish a certain number per week, for example.

It is suggested that you contact Mr. Blendell to discuss the possibility of obtaining the records on a periodic basis. I believe that you have corresponded with Mr. Blendell and have his address. If you would like to contact him by phone, he can be reached at (518) 474-7770.

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: James Blendell

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1090

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

April 3, 1979

Mr. Anthony MacDonald
The City of New York
Department of Parks and Recreation
The Arsenal
830 Fifth Avenue
New York, New York 10021

Dear Mr. MacDonald:

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

It is noted at the outset that §87(1)(a) of the Freedom of Information Law requires the governing body of each public corporation, such as the City of New York, to promulgate uniform rules and regulations "for all agencies in such public corporation." Consequently, if the New York City Council has promulgated regulations under the Freedom of Information Law, the regulations would be applicable to the Department of Parks and Recreation.

Nevertheless, as requested, enclosed are copies of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force of law, as well as model regulations that can be used as a guide to compliance.

The Committee is not the repository of regulations adopted by state agencies, for there is no reporting requirement in the Law. If you are interested in reviewing regulations adopted by the state agencies, for example, it is suggested that you review appropriate sections of 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:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1091

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

April 3, 1979

Martin G. Bunin, Esq.
Parker, Chapin, Flattau
& Klimpl
530 Fifth Avenue
New York, New York 10036

Dear Mr. Bunin:

I have received your letter of March 30 in which an advisory opinion has been requested on behalf of your client, [redacted]. [redacted] has been denied access to a particular record by the Principal of the Community Center for Adjustment ("CCA"), which is part of BOCES in Nassau County.

Specifically, your letter indicates that the Principal of CCA on December 22, 1978, instructed CCA's Division of Personnel by letter to place [redacted] on an "unpreferred" list of substitute teachers and avoid calling her unless there is no other substitute teacher available to work.

I agree with your contention that the letter in question is accessible.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a BOCES, are available, 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 Freedom of Information Law.

The only relevant exception under the circumstances 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 withhold inter-agency or intra-agency materials, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials.

The letter in question clearly constitutes an "intra-agency" document. Nevertheless, as you have contended, the letter should in my view be available under at least one of the three categories of accessible information within §87(2)(g). First, the letter itself likely constitutes "factual data." Second, it is clear that the letter is reflective of an instruction by an executive to staff which indirectly affects the public. And third, the instruction contained in the letter also constitutes a final determination made by the Principal with respect to [redacted] Consequently, I believe that the letter is accessible.

In addition, your letter indicates that the agency neither responded to your request in writing nor provided reasons for the denial. In this regard, I have enclosed a copy 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. Section 1401.7 of the regulations requires that an agency provide written reasons for a denial, inform the applicant of his or her right to appeal and provide the name and address of the person to whom an appeal should be directed.

Finally, Counsel to the agency informed you that it is "a BOCES policy" to deny access to intra-agency materials such as the letter in question, "irrespective of any provision of the FOIL." In this regard, an agency lacks discretion to restrict rights granted by any statute enacted by the State Legislature. Consequently, an agency cannot unilaterally adopt a policy that conflicts with or in any way 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
Executive Director

RJF:nb
Enc.

cc: Russell Riggio

Brauner, Baron, Rosenzweig,
Kligler & Sparker

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1092

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

April 3, 1979

Mr. Bill Sheehan
[redacted]

Dear Mr. Sheehan:

I have received your letter of March 23, which concerns your inability to gain access to a list of substitute teachers in possession of the Avon School District.

Specifically, your letter indicates that you were required to complete a "Freedom of Information Form" and that the list was denied on the basis of §87(2)(c) of the Freedom of Information Law.

In my opinion, the list is accessible and should be made available to you.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a school district, are accessible, except to the extent that records or portions of records fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law (see attached).

Section 87(2)(c) of the Law provides that an agency may withhold records or portions thereof which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations." Despite the quoted language, I believe that the list in question is nonetheless available.

It is noted that §87(3)(b) of the Law requires each agency to maintain a payroll record including the name, public office address, title and salary of every officer or employee of the agency. It is emphasized that the payroll record must be compiled and made available on a continuing basis. Under the circumstances, if the list that you are requesting now had been sought during a period in which there were no collective bargaining negotiations, it

would have been available. Further, presumably it could have been preserved by the recipient and used for any purpose at a later date. As a consequence, I do not believe that disclosure of the list in question now would "impair" the collective bargaining negotiations in which the District is engaged, for it had been and continues to be available on an ongoing basis.

If substitute teachers are identified on a list separate from the payroll record described earlier, that list also should in my view be made available. The list would constitute a "factual tabulation" which is required to be made available under §87(2)(g)(i) of the Freedom of Information Law. Further, I do not believe that disclosure of a separate list of substitute teachers, which had been available in the past on a continuing basis, would impair the collective bargaining process.

Your letter also indicates that you were required to complete a form prescribed by the District. In this regard, the Committee has consistently advised that any request made in writing that "reasonably describes" the records sought should suffice [see §89(3)]. Consequently, a failure to complete a form prescribed by an agency cannot in my view constitute a valid ground for a denial of access.

Enclosed for your consideration is a 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Mr. William LeFeber

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1093

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

April 4, 1979

Mr. Howard Caudle
[redacted]

Dear Mr. Caudle:

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.

The question raised concerns rights of access to the names of persons who signed a "counter petition". All of those who signed the counter petition had previously signed a petition seeking a different course of action. Further, in a letter from Mr. Henry Kujawa, a member of the Webster Town Board, it was indicated that the signatures appearing on the counter petition were "intentionally omitted at the request of the individuals who signed it." Mr. Kujawa also stated that the people who signed the counter petition "apparently felt that they would be subjected to some unnecessary harassment if their names were made known."

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 categories of deniable information enumerated in §87(2)(a) through (h) of the Freedom of Information Law (see attached).

Relevant to your inquiry is §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy." In addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy.

The subject of privacy has continually been perplexing, for subjective judgments must of necessity be made when issues involving personal privacy arise. It is unclear where a dividing line may be drawn between disclosures which would result in unwarranted, as opposed to a permissible invasion of personal privacy. If, as Mr. Kujawa suggested,

the signers of the petition felt that they would be subjected to harassment if their names were disclosed, it is possible that a court would agree that disclosure under the circumstances would result in an unwarranted invasion of personal privacy. Moreover, I do not feel that I can appropriately inject my personal subjective judgments regarding access to the records in question. Therefore, it appears that the town officials have the authority to withhold the information in question if in their judgment disclosure would result in an unwarranted invasion of personal privacy, unless otherwise ordered by a court.

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

Enc.

cc: Henry Kujawa
Robert Abrams, Attorney General

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1094

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

April 4, 1979

Ms. Judy Diamond
[redacted]

Dear Ms. Diamond:

I have received your letter of March 29 in which you described several problems regarding the ability to gain access to records in possession of the Elwood School District.

It is noted at the outset that the Freedom of Information Law, a copy of which is attched, is based upon a presumption of access. All records in possession of an agency are available, except those records or portions of records that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law.

With respect to the on sight inspection report of the Elwood School District by the State Education Department, I can merely conjecture as to rights of access without having seen the report. Nevertheless, it appears that the only exception that could appropriately be raised 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 inter-agency (records transmitted from one agency to another) or intra-agency (records transmitted between officials within an agency) may be withheld, an agency, such as a school district, must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records.

Under the circumstances, the on sight inspection report transmitted to the Elwood School District by the Education Department constitutes inter-agency material. However, it likely contains substantial portions of statistical or factual data that would be available. Further, it might also be reflective of the final determination of the Education Department with respect to particular responsibilities of the Elwood School District. If the report is indeed considered a final determination, it is available in its entirety.

It is also emphasized that the introductory phrase in §87(2) states that an agency may withhold certain "records or portions thereof..." Consequently, it is clear that the Legislature recognized that there may be situations in which records are in part accessible and deniable. Therefore, an agency is responsible for reviewing a record in its entirety to determine which portions, if any, may justifiably be withheld.

Your letter indicates that you were informed by a District official that you must wait five business days to obtain copies of records. Although the Freedom of Information Law states that an agency must respond to a request within five business days of its receipt [see §89(3)], five days is in my view intended to be an outer limit for response. Further, §1401.4 of the regulations promulgated by the Committee (see attached), which have the force and effect of law, states that agencies shall "produce records during all hours they are regularly open for business." Therefore, if records are readily accessible, there is no reason why an applicant should be required to wait five days to obtain copies of records.

Further, when records are denied, the denial must be in writing, provide reasons for the denial, inform the applicant of his or her right to appeal, and include the name and address of the person to whom an appeal should be directed. In addition, when an agency receives an appeal following a denial of access, the agency is required to transmit a copy of the appeal and the determination that

ensues to this Committee [see Freedom of Information Law, §89(4)(a)].

You have also written that you were informed that you could not inspect records until the Board of Education has had an opportunity to do so. I disagree with such a contention. The Freedom of Information Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency [see §86(4)]. As such, as soon as a record is in possession of the District, it is subject to rights of access granted by the Freedom of Information Law, whether or not the Board has had an opportunity to review it. Very simply, public rights of access are not contingent upon a review of records by a governing body, such as a school board.

Finally, you stated that you believed that reports pertaining to your daughter given to you had been in part deleted. Under the circumstances, the Freedom of Information Law would not be applicable, for the Family Educational Rights and Privacy Act governs rights of access to student records. Regulations adopted by the U.S. Department of Health, Education and Welfare further clarify the Act (see attached), and the District is required to follow those regulations. In brief, the Act and the regulations provide that all education records identifiable to a student are accessible only to the parents of the student. I cannot conjecture as to whether any deletions made from your daughter's records were proper. Nevertheless, if you have questions or problems concerning rights of access to your children's records, it is suggested that you call or write to the Family Educational Rights and Privacy Act Office in Washington. The person that you should contact is Ms. Pat Ballinger, FERPA Office, Room 526F, Hubert Humphrey Building, Department of Health, Education and Welfare, Washington, D.C., 20201. She can be reached by phone at (212) 245-7488.

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. George Bouklas
Elwood School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1095

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

April 4, 1979

Mr. Joseph Zuckerman
[redacted]

Dear Mr. Zuckerman:

I have received your letter of March 22, in which you explained that your appeal of March 5 directed to the Office of Court Administration had not been determined by the date of your letter. Consequently, you have asked what your "next step" might be and have indicated that you do not want to initiate an Article 78 proceeding.

As you are aware, §89(4) of the Freedom of Information Law requires that the head of the agency or whomever is designated to determine appeals must render a final determination in writing within seven business days of receipt of an appeal. In addition, the Law requires that agencies transmit to this Committee appeals and the determinations that ensue. Having reviewed the Committee's files, it appears that the Office of Court Administration has transmitted no documentation regarding your appeal.

In terms of your next step, unfortunately there is none short of a judicial review of a denial of access or a failure on the part of an agency to perform a duty that is required to be performed by law.

Nevertheless, I would be willing to contact the Office of Court Administration on your behalf to mediate. However, I have no knowledge of the nature of the records in which you are interested. As such, it would be impossible to conjecture as to rights of access to the records that you are seeking.

If you feel that I can be of assistance to you, please feel free to contact me once again.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Judge Jawn Sandifer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1096

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

April 6, 1979

Rev. Msgr. James A. Healy
Chairman
New York State Mediation Board
Two World Trade Center
34th Floor
New York, New York 10047

Dear Rev. Msgr. Healy:

I have received your letter of March 30 and thank you for your interest in complying with the Freedom of Information Law.

Your letter raises two questions. First, are opinions and awards made by the State Mediation Board accessible under the Freedom of Information Law? And second, can a distinction be made "between the opinions and awards of private arbitrators and staff people, including special mediators?"

I have reviewed both Article 21 of the Labor Law and 21 NYCRR part 4000, both of which concern the mediation of labor disputes and the powers and duties of the State Mediation Board. In none of the provisions is there specific direction regarding access to records reflective of the opinions and awards made by the State Mediation Board. Consequently, rights of access are determined by the Freedom of Information Law.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the Board, are available, except to the extent that records or portions of records fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law (see attached).

Relevant to your inquiry is §87(2)(g), which permits an agency to 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 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 final agency policy or determinations found within such materials.

Under the circumstances, I believe that the opinions and awards are reflective of final determinations of the Board. Therefore, the records in question are in my view accessible.

I would like to admit in all honesty that I am not closely familiar with the work of the Board. In this regard, in situations in which opinions are rendered that affect a specific individual, it is possible that disclosure of the identity of the individual could result in an "unwarranted invasion of personal privacy" [see §87(2)(b)]. In such cases, it has been advised that the substance of an opinion must be made available, but that identifying details regarding the subject of an opinion might be withheld to protect his or her privacy. Unless I am mistaken, however, it appears that the subjects of arbitrations are labor organizations and employers rather than the concerns or complaints of specific individuals. If that is the case, I believe that records of the opinions and the awards are accessible in their entirety.

Lastly, rights of access granted by the Freedom of Information Law as well as the capacity to withhold records are based upon the nature and content of records. Consequently, I do not believe that a distinction can be made in terms of rights of access between opinions rendered by a private arbitrator, a staff employee, or a specific mediator. Although the opinions may be reached by different groups of arbitrators, the nature of the record determines rights of access, not its author.

In sum, I believe that records indicative of the opinions and the awards are accessible, except to the extent that identifying details may be deleted if in your judgment disclosure of such details 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:jm

Enc.

FOIL-AO-1097

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Patrick J. Cea April 10, 1979

FROM : Robert Freeman

SUBJECT : Department of State v. Valerie Gebert

I have received your memorandum of April 5 and the request appended to it.

Without greater knowledge of the contents of the records sought, it is difficult to provide specific advice. Nevertheless, I can offer the following.

The Freedom of Information Law states that all records in possession of an agency 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, but that the identity of the complainant is largely irrelevant (see Church of Scientology v. State, 61 AD 2d 492; aff'd by Court of Appeals, Feb. 15, 1979, ____ NY 2d ____). On that basis, it has been advised that the name of a complainant may be deleted, but that the substance of the complaint should be made available.

With regard to other materials generated by the Department relating to the 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 determinations must be made available.

Viewing the records in terms of the ability to withhold, advice or statements of opinion or impression, for example, may in my opinion be withheld.

I hope that I have been of some assistance. If there are further questions, please don't hesitate to call.

RJF:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1098

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

April 10, 1979

Mr. Dennis M. O'Leary
Administrative Regulations
Review Commission
13th Floor
Agency Building #4
Nelson A. Rockefeller
Empire State Plaza
Albany, New York

Dear Mr. O'Leary:

Thank you for your letter of March 27 and your interest in compliance with the Freedom of Information Law. You have sought an "investigation" by the Committee regarding the implementation of the Freedom of Information Law by the Division of Parole. The inquiry was precipitated by allegations made by Jeb Stuart Fries, an inmate at Attica Correctional Facility.

It is noted at the outset that I have had numerous communications with Mr. Fries as well as the Division of Parole.

The regulations originally promulgated by the Division had been reviewed in the past by means of an advisory opinion prepared on December 7, 1978 (see attached). Although those regulations were in my view deficient, I am pleased to report that the Division promulgated revised regulations on March 23, 1979. Having reviewed the new regulations, I believe that they are in substantial compliance with the Freedom of Information Law and the regulations promulgated by the Committee.

In view of the foregoing, I am hopeful that Mr. Fries and others will no longer experience the difficulties faced in the past.

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: Jeb Stuart Fries

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1099

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

April 11, 1979

Ms. Beverly J. Merrill
Registrar
Town of Nichols
Cady Library Building
Nichols, New York 13812

Dear Ms. Merrill:

I have received your letter of April 6 which seeks a "ruling" from the Committee regarding access to vital records.

Two points are noted at the outset. First, the Committee has no authority to issue "rulings." On the contrary, the Committee has the authority only to advise. Second, access to vital records, including birth, death and marriage records, is not governed by the Freedom of Information Law, but by other provisions of law.

Specifically, access to birth and death records is governed by §§4173 and 4174 of the Public Health Law. Access to marriage records is governed for the most part by §19 of the Domestic Relations Law. Each of the statutes cited provides that vital records may be disclosed upon a showing of a "proper purpose." Unfortunately, the phrase "proper purpose" is undefined.

In my opinion, however, a request made for the purpose of a genealogical search does constitute a "proper purpose." The State Health Department, which maintains original records of marriage, birth and death, has long engaged in genealogical searches. Further, although regulations promulgated by the Health Department had for several years directed local registrars of vital records to direct requests to them, I believe that its regulations have recently been altered to permit local registrars, such as yourself, to accept and perform genealogical searches.

To obtain the most up to date information regarding access to vital records, it is suggested that you contact Joseph Sterzinger, Director of the Bureau of Vital Records, State Health Department, Empire State Plaza, Tower Building, Albany, New York, 12237. If you would like to telephone Mr. Sterzinger, he can be reached at (518) 474-3038.

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- 323
FOIL-AO- 1100

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

April 12, 1979

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

As you requested in your most recent letter, I have referred to your letter of March 14 and my response of March 19.

Your first question concerns the ability of the public to be aware of the provisions that are the result of collective bargaining negotiations that have been all but settled. Stated differently, you have asked whether the public has the ability to learn of the terms and conditions of a collective bargaining agreement prior to its ratification. The inquiry arises under the Freedom of Information Law, and I believe that such records should be made available. As you are aware, the Freedom of Information Law provides access to all records in possession of an agency, except records or portions thereof that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law. Relevant to your inquiry is §87(2)(c), which states that an agency may withhold records or portions of records which if disclosed would "impair present or imminent contract awards or collective bargaining negotiations." If an agreement has been reached and all that remains is ratification, disclosure of the terms of the agreement would not in my opinion at that point "impair" the negotiations. Consequently, the agreement at that stage should in my view be made available.

Your second question described the relationship between the Jamestown Board of Education and the Jamestown Principals' Association. Based upon your letter, it appears that the Association does indeed participate in collective bargaining negotiations. Therefore, discussions involving the negotiations could likely be held in executive session under §100(1)(e) of the Open Meetings Law.

Further, your letter appears to indicate that the Jamestown Board of Education schedules executive sessions in advance of a meeting. In my opinion, a public body can never schedule an executive session in advance. As noted earlier, §100(1) of the Open Meetings Law requires that a vote be taken during an open meeting that is passed by a majority of the total membership of a public body prior to entry into executive session. Therefore, a public body can never know in advance that there will be a sufficient number of votes to enter into executive session until an open meeting has been convened. Members of a public body may be ill or may vote against entry into executive session. Consequently, to reiterate, a public body cannot schedule an executive session in advance of convening 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

Robert J. Freeman
Executive Director

RJF:nb

Your final question concerns the language of the Open Meetings Law insofar as it pertains to the ability to enter into executive session. The Law states that a public body may enter into executive session:

> "[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, provided, however, that no action by formal vote shall be taken to appropriate public moneys" (emphasis added).

I regret that I cannot provide a clear and concise interpretation of the meaning of "general." Nevertheless, I do not believe that "personnel matters" without more can be cited as a basis for entry into executive session. Section 100(1)(f) of the Open Meetings Law 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, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The word "personnel" does not appear in the quoted provision. Further, the Committee has consistently advised that §100(1)(f) is intended largely to protect privacy, not to shield policy under the guise of privacy. Therefore, a public body could hold an executive session to discuss the employment history of a particular individual, for example. However, a discussion of budget cuts or the elimination of positions should in my opinion be discussed during an open meeting, for such a discussion would concern policy. This stance has been confirmed by a recent judicial decision (see Orange County Publications v. County of Orange, Supreme Court, Orange County, December 6, 1978).

In view of the foregoing, although a public body need not identify the specific individual or individuals who may be the subject of an executive session, a public body must state the "general" area of inquiry, such as the "matters leading to the employment of a particular individual," or "the financial history of a particular corporation," for instance.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1101

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

April 12, 1979

Mr. Erwin van Swol
[redacted]

Dear Mr. van Swol:

I have received your letter of April 2, which states that the Delaware Valley Central School District's Board of Education and its Superintendent "remain adamant in refusing to mail board minutes and other pertinent public documents to persons requesting them and offering to pay photocopying and postage costs." You have asked that the Committee "take appropriate action" against the District.

I regret to inform you that the Committee has no authority to compel compliance with the Freedom of Information Law; on the contrary, the Committee has only the authority to provide advice. Consequently, at this juncture it appears that your only remedy is the initiation of a judicial challenge to a denial of access under Article 78 of the Civil Practice Law and Rules.

Please be advised that the Committee has proposed that the Freedom of Information Law be amended to provide courts with discretionary authority to award reasonable attorney fees to a person who substantially prevails in a judicial challenge to a denial of access. Under the current Law, the public is forced to bear the financial brunt of a lawsuit. I am hopeful that the Legislature will amend the Law this session to give the public an opportunity to be reimbursed following a successful challenge made under the Freedom of Information Law.

Once again, I regret that at this juncture there is little that I can do to assist you further.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1102

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

April 12, 1979

Mr. Joseph Schuster
[redacted]

Dear Mr. Schuster:

I have received your letter of April 10 in which you asked that I forward to you the last known address of a former employee.

Please be advised that this Committee does not have possession of government records, nor does it have the capacity to obtain records on behalf of the public. On the contrary, the Committee merely has the power to give advice regarding the Freedom of Information Law.

Further, it is emphasized that the Law provides and the courts have upheld the notion that the home addresses of public employees need not be generally made available, for disclosure would result in an unwarranted invasion of personal privacy. Further, the payroll record provision in the Freedom of Information Law [see attached, §87(3)(b)] makes reference to the "public office" addresses of public employees.

Nevertheless, it is suggested that you direct your inquiry to the Department of Audit and Control, which maintains payroll information regarding all state employees. Perhaps with the assistance of that Department, you can obtain a "lead" with regard to a past employee. Your inquiry should be addressed to the Public Information Officer, Department of Audit and Control, Alfred E. Smith Office Building, Albany, New York, 12225.

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
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1103

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

April 16, 1979

Mr. Joseph Schuster
[redacted]

Dear Mr. Schuster:

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.

The question raised concerns the length of time that an agency must keep records pertaining to a former employee.

Practices concerning the length of time records are kept prior to their disposal varies among agencies. Some agencies have developed schedules that specify the amount of time that particular records are kept. Others, however, have not developed similar schedules.

Further, §186 of the State Finance Law requires agencies to follow a procedure prior to the destruction of their records. If an agency seeks to destroy records, it must give notice of its intent to do so to the Commissioner of General Services. In turn, the Commissioner of General Services must transmit the request to the Commissioner of Education, the Attorney General, the Director of the Budget and the Comptroller, any one of whom can essentially "veto" a request to destroy. For instance, the Commissioner of Education may veto destruction of records on the ground that records may have historical value; the Attorney General might do the same if the records have relevance to litigation.

It is suggested that you contact the agency in possession of the records in which you are interested to determine the existence of any retention or disposal schedules of the particular 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
Executive Director

RJF:nb

cc: Attorney General Abrams

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1104

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

April 16, 1979

Mr. James F. Lepera
[redacted]

Dear Mr. Lepera:

I have received your letter of April 12 in which you have sought advice regarding the ability to gain access to records relative to a criminal case in which you were involved.

It is emphasized at the outset that the Freedom of Information Law does not apply to records in possession of courts. The Law includes within its scope agencies, but the definition of "agency" specifically excludes the "judiciary" from the coverage of the Law [see attached, Freedom of Information Law, §86(3); see also definition of "judiciary", §86(1)].

Nevertheless, as a general matter, records in possession of courts are available. Specifically, I refer to §255 of the Judiciary Law, which states 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 to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Stated differently, a clerk of the court is required to search and make available the records in his or her possession upon payment of the appropriate copying fees.

As such, to the extent that records in possession of a court clerk exist, they should in all likelihood be made available to you.

Further, if you would like to inspect or learn of your criminal history record, it is suggested that you contact the Division of Criminal Justice Services. That office maintains criminal history information that is available only to law enforcement agencies and the subjects of the records. If you wish to contact that office, you should direct your inquiry to the Division of Criminal Justice Services, Director of Data Systems, Executive Park Tower, Stuyvesant Plaza, Albany, New York, 12203.

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

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: Sol Greenberg

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1105

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

April 16, 1979

Ms. Lynette Kirkwood
Youth Employment Counselor
Port Washington Community
Action Council, Inc.
382 Main Street
Port Washington, New York 11050

Dear Ms. Kirkwood:

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

Your inquiry concerns rights of access to information to be contained in a "Youth Needs Assessment Survey." The question arose as a result of the language of an agreement that would be signed by the executive officer or school board president of the district or districts in which the survey would be taken. Specifically, the agreement states that:

> "[W]e agree that the information received will be regarded as confidential, and will be used only by persons authorized by the Executive Officer of the requesting agency and/or its President of the Board of Directors. The information will be fore the sole use of the requesting agency."

Having reviewed the survey, I believe that any statistical or factual findings that result would be available under the Freedom of Information Law to any person.

It is noted at the outset that the Freedom of Information Law applies only to records in possession of government [see attached Freedom of Information Law, §86(3)]. Therefore, although the Community Action Council is not an agency and would not be subject to rights of access granted by the Freedom of Information Law, school districts, county offices and other governmental entities in possession of the survey or the results of the survey would be required to comply with the Freedom of Information Law.

In addition, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are available, except those records or portions thereof falling within one or more enumerated categories of deniable information listed in §87(2)(a) through (h) of the Law.

Under the circumstances, I do not believe that the contents of the survey or the statistical findings developed after the survey is taken could justifiably be denied.

From my perspective, the promise of confidentiality has minimal significance. As stated in Langert v. Tenney, "[T]he concern...is with the privilege of the public officer, the recipient of the communication, rather than with the maker of the communication" [5 AD 2d 586, 589 (1958); see also People v. Keating, 286 App. Div. 150 (1955), Cirale v. 80 Pine St. Corp. 35 NY 2d 113 (1974)]. Related to a promise of confidentiality is the common law privilege of confidentiality, also known as the governmental privilege. In this regard, the courts have held that the privilege continues to exist notwithstanding the enactment of the Freedom of Information Law. However, the privilege is based upon the notion that a public officer must prove that information in his or her possession would if disclosed result in detriment to the public interest. Further, a determination regarding the propriety of an assertion of privilege can be made only by a court on a case by case basis.

In view of the foregoing, there are in my opinion only two instances in which records may be characterized as "confidential." First, records are confidential when a statute specifically prohibits disclosure. Second, a record may be deemed confidential if in the opinion of a court disclosure would, on balance, result in detriment to the public interest. Therefore, as a general matter, I do not believe that a promise of confidentiality is valid, unless it can be demonstrated that disclosure would indeed result in detriment to the public interest.

With respect to the protection of personal privacy, the results of the survey, according to our conversation, will be presented in statistical or factual form and its contents will not identify particular students. If, however, any component of the survey would identify a particular student or students, to that extent, the survey could justifiably be withheld. Information that would identify

students could be denied under the Freedom of Information Law, for disclosure would likely constitute an unwarranted invasion of personal privacy [see §87(2)(b)]. More importantly, such a disclosure might violate the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment" (20 USC §1232g). In brief, the Buckley Amendment requires that information identifiable to a student maintained by an educational agency or institution be confidential to all but the parents of the student, and that the student acquires the rights of his or her parents when he or she reaches the age of 18. Nevertheless, in situations in which specific students could not be identified due to the size of the sampling, neither the Buckley Amendment nor the privacy provisions of the Freedom of Information Law could in my view be appropriately cited as a ground for denial.

For the reasons described above, I do not believe that the restrictions contained in the proposed agreement could stand as a justification for a denial of access to the survey to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1106

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

April 17, 1979

Mr. Jeffrey Berdy
[redacted]

Dear Mr. Berdy:

I have received your request for assistance regarding your ability to gain access to records in possession of the New York City Board of Education. In addition, enclosed are copies of all materials in possession of the Committee related to your requests.

Having reviewed my files, I have located each of the four requests numbered 9071-9074 directed to the Board. In each of the four cases, the Board denied access by stating simply that "[T]his is an improper request under the Freedom of Information Act."

I feel compelled to state at the outset that I regret not having reviewed the requests in a more substantive manner when they were received. Although I do not intend to cite the volume of my work as an excuse, it is often difficult to review all of the appeals transmitted to this office as fully as necessary.

In my opinion, the denials in some cases may have been proper, while in others your requests should have been granted.

Your first request identified as case number 9071 sought access to "[A]ny and all records relating to any and all expense accounts of the Board from September 1, 1975 through January 16, 1979." To the extent that such records exist they are in my opinion available.

It is important to note that the original Freedom of Information Law required an applicant to seek "identifiable" records. Section 89(3) of the amended Law, however, merely requires an applicant to "reasonably describe" the record or

records sought. It appears that your request reasonably describes the records sought.

Further, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the Board of Education, are available, except those records or portions thereof that fall within one or more categories of deniable records enumerated in §87(2)(a) through (h) of the Freedom of Information Law. In addition, an agency must in my view cite one or more grounds for denial in order to withhold records; it cannot assert that a request is "improper" without more.

In terms of the substance of the request, I believe that the records sought should 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 an agency may withhold inter-agency or intra-agency records, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Since records reflective of expense accounts constitute "factual tabulations or data," they should in my view be made available.

Although the records might identify specific Board members, disclosure would not in my opinion result in an "unwarranted invasion of personal privacy" under §87(2)(b). As a general matter, the Committee has advised and the courts have upheld the notion that records relevant to the performance of the official duties of public employees are accessible, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy.

The second request identified as case number 9072 seeks records "relating to any and all petty cash expenses of the Board from September 1, 1975 through January 16, 1979." My response in this instance is analogous to that given with respect to the first request. Records reflective of petty cash expenses constitute factual tabulations or data that should be made available.

It is noted at this juncture that the Freedom of Information Law grants access to existing records. Consequently, if you request information that does not exist in the form of a record or records, the agency in receipt of the request need not create records on behalf of an applicant. Therefore, if, for example, there is no group of records identifiable to "petty cash," the Board need not create such records on your behalf.

The third request identified as case number 9074 seeks records "relating to any and all Board of Education expenses for meetings, trips, and conventions at any time from September 1, 1975 through January 16, 1979." Again, to the extent that such records exist, they would be reflective of factual tabulations or data and as such should be available.

Finally, the fourth request identified as case number 9073 seeks information relating to payments made to "officials of the Board" by organizations doing business with the Board. Further, you have suggested that the scope of records sought include reference to "interest, salaries, stock, dividends, commissions and gifts from September 1, 1975 through January 16, 1979." Unless the Board and its employees are subject to a disclosure order or law, it appears unlikely that the Board would have possession of records indicating the gifts to which you make reference. Further, it is possible that disclosure of such items would result in an unwarranted invasion of personal privacy. It is suggested, however, that you attempt to discern whether the Board operates pursuant to a disclosure provision or a code of ethics that would require disclosure of the items sought or preclude the acceptance of gifts similar to those described.

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: Chancellor Macchiarola
Dr. Amelia Ashe
Mr. Miguel O. Martinez
Mr. Harold Siegel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1102

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

April 18, 1979

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

Dear Mr. Dooley:

Thank you for your continued interest in complying with the Freedom of Information Law. I have received your letter of April 12 and the materials appended to it. The enusing paragraphs consist of a critique of the proposed "Introductory Local Law" of 1978.

In addition, as requested, enclosed are model regulations developed by the Committee to assist agencies in complying with the procedural aspects of the Freedom of Information Law. In short, an agency can adopt regulations consistent with those promulgated by the Committee by filling in the appropriate blanks.

First, it is noted that one of the central goals of the Freedom of Information Law is to enhance the ability of the public to gain access to records in possession of government. Consequently, the Committee's regulations are relatively simple and direct, and I believe that regulations adopted by agencies, including the Town of Brookhaven, should be equally straightforward.

Second, it is emphasized that the Committee's regulations pertain only to procedures; they do not pertain to the substantive aspects of the Law, i.e. rights of access. Therefore, to the extent that regulations seek to deal with rights of access, they would in my view be inappropriate.

Section 2 of the proposed local law contains a series of definitions. In my opinion, it is unnecessary. The Freedom of Information Law defines terms, and in my view an addition to the substantive provisions of the statute itself is merely surplusage.

Section 2 of the proposal describes the duties of a records access officer. It is noted at this juncture that the Committee's regulations state that there may be one or more records access officers. In a manner consistent with your suggestion, the heads of divisions within the Department of State are the records access officers for their respective divisions. Further, according to the Committee's regulations, the records access officer is responsible for assuring that agency personnel:

> "[U]pon locating the records, take one of the following actions:
>
> (i) Make records available for inspection; or
>
> (ii) Deny access to the records in whole or in part and explain in writing the reasons therefor..." [§1401.2(b)(3)].

Thus it is clear that the Committee's regulation seeks to require that records access officers make initial determinations to grant or deny access. The reason behind the capacity to designate more than one records access officer is the fact that agencies, such as the Town, may be multi-faceted in terms of duties and the nature of records in their possession. From my perspective, a records access officer should be generally familiar with the records over which he or she has the ability to grant or deny access. Consequently, the idea of the designation of a "subject matter advisor" to make determinations is in my opinion inappropriate, although not illegal, because it is unlikely that a single individual would have knowledge of the nature and contents of all records in possession of the Town. Again, it is the records access officer who is supposed to make determinations to grant or deny access.

Subdivision (e) of a second §2 (which should be enumerated as §3), makes reference to "a list of accessible items." In addition, in §4 concerning the responsibilities of the subject matter advisor, subdivision (d) requires the advisor to establish a list of available information, which is delineated in terms of contents by subdivision (e). In my opinion, this approach may lead to erroneous interpretations of the Freedom of Information Law.

I would like to point out at this juncture that the subject matter list required to be compiled pursuant to §87(3)(c) of the Freedom of Information Law is not intended

to be a reference or index to all records in possession of an agency. On the contrary, it is intended to be a general index in which the records in possession of an agency are identified by subject matter or perhaps by file category. The danger in developing the list of accessible records is that many may be excluded that are indeed available. Moreover, viewing the Freedom of Information Law from an historical perspective, the original statute listed accessible records to the exclusion of all others. Due to the problems that arose under that presumption, i.e. the presumption that records were deniable unless they fell within categories of accessible records, the Law was substantially amended in 1977. As of January 1, 1978, the Freedom of Information Law did not state what is available; conversely, it now states that all records are available, except those records or portions thereof falling within specific, enumerated categories of deniable records appearing in §87(2)(a) through (h) of the Law.

Further, the introductory language in §87(2) makes reference to "records or portions thereof" that may be denied. As such, the Legislature recognized that there may be situations in which a record may be accessible or deniable in part. For all of these reasons, the scheme envisioned by the proposed local law is in my view inappropriate and should be discarded.

Subdivision (e) is apparently based upon the original Freedom of Information Law. Although the records described in the subdivision may remain accessible under the amended Law, it is misleading due to its appearance of exclusivity regarding rights of access.

Similarly, subdivision (f) concerning unavailable information is unnecessary, for it reiterates grounds for denial appearing in the current Freedom of Information Law.

Furthermore, exception 6 within subdivision (f) would permit the Town to withhold records that "[C]omprise material prepared solely for purposes of litigation or where government assumes the role of [sic] litigant." The quoted provision illustrates the danger of going beyond the scope of the Committee's regulations and the statute itself. As I mentioned earlier, the regulations are solely procedural. They are unrelated to the substantive aspects of the Law, i.e. rights of access. In the case of the quoted provision, the Town may by means of local law diminish rights granted by the Freedom of Information Law, a statute enacted by the State Legislature. To that extent it would be invalid. Specifically, although government may assume

the role of a litigant, it is clear that such a factor alone is not determinative of rights of access. Case law has established that if records are accessible, they should be made equally available to any person, without regard to status or interest. Even though records might be sought by a litigant or related to litigation, rights of access might not be affected. For example, in the case of Burke v. Yudelson, (368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165), audits sought by a litigant that were otherwise available continued to be accessible notwithstanding the fact that the applicant was a litigant and the records were related to ongoing litigation.

In sum, the language of §4(f)(6) of the proposal adds a ground for denial that does not appear in the Freedom of Information Law. The identification of a record on a list of "available" or "unavailable" records is in my view meaningless, for the classification or characterization of records is irrelevant; what is relevant is the effect of disclosure. Consequently, the only question that should be raised when government receives a request is the extent to which records fall within the provisions of §87(2), if any.

For all the reasons discussed above, I believe that the proposed local law would likely detract from both the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law.

Once again, it is suggested that the Town employ the model regulations as the basis for ensuring compliance, and reject those portions of the proposal that pertain to substance, that reiterate the statute itself, and that conflict with the direction provided in the 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:nb
Enc.

cc: Joseph R. Mulé

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1108

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

April 18, 1979

Mr. William Rowen
Chairman, Southern Region
New York State Tenant
and Neighborhood Coalition
115 East 23rd Street
New York, New York 10010

Dear Mr. Rowen:

I have received your letter of April 2 concerning a request directed to the New York City Conciliation and Appeals Board. In addition, the Board has transmitted to the Committee copies of your appeal and the ensuing determination as required by the Freedom of Information Law, §89(4)(a).

Having reviewed the materials, it appears that the Board's determination was appropriate.

The first item that was denied, a form, apparently was "never approved, adopted or implemented by the Board." Under such circumstances, the form is likely deniable under §87(2)(g) of the Law which permits an agency to 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 form in question is an "intra-agency" document, which, if never implemented, consists of neither statistical or

factual data, instructions to staff that affect the public, nor final agency policy or determinations. Therefore, based upon the materials submitted to this office, I believe that a denial of access to the form was proper.

The second item that was denied concerns a record that does not exist. In this regard, the Freedom of Information Law does not require an agency to create a record on behalf of an applicant, unless otherwise expressly provided [see §89(3)].

I hope that I have been of some assistance and that the remaining four items made available to you are of utility. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: William E. Rosen

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1109

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

COMMITTEE MEMBERS
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MARIO M. CUOMO
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BASIL A. PATERSON
IRVING P. SEIDMAN
GILBERT P. SMITH
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 19, 1979

Ms. Mary Lou Cohalan
Editor
The Suffolk County News
23 Candee Avenue
Sayville, New York 11782

Dear Ms. Cohalan:

As requested, I have reviewed the materials that you sent regarding the lawsuit in which you are involved (Cohalan v. Board of Education of Bayport-Blue Point School District).

The lawsuit deals with your request for "both sets of proposals exchanged in negotiations between the Bayport-Blue Point Board of Education and the Bayport-Blue Point Teachers Association." The proposals are in your view important because the voters of the District must accept or reject a budget prior to the consummation of an agreement between the District and the Teachers' Association. Currently, neither you nor any other voter of the District has the ability to ascertain the potential parameters of a possible settlement "and thus judge the true impact of the budget." In addition, you have stated that access to the proposals is important due to the "growing trend on Long Island to prolong negotiations with teachers in order not to include the impact of new contracts in annual budgets" (emphasis yours). Since a budget upon which the residents of a district vote will reflect less than the actual expenditures will be, budgets may be easily approved, but deceptive nonetheless. Further, during our conversation, you emphasized that a school board may, after the adoption of a budget, unilaterally increase the District's expenditures without the consent of the voters.

In a decision rendered by Justice Underwood of the Supreme Court, Suffolk County, it was held that disclosure of the proposals would "impair present or imminent contract awards or collective bargaining negotiations," which is one of the grounds for denial appearing in the Freedom of Information Law [see attached Freedom of Information Law, §87(2)(c)]. Nevertheless, you have stated that the Board merely asserted that disclosure would impair the negotiations, but offered

no proof of possible impairment. Your brief also states that the District Principal, the chief negotiator in the contract talks, was concurrently the appeals officer under the Freedom of Information Law who rejected your request. Consequently, you have alleged that the District Principal could not make "an unbiased judgment" and that he should have removed himself from the process of determining your rights. Lastly, you have argued that analogous proposals have in past years been made available with no harmful effects.

There are several points that I would like to make regarding your assertions.

First, the Freedom of Information Law is based upon a presumption of access. While the Law as originally enacted granted access to specified categories of records to the exclusion of all others, the amended Law, effective January 1, 1978, grants access to all records in possession of an agency, except those records or portions thereof that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h). Moreover, the amended statute has reversed the burden of proof in a judicial proceeding. Formerly a petitioner would have to demonstrate that a denial was unreasonable. The amended statute, however, requires that the agency that has denied access "shall have the burden of proving" that the records withheld in fact fall within the categories of deniable information appearing in §87(2) [see §89(4)(b)].

It is important to emphasize that an agency cannot merely assert that disclosure would "impair" collective bargaining negotiations; proof must be offered. In discussing the burden of proof in a recent decision, the state's highest court, the Court of Appeals, stated that:

> "[T]he record on appeal is wholly insufficient to sustain the refusal to disclose the materials sought by petitioner under the provisions of the Freedom of Information Act (Public Officers Law, Art. 6). In support of the denial of access the State officials have tendered only references to sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld. There is no tender of any factual basis on which to determine

> whether the materials sought either fell outside the scope of mandated disclosure under former section 88 (L 1974, ch 578, §2, ch 579, §2, ch 580, §1, effective September 1, 1974) or come within the exceptions specified in subdivision (2) of present section 87 of the Public Officers Law..." (Church of Scientology v. State, ____ NY 2d ____, decided February 15, 1979).

In view of the foregoing, it is clear that an agency must demonstrate to a court that the harmful effects of disclosure described in the exceptions would indeed arise. Based upon our conversation, no such demonstration was made.

Next, I believe that it is important to view your request in terms of the philosophy upon which the Freedom of Information Law is based. The legislative declaration of the Law (§84) is at the heart of the controversy. In relevant part, it states that:

> "[T]he legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

> The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article."

The first paragraph of the declaration refers to government being "responsible" to the public. If a school board can unilaterally increase a budget after the voters have approved it, is such an action "responsible" without adequate prior public knowledge of the scope of the increase?

The second paragraph makes reference to the "increase in revenues and expenditures" of government, and that it is "incumbent" upon government "to extend public accountability wherever and whenever feasible." It is true that the problems faced by government are complex and that it is difficult in many instances to arrive at reasonable and just decisions. In this instance, records reflective of the most significant potential expenditures within a budget might be determined without public knowledge.

The third paragraph refers to "documents and statistics leading to determinations," and that access to such records is "basic to our society." Again, in your District it is likely that a budget will be passed and followed by a major alteration without prior public knowledge of the specific bases for the alteration.

In short, it is clear that the Legislature intended that records reflective of the decision-making process be available except when disclosure would result in some detriment to the public interest as reflected in the grounds for denial appearing in the Law. Additionally, it is implicit in the declaration that the exceptions to rights of access should be narrowly construed. Unless it can be demonstrated that the governmental process would be so impaired by disclosure that the process itself would be more difficult to complete, I believe that records should be disclosed.

Your notes refer to a statement of the District Superintendent to the effect that release of the information would "harm the budget's chances of passing." I agree with your contention that the statement, if accurate, is "staggering." How could it be that a public corporation headed by an elected board seeks to adopt the cornerstone of its fiscal policy without letting its constituents know what the policy is?

Both your brief and the judicial determination make reference to an agreement between the District and the Teachers' Association to negotiate in secret. In this regard, it is important to emphasize that the Open Meetings Law permits public bodies to enter into executive session to discuss collective bargaining negotiations [see attached Open Meetings Law, §100(1)(e)]. Nevertheless, it is clear that you are not seeking to attend the negotiations themselves; you have not requested to be present at the negotiations or otherwise interfere with the negotiations. On the contrary, you have merely requested that proposals exchanged during the negotiations be made available in order that the public can have an idea of what its actual expenditures will be during the coming fiscal year.

Finally, I want to point out that the Freedom of Information Law deals with records, which are tangible. The Open Meetings Law, on the other hand deals with an intangible, conversation, the deliberative process, give and take. Whether or not the records are made available, the intangible aspect of the collective bargaining process, the negotiations, may continue behind closed doors under the Open Meetings Law. Perhaps most importantly to the taxpayer, the tangible aspects of the negotiations, the proposals, might if disclosed enable the taxpayer to approximate what he or she can expect to pay. Only with this information can the taxpayer knowledgeably cast a vote to accept or reject 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:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1110

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

April 19, 1979

Mr. Rocco Ferran
[redacted]

Dear Mr. Ferran:

I have received your letter of April 11, 1979 concerning the fees assessed by Rensselaer County for providing a copy of tax maps.

According to information provided by the Rensselaer County Bureau of Central Services, a tax map of eighteen by twenty-two inches costs five cents per sheet; a tax map of thirty-two by forty inches cost ten cents per sheet. The question raised in conjunction with these figures is the propriety of four dollars per copy for the tax maps assessed by the County.

As you are aware, §87(1)(b)(iii) of the Freedom of Information Law states that the maximum fee for photocopies of up to nine by fourteen inches is twenty-five cents per photocopy. In cases in which records are larger or subject to different types of reproduction processes, the fee assessed must be based upon "the actual cost" of reproduction.

Under the circumstances, although I am aware of the cost of paper used to produce the tax maps, I cannot conjecture as to the cost to the County for reproduction of the tax maps, which exceed nine by fourteen inches in size. Perhaps the fees should be based upon the number of photocopies that must be made in order to create a tax map.

In short, without greater knowledge of the means by which the tax maps are copied, it would be inappropriate to provide specific advice as to what the proper fee might be. Nevertheless, based upon the information

provided to you by the Rensselaer County Bureau of Central Services, it would appear that the fee of four dollars for photocopies exceeds the actual cost of reproduction to the County. If that is the case, the fee would in my view be improper to the extent that it exceeds 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:jm

cc: Mr. William Murphy
Mr. Marvin Honig

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1111

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

April 19, 1979

Mr. Peyton Boswell, III
Deputy Chief Clerk-Referee
Nassau County Surrogate's Court
Nassau County Court House
Mineola, New York 11501

Dear Mr. Boswell:

I have attempted to reach you by phone without success regarding your letter of March 30 addressed to the Attorney General's Office. Since your inquiry pertains to access to records, it has been transmitted to this office, which is responsible for advising with respect to the Freedom of Information Law.

It is emphasized at the outset that the Freedom of Information Law is not applicable to records in possession of the courts, i.e. the "judiciary" as defined by the statute (see attached, Freedom of Information Law, §86). However, as a matter of practice, the Department of Law sends to the Committee inquiries relative to rights of access.

The circumstances surrounding your inquiry involve a request by a genealogist to inspect the trust fund register in order to "locate estates for which large deposits were made into the court for the benefit of distributees and legatees whose whereabouts are unknown in order to locate such beneficiaries and represent them as their attorney-in-fact for a fee." The central question is whether the public has "carte blanche" to review the court and trust fund register. Ancillary questions concern requirements that a form be completed, including a statement regarding the purpose for a request.

Having reviewed Article 25 of the Surrogate's Court Procedure Act, it appears that the records in question are available to any person.

Specifically, §2501 in relevant part provides that:

> "7. Records and papers which are sealed and withheld from public inspection as required by law or directed by the court shall thereafter be opened only to the extent as may be authorized by the court.
>
> 8. All books and records other than those sealed are open to inspection of any person at reasonable times."

In view of the foregoing, I believe that any records in possession of a Surrogate's Court clerk are accessible, except to the extent that records may be sealed, exempted from disclosure by law, or otherwise determined to be withheld by a court.

Further, since subdivision (8) quoted above confers the ability to inspect "to any person," the purpose for a request is irrelevant in terms of rights of access. Consequently, it would in my view be inappropriate to require "a statement as to why access is necessary" as a condition precedent to disclosure.

Lastly, although many agencies subject to the Freedom of Information Law have prescribed forms for administrative reasons, neither the statute nor the Committee has required that a specific request form be used. Under the regulations promulgated by the Committee, which govern the procedural aspects of the Law, an agency may accept oral requests or require that requests be made in writing (see attached regulations, §1401.5). However, since the courts are not subject to the Freedom of Information Law or the regulations, I believe that a court and its clerk may prescribe whatever forms may be appropriate or necessary for the purpose of responding to requests for records.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Attorney General Abrams

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1112

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

April 20, 1979

Mr. Thomas K. Topping
78-D-214
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Topping:

Your letter addressed to Ms. Tiano of the Department of Law has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law (see attached).

Your letter concerns unsuccessful attempts to obtain a "jail time certificate" and other information pertaining to you regarding your incarceration at the Fulton County Jail from the Fulton County Sheriff. You have indicated further that several requests have been made, but the Sheriff has not yet responded.

I tend to agree with your contention that the records in which you are interested are accessible, for it appears that they were created in the ordinary course of business and not compiled for law enforcement purposes. Moreover, although the information might justifiably be denied if requested by a person other than yourself on the ground that disclosure would result in an "unwarranted invasion of personal privacy," since you have made the request by means of a notorized letter, I believe that the records should be made available.

In terms of procedure and the time limits for response, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of the request. In addition, if, for example, an agency cannot grant or deny access within five business days of its receipt of a request, it may acknowledge receipt of the request and estimate when production or denial of the records will be forthcoming. The agency then has ten additional business days from the date of its acknowledgment to grant or deny access.

In the event that a request is denied in whole or in part, the denial must be in writing, state the reasons for denial, apprise you of your right to appeal and identify the name and address of the person to whom an appeal should be directed. It is also noted that a failure to respond within five business days constitutes a constructive denial of access that may be appealed to the head of the agency.

Copies of my response to you will be sent to both Sheriff Wandel and the New York State Commission on Correction. Perhaps greater familiarity with the Freedom of Information Law will encourage the Sheriff to give effect to the Law.

Also enclosed is 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
Enc.

cc: Sheriff Wandel
Commission on Correction
Solicitor General

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1113

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

April 23, 1979

Mr. Jeb Stuart Fries
#75-B-1422
Box 149
Attica, New York 14011

Dear Mr. Fries:

I have received a carbon copy of your letter to Dennis O'Leary, Director of the Assembly Administrative Regulations Review Committee, dated April 14.

There are several comments that I would like to make.

First, you have characterized the Committee on Public Access to Records as "another case of a regulatory agency having a relationship amenable to the ploys of the regulated agency, and against all manifest intent in creating the agency in the first place to regulate compliance." I must emphasize at the outset that the Committee is not a regulatory agency. On the contrary, the Committee on Public Access to Records merely has the authority to give advice. Its opinions are not binding upon government or members of the public. In short, the Committee has no authority to compel the Division of Parole or any other entity of government in New York to comply with the Freedom of Information Law. Despite the inability to compel compliance with the Law, I believe its efforts have resulted in some successes. For example, in my view the new regulations promulgated by the Division of Parole were in great measure the result of communications between the Committee and the Division. Clearly the new regulations are more appropriate than those initially promulgated and in my opinion will in the future enhance your ability to assert your rights under the Law.

In the same vein, it is noted that the Administrative Regulations Review Committee is not regulatory in nature. It too acts as an advisory body.

With respect to the substantive aspects of your letter, all I can suggest is that the Freedom of Information Law and the regulations promulgated by the Committee, which which agencies must comply, specify the time limits for responses to requests. In brief, §89(3) of the Law states that an agency must respond to a request within five business days of its receipt of a request. If an agency can neither grant nor deny access within five business days, it must acknowledge receipt of the request and estimate when production or denial of access will be forthcoming. The agency then has ten additional business days from its date of acknowledgment to grant or dany access. If a request is neither granted, denied nor acknowledged within five business days of its receipt by an agency, the request is considered a denial that may be appealed to the head of an agency.

In terms of Mr. Altschuller's statement that your request was "too broad," it is important to point out that §89(3) of the Law requires that an applicant "reasonably describe" the records sought. Since I do not have knowledge of the breadth of your request, I could not conjecture as to the propriety of Mr. Altschuller's response.

Lastly, I would like to reiterate the fact that both the Committee on Public Access to Records and the Administrative Regulations Review Committee have attempted and assuredly will continue to attempt to assist the public. Certainly there has been no attempt to participate in or otherwise condone what you have characterized as "ploys" of agencies. If anything, the situation is exactly the opposite and I am sure that both Committees would relish the opportunity to be more effective in insuring compliance 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:jm

cc: Dennis O'Leary

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1114

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

April 24, 1979

Mr. Robert J. Whitfield
Drawer B 69-A-0037
Stormville, New York 12582

Dear Mr. Whitfield:

I have received your letter regarding your attempts to gain access to particular records, including your pre-sentence report.

In all honesty, I cannot provide specific advice regarding most of the documents sought due to a lack of knowledge of their contents.

In terms of access to pre-sentence reports, §390.50 (2) of the Criminal Procedure Law states that:

> "[T]he presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, or the defendant himself, if he has no attorney, in which event the prosecutor shall also be permitted to examine the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to 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 send your request to the court that maintains custody of your pre-sentence report.

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-1115

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

April 24, 1979

Mr. Alfred O. Kuhnle
[redacted]

Dear Mr. Kuhnle:

I have received your letter of April 19 which concerns a denial of access by the Office of the Attorney General to a record indicating the residence claimed by an appointee of the Attorney General.

In my opinion, it is likely that the denial was proper.

As you are aware, the Freedom of Information Law provides that an agency may withhold records or portions of records which if disclosed would result in an unwarranted invasion of personal privacy [see attached, Freedom of Information Law, §87(2)(b)]. Although the Law does not specifically provide that disclosure of the home addresses constitutes an unwarranted invasion of personal privacy, I believe that the home address is deniable by implication. Here I refer to §87(3)(b), which states that each agency shall maintain a payroll record that includes the name, public office address, title and salary of all officers and employees of the agency. If it was intended that home addresses be disclosed, the cited provision would likely have made specific reference to home addresses. However, contrarily, the Law makes specific reference to the public office address.

This stance is bolstered by means of a review of the legislative hostory of the Freedom of Information Law. As originally enacted, the Law provided that the payroll record make reference to the name, address, title and salary of public employees [see §88(1)(g), original Freedom of Information Law]. The original statute did not specify which address should have been given, home or business. Moreover,

the new Freedom of Information Law was amended to include reference to the public office address due to complaints by public employees that they were being solicited or harrassed in their homes. As such, I believe that as a general matter the home addresses of public employees may justifiably be denied.

Nevertheless, there is one judicial decision that was rendered prior to the Freedom of Information Law which held that:

> "[T]he employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed. See, 15 Op.St.Compt.377 (1959). In such instances, the strength of the competing consideration of employee privacy must be balanced against the marginal benefit in the public's knowledge of this specific information, such as protection against 'cronyism' or violations of local residence laws, and some cause should be shown to warrant their disclosure" [Winston v. Magan, 338 NYS 2d 654, 662 (1973)].

Therefore, based upon case law, it appears that some "specific 'private' need" must be demonstrated to a court in order to obtain the home address of a public employee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1116

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

April 24, 1979

Mr. Henry Semp
[redacted]

Dear Mr. Semp:

I have received your letter of April 6 and thank you for your kind words. Your inquiry concerns the use of social security numbers.

It is noted at the outset that I share your concerns regarding the possibility of invasions of privacy by means of the use of the social security number as an identifier. It is true that the social security number has become something of a universal identifier that is used in numerous contexts other than Social Security. Nevertheless, there is little law that precludes the use of social security numbers.

Although Congress has passed a privacy act (5 USC 552a), New York has not yet passed a similar act. Consequently, to the best of my knowledge, there is no law in New York that precludes the use of social security numbers as an identifier.

Further, even the federal Privacy Act does not expressly prohibit the use of social security numbers as identifiers. Section 7 of the Privacy Act states that:

> "(a)(1) [I]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
>
> (2) the provisions of paragraph (1) of this subsection shall not apply with respect to --

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

Although the quoted provision places limitations upon the use of social security numbers by government, it appears that no such limitations are applicable to the private sector.

For several years, there have been attempts at the federal level to stop the use of social security numbers as identifiers. To date, however, those attempts have been unsuccessful.

Perhaps the best way of expressing your concerns is to contact your state and federal legislators.

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-1117

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

April 30, 1979

Mr. Ambrose P. Donovan, Jr.
Counsel
Department of Health
Office of the Counsel
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Ambrose:

I have received your letter of April 26 regarding requests pertaining to the Love Canal situation. It is noted at the outset that I am in general agreement with your conclusion. Nevertheless, I would like to point out a few principles that might be relevant in terms of your responses to future requests.

First, I agree that records created in conjunction with the provisions of §206(1)(j) of the Public Health Law are confidential. Due to the language of the cited provision, such records may be withheld pursuant to §87(2)(a) of the Freedom of Information Law, which permits an agency to deny access to records that are specifically exempted from disclosure by statute. Nevertheless, I question the breadth of the authority to deny under §206(1)(j). It appears that the records considered confidential are restricted to those developed "through the conduction of medical audits within the state." Although the phrase "medical audits" is undefined, it might be construed broadly to include virtually any scientific study or research conducted for the purpose of improving the quality of medical care. If, however, it is construed narrowly, the confidentiality provision might be cited only with respect to scientific studies and research that are developed pursuant to a specific situation or situations in which the Health Department initiates the audit process.

Secondly, the fact that records may be relevant to litigation does not alone restrict access. As you are aware, the Freedom of Information Law states that accessible records should be made equally available to any person, regardless of status or interest [see e.g. Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Further, under the amended Freedom of Information Law, the only question that can be raised by an agency in receipt of a request involves the extent, if any, to which records sought fall within one or more of the exceptions to rights of access listed in §87(2)(a) through (h).

And third, the term "privileged" is in my view much overused. I believe that it can appropriately be cited to withhold records only in two instances. The first is one that was raised earlier, i.e. the situation in which records are specifically exempted from disclosure by statute, as in the case of §206(1)(j) of the Public Health Law. The only other instance in which records may be deemed privileged or confidential would involve a finding by a court that disclosure would result in a detriment to the public interest [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)].

In sum, I agree with your contention that the records developed by the Health Department in conjunction with §206(1)(j) of the Public Health Law are confidential. However, to the extent that requests involve records outside the scope of §206(1)(j), rights of access must in my view be determined by a case by case basis.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Shirley Adelson Siegel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1118

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

April 30, 1979

Ms. Rochelle Screeney
[redacted]

Dear Ms. Screeney:

I have received your letter of April 24, which concerns access to records in possession of the Brentwood Public Library Board of Trustees.

According to your letter, the Board has refused to permit you to gain access to a report prepared by a management consulting firm at a cost of $5,000 to the taxpayers of the District. The board has denied access on the ground that personnel would be identified by name.

In my opinion, the report is available at least in substatial part and perhaps in its entirety.

The Freedom of Information Law is based on a presumption of access. Specifically, §87(2) states that all records in possession of an agency are accessible, except those records or portions thereof that fall within one or more enumerated categories of deniable information appearing in the ensuing paragraphs (a) through (h). Further, §86(4) of the Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency. Therefore, all records in possession of a public library board are subject to rights of access granted by the Law, irrespective of whether the records were created by the Board or a person or entity separate and distinct from the Board.

In view of the foregoing, the only question that the Board may raise with respect to your request for the report involves the extent to which the report falls within any of the categories of deniable information, if any. It is important to note in this regard that the introductory language of §87(2) permits an agency to withhold records "or portions thereof".

As such, the Legislature recognized that there may be situations in which records may be accessible or deniable in part. Consequently, when an agency receives a request, it has the responsibility of reviewing the record in its entirety to determine which portions, if any, may justifiably be withheld.

Based upon the information that you provided regarding the report in question, it appears that only one ground for denial may possibly be raised. None of the grounds for withholding listed in §87(2) may in my view be cited, except paragraph (b), which states that an agency may deny access to records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy".

Nevertheless, the fact that a record may identify particular personnel does not alone permit an agency to withhold a record or even portions of records that identify personnel. This Committee has consistently advised and the courts have upheld the notion that records pertaining to public employees that have relevance to the performance of their official duties are accessible, for disclosure in such instances would result in a permissible, as opposed to 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, NYLJ, Nov. 22, 1977; Matter of Sinicropi, Supreme Court, Nassau County, NYLJ, Feb. 15, 1979]. Therefore, if the details of the report which identify public employees are relevant to the performance of their official duties, they are in my view accessible. Conversely, to the extent that the identifying details have no bearing upon the manner in which public employees perform their duties, they may be deleted when disclosure would result in an unwarranted invasion of personal privacy. In sum, the report is in my opinion accessible, except to the extent that disclosure of identifying details would result in an unwarranted invasion of personal privacy.

Moreover, in a similar situation in which a study was furnished to a park district in Nassau County regarding the construction of a skating rink, it was held that:

> "[U]ndoubtedly, the public interest in the results of this study is high for the skating rink entailed a substantial financial outlay of public monies and taxpayers have a profound right to know the value and result of that investment. However embarrassing or flattering the furnished study may prove to be to the Park District administration, is not determinative or relevant. It is a public record" [Winston v. Mangan, 338 NYS 2d 654, at 660,661 (1973)].

Under the circumstances, I believe that the report you are seeking is accessible.

Your second question concerns the possibility of the existence of a requirement that misinformation contained in a report must be corrected. In this regard, there is no law of which I am aware that requires an agency to correct information that may be misleading or inaccurate. However, it would seem reasonable that an agency would want to ensure that records kept for the purpose of reference or that are used for posterity should be as accurate as possible.

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/kk

cc: Brentwood Public Library
Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1119

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

May 1, 1979

Ms. Joan Washburn
[redacted]

Dear Ms. Washburn:

I have received your letter of April 23, which concerns a denial of access to a real property appraisal prepared by a private firm for the Mount Pleasant Central School District.

Specifically, the Superintendent of the District wrote that the District's attorney advised that "these appraisals were prepared by the Lane Appraisers at his request, for his information in advising the Board of Education. He, at this time, does not consider them to be public documents..."

While I disagree with the rationale given as the basis for the denial, it is possible that the denial was proper.

First, the fact that the appraisal was prepared by Lane Appraisers is in my view irrelevant. 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 appraisal was produced for the District, it is a "record" subject to rights of access granted by the Freedom of Information Law.

Second, §87(2) states that all agency records are available, except those records or portions thereof that fall within one or more among eight categories of deniable information enumerated in paragraphs (a) through (h) of the cited provision.

Under the circumstances, one of the grounds for denial might appropriately be raised. Section 87(2)(c) of the Law states that an agency may withhold records or portions thereof that "if disclosed would impair present or imminent contract awards or collective bargaining negotiations." Therefore, the question is whether disclosure of the appraisal would "impair" the ability of the District to enter into a reasonable contractual agreement. If, for example, the effect of disclosing the appraisal would result in the District obtaining a lesser amount for the property, disclosure would likely impair the ability of the District to consummate a reasonable agreement.

In addition, it is noted that judicial decisions have held that similar records related to "inchoate" or uncompleted transactions might if prematurely disclosed result in detriment to the public interest by defeating the capacity of an agency to buy or sell real property at an optimal price [see e.g., Sorley v. Village of Rockville Centre, 30 AD 2d 822 (1968)].

In sum, the appraisal in which you are interested is in my view accessible, unless the negotiating position of the District would be damaged due to 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:jm

cc: John S. Whearty, Superintendent

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1120

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

May 1, 1979

Mr. James S. Flavin
[redacted]

Dear Mr. Flavin:

I have received your letter of April 27 as well as the correspondence appended to it. Your inquiry concerns a denial of access to "tax delinquency buff cards" by Albany County.

Based upon my knowledge of the buff cards in conjunction with conversations with you and Guy Paquin, the County Clerk, I believe that they are accessible.

It is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records in possession of an agency are available, except to the extent that records or portions of records fall within one or more categories of deniable information enumerated in §87(2) (a) through (h) of the Law. Further, §86(4) of the Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency, such as Albany County. As such, the tax buff cards constitute "records" subject to rights of access, notwithstanding their use or utility. Therefore, the fact that the buff cards may be maintained "as an internal control only" has no bearing upon rights of access. The only question that may be raised concerns the extent to which the records may be denied, if any.

Under the circumstances, it does not appear that any of the grounds for denial listed in the Freedom of Information Law could appropriately be raised. According to the documents that you showed me during one of your visits and my ensuing conversation with the County Clerk, the buff cards that you requested constitute a history of tax payments with respect to particular properties and their owners. In essence, the tax buff cards contain information

analogous to that contained in the sale books, which are made available to any person. To the best of my knowledge, the only distinction between the contents of the sale books and the buff cards is the fact that the sale books pertain to a single year, while the buff cards pertain to a series of years.

The County Attorney in his memorandum to John Lynch, Director of the Real Property Tax Agency, suggested that the buff cards are not "official" records and that "allowing the publication thereof would impose potential liabilities on the County for any errors which occurred in the transcription of same." I am not aware of the "liabilities" that might arise should information contained within the buff cards be erroneous. Nevertheless, there is no reason why the County could not stamp or otherwise mark copies of the buff card as "unofficial" or "draft", for example. By so doing, the buff cards could be made available and concurrently the recipient of the cards would have knowledge that the contents may be erroneous and are unofficial and non-binding upon the County.

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/kk

cc: Robert G. Lyman, County Attorney
John Lynch, Director Real Property Tax Service Agency
Guy Paquin, Albany County Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-112

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

May 2, 1979

Ms. Doris Wenger
[redacted]

Dear Ms. Wenger:

I have reviewed the regulations adopted by the Islip School District that you transmitted to me, and there are several comments that I would like to make.

First, §1(b) makes reference to a "fiscal officer". Although both the original Freedom of Information Law and the regulations promulgated thereunder by the Committee made reference to a fiscal officer, neither the amended law nor regulations currently in effect refer to a fiscal officer. The reason for the change concerns a direction in the old law that a specific individual be designated as a fiscal officer for the purpose of providing payroll information to members of the news media and others. Under the current law, however, payroll information is available to any person. Consequently, although the designation of a fiscal officer does not represent a violation, it is in my view unnecessary.

Section 3(a) states that an applicant must complete a form prescribed by the District. In this regard, §89(3) of the Freedom of Information Law merely requires that an applicant "reasonably describe" the records sought in writing. Further, this Committee has consistently advised that a failure to complete a prescribed form cannot constitute a valid ground for denial of access and that any request in writing that reasonably describes the records sought should suffice.

The same provision also states that the request must be submitted "at least five (5) business days prior to the dates upon which the individual wishes to inspect or obtain copies of the record. An appointment will be scheduled for the inspection." In my opinion, the quoted provision is inappropriate. Both the Freedom of Information Law and Committee's regulations require that a response in the form of a grant or denial of access be given within five business days of receipt of a request. The five business day limitation

is in my view intended to be an outer limit for response rather than a period during which applicants must in all cases wait for a response until the end of the five day period. If records can be readily located there is no reason why they should not be readily made available. Further, there should be no need for an appointment procedure. As stated in §1401.4(a) of the regulations promulgated by the Committee, which have the force and effect of law, "[E]ach agency shall produce records during all hours they are regularly open for business." Therefore, the necessity of making an appointment arises only in situations in which an agency has no regular business hours [see §1401.4 (b)]. Since the School District operates by means of regular business hours, there should be no need for appointment procedure.

Subdivision (e) of §3 states that a denial of access to records "will be given in written form and the reasons for the denial so stated." In addition, the Committee's regulations require that the denial must indicate the name, title, business address, and business telephone number of the person or body designated to determine appeals [see §1401.7 (b)].

Section 5 states that the charge for computer time shall be one dollar per minute. If that fee represents the actual cost to the District for the use of the computer, it is proper. Otherwise, the provision should be amended accordingly.

Section 6 concerning the subject matter list makes reference to the requirements of "the Freedom of Information Law of 1974." The 1974 Law was repealed and replaced by an amended statute, effective January 1, 1978. Under the original statute, the subject matter list was required to make reference by category to records produced, filed or first kept by the effective date of that statute. Section 87(3)(c) of the new Freedom of Information Law, however, requires that the subject matter make reference by category to all records in possession of an agency, whether or not the records are available.

Lastly, the description of duties of the records access officer is not in my opinion sufficently specific.

To assist you and the District, I am enclosing copies of the regulations promulgated by the Committee, as well as model regulations which may be helpful to the District in ensuring compliance with the procedural implementation of the Law. In brief, an agency can comply with the Committee's regulations by filling in the appropriate blanks in the model regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Board of Education, Islip School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1122

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

May 3, 1979

Mr. John J. Sheehan
[redacted]

Dear Mr.Sheehan:

I have received your inquiry of April 26 as well as the correspondence appended to it.

There are several comments that I would like to make with respect to the response by Mayor Libous as well as your appeal.

First, I disagree with the grounds for denial given by the Mayor. It has consistently been held that the reason for a request is largely irrelevant under the Freedom of Information Law. Therefore, in my opinion, a denial on the ground that a request is inconsistent with the intent of the Freedom of Information Law is inappropriate.

Second, in terms of inconvenience to the City and the amount of time it would take to respond to your request, I can only state that there have been no judicial determinations made to date under the Freedom of Information Law of which I am aware that have drawn a line of demarcation between what may constitute "mere inconvenience" and "undo inconvenience". As such, at this juncture, it is unclear whether "undo inconvenience" can appropriately be cited to withhold records.

Notwithstanding the Mayor's response, I do not believe that you have met your burdens under the Freedom of Information Law.

First, the regulations promulgated by the Committee, which have the force and effect of law, provide that "[A]ny person denied access to records may appeal within thirty days of the denial" [see regulations, §1401.7(d)]. Since your appeal makes reference to "all denials from the Binghamton Police Department that occurred over the past 120 days", the appeal is untimely.

Moreover, the regulations require that an appellant include specific information in order to appeal. In this regard, §1401.7(e) of the regulations provides that:

> "[T]he time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of written appeal identifying:
>
> (1) The date and location of a request for records;
>
> (2) the records that were denied; and
>
> (3) the name and return address of the appellant"

In view of the foregoing, your request for review by the Mayor clearly did not contain the information required to be included in an appeal.

In sum, while I disagree with the grounds for denial offered by Mayor Libous, it appears that the appeal that you transmitted to the Mayor was insufficient.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Alfred Libous, Mayor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1123

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(513) 474-2518, 2791

May 3, 1979

Ms. Joanne C. Hearl
[redacted]

Dear Ms. Hearl:

Your letter addressed to Thomas Collins has been received at the administrative office of the Committee on Public Access to Records. Generally, as Executive Director of the Committee, I perform legal research in response to inquiries and prepare advisory opinions. I have communicated with Mr. Collins regarding your letter, and he has agreed that I should respond.

Your letter raises five questions regarding rights of access to records relative to foster care.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law states that all records in possession of an agency are available, except those records or portions of records that fall within one or more categories of deniable information listed in the cited provision.

I would also like to point out that records that identify recipients of or applicants for public assistance are confidential under §136 of the Social Services Law. Consequently, such records are outside the scope of the Freedom of Information Law [see Freedom of Information Law, §87(2)(a)]. In addition, §372(4) of the Social Services Law requires that records kept by the Department of Social Services pertaining to children:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of

> a claim or other proceeding in such court or by a justice of the supreme court after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

Despite the provisions requiring confidentiality to which reference has been made, I believe that some of the information in which you are interested is available.

First, you have raised questions regarding foster parents' right to inspect records pertaining to them in possession of an agency boarding home. "Agency boarding home" is a phrase that is defined in §427.2(h) of the regulations adopted by the Department of Social Services as:

> "a family-type home for the care and maintenance of not more than six children operated by an authorized agency, in quarters or premises owned, leased, or otherwise under the control of such agency; except that such a home may provide care for more than six brothers and sisters of the same family."

Based upon discussions with representatives of the State Department of Social Services, an agency boarding home is in my view outside the scope of the Freedom of Information Law. For the purposes of the Freedom of Information Law, "agency" is defined to include "governmental" entities performing a governmental function [see §86(3)]. Since an agency boarding home is privately owned and merely enters into a contractual relationship with government, it is not a "governmental" entity. Therefore, its records are not subject to the Freedom of Information Law.

Nevertheless, to the extent that a governmental entity, such as a social services department, maintains records regarding agency boarding homes identifiable to foster parents, such records are subject to the Freedom of Information Law.

While records that make reference to children would be confidential under the Social Services Law, it is possible that other records concerning foster parents in possession of a department of social services do not identify particular children. If that is the case, statistical or factual tabulations or data regarding foster parents in possession of a department of social services should be made available [see Freedom of Information Law, §87(2)(g)(i)].

In addition, I have enclosed a copy of §431.10 of the regulations adopted by the State Department of Social Services. I am not sure that the regulations are relevant to your inquiry. However, they specify a procedure regarding the removal of children from foster family care and require that reasons be given to foster parents prior to the removal of a child from their care.

Your second question concerns "costs" and you are seeking information regarding "the amount of monies being paid by parents of foster children under court orders such as child care payments." Further, your letter indicates that you are not interested in obtaining information relative to specific payments that might identify individuals; on the contrary, you are interested in obtaining a report of aggregate costs. In my opinion, to the extent that such figures exist, they are accessible. It is emphasized that the Freedom of Information Law does not require government to create a record in response to a request. Therefore, if the information that you are seeking does not exist or has not been compiled, the Social Services Department is not required to create the records on your behalf.

As stated earlier, the Law requires that statistical or factual tabulations or data must be made available. Assuming that the County Department of Social Services maintains such records, they must be made available.

If the records are in custody of the Family Court, a judge has discretionary authority to disclose. Rights of access to Family Court records are vague at best, for §166 of the Family Court Act states:

> "[T]he records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the

> record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

In view of the quoted provision, the public has no "right" to inspect Family Court records. However, records may be disclosed upon a showing of a proper purpose for a request.

Your third question concerns a numerical breakdown concerning foster children who have been involved in a twenty-four month court review. In all honesty, I am unfamiliar with the proceeding to which you made reference. Nevertheless, again, to the extent that statistics exist, they would likely be available. It is possible that the records in question might be maintained by the State Office of Court Administration. If so, the request should be directed to that office.

Your fourth question concerns the amount of money given to Suffolk County under Title XX for the purpose of training foster parents. Records indicating the receipt or expenditure of public monies are generally accessible, and you should direct your inquiry to the Suffolk County Department of Social Services.

Your final question involves a breakdown of budget requests by divisions within the Suffolk County Department of Social Services. You also indicated that you have been informed that there are no "individual" budgets and that a final request combining all of the submissions is the only record that is available. In this regard, the state's highest court has held that budget worksheets, which included requests made by various components of the Executive Department, constitute statistical and factual tabulations that are available [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NYS 2d 754, (1977)]. Although it is possible that the figures you are seeking do not exist, it seems unlikely that individual requests made by divisions within the Department are not submitted prior to their compilation into a single figure. To reiterate, if numerical figures used to develop an aggregate figure exist, they are available.

Finally, in order to apply for records under the Freedom of Information Law, you should submit a request in writing that "reasonably describes" the records sought. The request should be sent to the "records access officer" for the Department of Social Services in Suffolk County.

Upon receipt of your request, the records access officer has five business days to respond by granting or denying access, or acknowledging receipt of your request. If, for example, the records cannot be located within five business days of receipt of your request, the records access officer must state the reason for the delay in the acknowledgment. He or she then has ten additional business days to grant or deny access.

If any portion of your request is denied, the denial must be in writing, provide the reasons, inform you of your right to appeal, and include the name and address of the person to whom the appeal should be directed. The appeals person or body must transmit to the Committee copies of appeals and the determinations that ensue.

I would like to emphasize in closing that it may be worthwhile to follow the procedure outlined in the preceding two paragraphs. While I am unfamiliar with officials of the Suffolk County Department of Social Services, I do know that appeals are determined by the County Attorney and his staff, with whom I have a longstanding and excellent relationship. Therefore, if you are initially denied, please be sure to assert your rights under the Freedom of Information Law by appealing.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern 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:jm

Encs.

cc: Thomas Collins

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1124

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

May 4, 1979

Mr. Joseph Fournier
Box B 77-A-3575
Dannemora, New York 12929

Dear Mr. Fournier:

I acknowledge receipt of your letter of May 1 in which you requested copies of all materials that fall within particular categories of the Committee's subject matter list.

Before making a final count of the number of pages that might be copied, one of my assistants tabulated the pages within a single category. The number of copies within that category alone would amount to hundreds of pages. Further, since the Executive Law, §96, generally requires that Department of State charge fifty cents per photocopy, the cost of reproducing all of the records in which you are interested would be hundreds or perhaps thousands of dollars.

In the alternative, I am taking the liberty of offering suggestions to enable you to redefine your request.

The vast majority of the correspondence between this office and state agencies consists of advisory opinions. In this regard, I have enclosed an index to advisory opinions, which identifies the opinions by number and by key phrase. After reviewing the index, if there are any opinions of particular interest to you, please designate them by number or key phrase and I will send them to you.

Your second area of inquiry concerns Article 78 proceedings. In this instance, I have enclosed a case summary of judicial opinions rendered under the Freedom of Information Law. It provides citations of cases in which the decisions have been officially reported. For those cases in which the decisions have not been officially reported, I will send you copies of opinions of particular interest on request.

In terms of rules and regulations submitted to the Committee, much of the information is of minimal utility. The vast majority of the correspondence concerns regulations submitted to the Committee by local government for review under the original Freedom of Information Law, which was enacted in 1974 and has since been repealed and replaced by a new Freedom of Information Law, effective January 1, 1978. Moreover, each agency in the state is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee. Enclosed for your consideration are copies of the Committee's regulations and model regulations that are distributed on request to agencies and are used to ensure compliance.

Finally, you have requested documentation regarding policy research. The information in this instance was drafted in 1974 soon after the enactment of the original Freedom of Information Law. Since the Law was drastically changed in 1978, the old documentation is out of date and would in my view likely be misleading.

In sum, I believe that the most appropriate vehicle that you can use to determine the nature of advice that the Committee has provided is the index to advisory opinions.

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/kk

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1125

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

May 8, 1979

Mr. Joseph M. Belth
The Insurance Forum
P.O. Box 245
Ellettsville, Indiana 47429

Dear Mr. Belth:

I have received your letter as well as the correspondence appended to it. In short, you have indicated that the Insurance Department has failed to respond to your request of January 22, despite assurances that your request would be processed within a reasonable period of time.

In all honesty, all I can suggest is that you follow the letter of the law and the regulations promulgated by the Committee, both of which are attached. In short, although an agency may acknowledge receipt of a request, §1401.5(d) of the Committee's regulations, which have the force and effect of law, require that a response be given in the nature of a grant or denial of access within ten business days of the date of acknowledgement. If no determination is made within ten business days of the acknowledgement, you may consider that the request has been denied. At that point, you may appeal to the Superintendent of the Insurance Department of his designate.

It is noted that long before the Freedom of Information Law was enacted, the courts held that "mere inconvenience" is not a sufficient basis for a denial of access, constructive or otherwise.

Beyond the suggestions outlined above, all I can recommend is that you continue to be persistent.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Morton Greenspan
Nicholas C. Silletti

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 1126

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

May 8, 1979

Mr. Manuel Harris
Din #77A-1323
250 Harris Road
Bedford Hills, New York 10507

Dear Mr. Harris:

I have received your letter of May 3 in which you requested that this office send you records in possession of the Taconic Correctional Facility.

Please be advised that the Committee on Public Access to Records does not have custody of records generally. On the contrary, the duties of the Committee involve providing advice to individuals who have questions regarding rights of access to records under the Freedom of Information Law.

Since the Taconic Correctional Facility maintains custody of the records in which you are interested, it is suggested that you direct a written request reasonably describing the records sought to the superintendent of the facility. Under the Law, the superintendent has five business days to grant or deny access, or acknowledge receipt of your request. If your request is acknowledged, the reason for the delay must be given in writing, and the superintendent then has ten additional business days to grant or deny access.

If any portion of your request is denied, the reasons must be given in writing and you must be informed of your right to appeal. The person to whom an appeal should be directed is Patrick Fish, Counsel to the Department of Correctional Services, State Campus, Correctional Services Building, Albany, New York 12226.

Enclosed 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

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-332
FOIL-AO-1127

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

May 8, 1979

Mr. Gene Russianoff
Project Coordinator
New York Public Interest
Research Group, Inc.
5 Beekman Street
New York, New York 10038

Dear Mr. Russianoff:

I have received your letter of May 3 and thank you for your interest in compliance with the Open Meetings Law. Appended to your letter is correspondence with Haskell Ward, Chairperson of the New York City Health and Hospitals Corporation, in which several alleged violations of the Open Meetings Law were brought to Mr. Ward's attention. For the purpose of my response, it will be assumed that your allegations are accurate.

First, you have stated that the Board of Directors of the Health and Hospitals Corporation has held a series of "informal" sessions during which the public has been excluded. In fact, the exclusion of members of the public from the sessions in question was not due to lack of knowledge of the sessions, but rather to specific refusals to permit entry on the part of those who sought to attend.

In this regard, the focal point of the Open Meetings Law is the definition of "meeting" [see attached, §97(1)]. Despite the vagueness of the definition, the Court of Appeals has affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing or carrying on public business is a "meeting" subject to the Open Meetings Law in all respects (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). It is emphasized that the opinion rendered by the Appellate Division dealt specifically with the status of "work sessions" and other "informal gatherings":

> "[W]e believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 415).

The court further stated that:

> "[W]e agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'..." (id. at 416).

As such, it is clear that the entire decision-making process is subject to the Open Meetings Law and not merely the situation in which action is taken or in which there is an intent to take action.

In addition, it is equally clear that the Board is a "public body" as defined in §97(2) of the Law. The Board is an entity consisting of more than two members that is required to act by means of a quorum (see General Construction Law, §41), and that performs a governmental function for a public corporation as defined in §66 in the General Construction Law. The definition of "public corporation" includes "public benefit corporation" [see General Construction Law, §66(1)].

Your letter to Chairperson Ward also indicates that no notice was given prior to the sessions in question. In this regard, §99(1) of the Law requires that meetings scheduled at least a week in advance must be preceded by notice given to the public and the news media not less than seventy-two hours prior to the meeting. Section 99 (2) states that a meeting scheduled less than a week in advance must be preceded by notice given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Consequently, all meetings must be preceded by notice to the public and news media, whether regularly scheduled or otherwise.

Lastly, in your letter to Chairperson Ward, you requested minutes or a transcript of the informal session held by the Board on April 24. In conjunction with that request, I direct your attention to the provisions of the Freedom of Information Law (see enclosed).

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the Health and Hospitals Corporation, are available, 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.

In addition, "record" is defined in §86(4) to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, notwithstanding the status of the gathering held on April 24, materials created in the nature of minutes or a transcript relative to the gathering constitute "records" 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:jm

Enc.

cc: Haskell Ward

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1128

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

May 9, 1979

Mr. Robert J. Mendillo
Director of Personnel
Community School District 2
210 East 33rd Street
New York, New York 10016

Dear Mr. Mendillo:

I have received your letter of May 4 and the materials appended to it. According to the materials and our telephone conversation, Community School Board 2 is in the process of seeking applicants for the position of superintendent. In order to gain input from the community, the Board has created an advisory committee to assist in the selection of a superintendent. Your question is whether the Board may permit the distribution of applications to the members of the advisory committee.

In my opinion, the Board may distribute the information in question to the members of the advisory body without any legal impediments.

It is emphasized that the Freedom of Information Law states that an agency may deny access to certain records or portions of records that fall within enumerated categories of deniable information appearing in §87(2)(a) through (h) of the Law (see attached). Nowhere in the Law is there a provision stating that an agency must deny access to those records. As a matter of fact, in a related area, the United States Supreme Court recently held in Chrysler Corporation v. Schlesinger that the federal Freedom of Information Act does not require a federal agency to withhold records falling within categories of deniable information. Similarly, the New York Freedom of Information Law is permissive; an agency may deny access in certain circumstances, but it need not.

With respect to the situation in question, it is clear that members of the public serving on the advisory committee would be acting on behalf of the Board. From my perspective, in order to provide optimal assistance, the members of the advisory committee would have a need to know the contents of the applications to make reasonable judgements. As such, I know of no reason why the members of the advisory committee should be precluded from gaining access to the records concerning applicants for the position of superintendent.

Lastly, it is noted that several judicial determinations have held that public officials are immune from civil suit for damages for disclosure of information when they are acting in the performance of their official duties [see e.g. Ward Telecommunications and Computer Services, Inc. v. State, 42 NY 2d 289 (1977)]. In the case of the School Board, it is clear that the Board would be disclosing information to members of the advisory committee in the performance of their official duties. Consequently, it is my view that disclosure would not in any way result in liability to the District or its officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1129

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

May 9, 1979

Mr. Donald Caldwell
Music Editor
The Village Times
P.O. Box 28
E. Setauket, NY 11733

Dear Mr. Caldwell:

I have received copies of your requests directed to the Chautauqua County Association for the Arts and the New York State Council on the Arts.

In my opinion, since the Freedom of Information Law merely requires that an applicant "reasonably describe" the records sought, you have met your burden [see attached Freedom of Information Law, §89(3)]. Further, in a decision rendered under the original Freedom of Information Law, which required that an applicant seek "identifiable" records, even though a request covered records found in some forty file folders, the court held that the request was sufficiently detailed to permit the agency to respond appropriately (Dunlea v. Goldmark, 54 AD 446, aff'd 43 NY 2d 754). In short, if the agency can determine which records you are seeking, you have met your burden under the Law.

I should add that I have uncertainty with respect to the request directed to the Chautauqua County Association for the Arts. The Freedom of Information Law defines "agency" to include governmental entities performing a governmental function [see §86(3)]. I have no knowledge of whether the Chautauqua County Association for the Arts is a governmental entity. It may be a not for profit group that operates with assistance from government. Consequently, it is possible that the Association is outside the scope of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1130

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

May 10, 1979

Mrs. Shirley Paris
[redacted]

Dear Mrs. Paris:

I have received your letter of May 7 concerning the release of various types of information by the State Insurance Department. More specifically, your questions involve disclosures that might result in unwarranted invasions of personal privacy.

It is noted at the outset that the Freedom of Information Law is permissive. Stated differently, although the Law states that an agency may withhold records or portions of records pursuant to categories of deniable information, there is no requirement that an agency do so. Therefore, an agency may deny access to certain records, but need not.

In addition, with respect to disclosure of the names of public employees, §87(3)(b) of the Law requires that each agency maintain and make available a payroll record consisting of the names, public office addresses, titles, and salaries of all officers and employees of the agency. Even before the enactment of the Freedom of Information Law, case law determined that the payroll information in question was accessible to the general public. In my opinion, the payroll record is accessible to any person under the current Law.

With regard to other lists, I agree with your contention that if the lists of the names and addresses are intended to be used for commercial or fund-raising purposes, they may be denied. Nevertheless, to reiterate the point made earlier, the Law does not prohibit an agency from disclosing such lists, notwithstanding the direction given by §89(2)(b)(iii).

If you would be willing to provide me with more information regarding the kinds of materials that are being disclosed, I would be more than happy to discuss the issue with the Insurance Department. In short, at this juncture, I feel that more specific information is necessary for me to intercede.

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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1131

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

May 14, 1979

Mr. Ronald A. Koster
Assoc. Dean of Faculty for
Continuing Education
Ulster County Community College
Stone Ridge, New York 12484

Dear Mr. Koster:

I have received your letter of May 9 regarding your request for a list of real estate brokers or salespeople in Ulster County. Although the correspondence appended to your letter indicates that Fred Koster, Director of Electronic Data Processing for the Department of State, informed you that a list relative to licensees in Ulster County does not exist, your latest letter asserts that the Department of State maintains a list of all licensed real estate brokers in the state.

I have discussed the matter with Mr. Koster on your behalf. Contrary to your assertion, it appears that there are no lists in existence relative to licensees in Ulter County or statewide. As such, I agree with his contention that your request may be denied on the ground that the record that you are seeking does not exist.

It is important to emphasize that the Freedom of Information Law grants access to records and that an agency is not obligated to create a record in response to a request. I direct your attention to §89(3) of the Law, which in relevant part 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..."

In my opinion, since no list of licensees for either Ulster County or the state exists, the information sought need not be compiled as a record in response to your request.

Further, the Freedom of Information Law states that an agency may withhold records which if disclosed would result in "an unwarranted invasion of personal privacy" [see §§87(2)(b) and 89 (2)(b)]. In addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, one of which includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)]. While it might be argued that the purpose of your request is something other than "commercial", it is clear that the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) are merely illustrative. In my view, it is equally clear that the intent of the provision quoted above concerning the disclosure of lists of names and addresses is to enable agencies to deny access to records that would be used for the purpose of solicitation. Therefore, even if the information in which you are interested existed in the form of records, it might justifiably be denied on the basis of the privacy provisions in the Law.

It is noted in closing that individual records concerning licensees do exist. If you or a representative would want to peruse the individual records to compile your own list, I believe that you would be welcome to do so.

I hope that the foregoing explanation serves to clarify the situation. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: Fred Koster

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1132

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

May 15, 1979

Ms. Judy A. Lauer
Librarian
Hancock, Estabrook, Ryan,
Shove & Hust
One Mony Plaza
Syracuse, NY 13202

Dear Ms. Lauer:

I have received your letter of May 14. As requested, your name will be placed on the Committee's mailing list to receive materials on an ongoing basis.

You have also asked whether there is a specific or suggested format for requesting records from government. There is no specific language that has been suggested, for §89(3) of the Law simply requires that an applicant "reasonably describe" the record or records sought. Nevertheless, I have recommended that a few "magic words" be used to make a request. For example, an applicant should seek "all records or portions thereof pertaining to" whatever the subject matter might be, "including but not limited to" particular records if you are sure of their existence. In addition, you should offer to pay the requisite fees for photocopying, advise the records access officer that he or she has five business days to respond to your request and that if any portion of the request is denied, the reason for the denial should be stated in writing and apprise you of your right to appeal to the head of the agency or whomever has been designated to determine appeals.

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-1133

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

May 15, 1979

Beverly F. Minier
Councilwoman
Town of Big Flats
Town Hall - 476 Maple Street
Big Flats, New York 14814

Dear Councilwoman Minier:

Thank you for your letter and your interest in compliance with the Freedom of Information Law (see attached).

Your inquiry concerns your efforts as a member of the Town Board to inspect books of accounts, such as ledgers, in possession of the Town. You have indicated that the Supervisor, Karl Balland, has refused to permit you to inspect the books in question. Contrarily, he has contended that you may ask questions regarding the contents of the books, which must be safeguarded to prevent misinterpretation or loss, but that you may not physically inspect them.

In my opinion, any person, including you as a member of the Town Board, may inspect and copy the records in question.

The Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law states that all records in possession of an agency, such as a town, are accessible, except those records or portions thereof that fall within one or more specified categories of deniable information enumerated in paragraphs (a) through (h) of the cited provision. Moreover, the term "record" is defined to mean "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." [§86(4)]. Consequently, the books in which you are interested clearly constitute "records" subject to rights of access granted by the Law.

Further, there in my view is no justifiable ground for denial that might be offered to preclude you or any person from inspecting the books. The only exception that

may have tangential relevance is §87(2)(g), which 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 provision quoted above contains what in effect is a double negative. While an agency may deny access to inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Since the contents of the books are reflective of "statistical or factual tabulations or data" they are in my opinion accessible.

The books that you are seeking have in fact been available to the public for decades. In this regard, §89(5) of the Freedom of Information Law provides that nothing in the Law shall be construed to limit or abridge existing rights of access granted by any other provision of law or by means of judicial determination. In this instance, §51 of the General Municipal Law has for years granted rights of access to "books of minutes, entry, or account" and similar documents in possession of municipalities.

In terms of the Supervisor's desire to interpret the books, it is clear that the purpose of the Freedom of Information Law is to enable the public to inspect and copy records. Presumably, any person has the right to interpret or perhaps misinterpret accessible records.

Additionally, §89(3) of the Law states that an agency "shall make" records available, and "shall provide a copy" of an accessible record upon payment of the requisite fees. Therefore, if for example, you requested copies of records, the Town would be obliged to make photocopies.

Finally, neither the Town Board by means of a resolution nor the Town Supervisor by means of an "executive order" may in my view adopt procedures or limit rights that conflict with or are more restrictive than those provided by a statute enacted by the State Legislature, such as the Freedom of Information Law. Therefore, to the extent that the Board or the Supervisor has diminished rights granted by the Freedom of Information Law, such action would in my opinion be 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Karl Balland, Town Supervisor
Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1134

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

May 16, 1979

Ms. Myrna Luster
[redacted]

Dear Ms. Luster:

I have received your latest letter which only recently was delivered to this office. Once again your inquiry concerns rights of access to records in possession of the Board of Education of the City of New York and Community School Board 10.

Before discussing specifics, I would like to note that all of the information that you requested is in my opinion accessible to the extent that it exists. However, once again it is important to note at this juncture that an agency need not create records in response to a request. Therefore, if, for example, you requested a list or tabulations that has not been compiled, the agency need not create the record on your behalf.

In addition, although Fred Goldberg, the Deputy Community Superintendent, responded to your request of February 26, it is apparent that much of the information provided by Mr. Goldberg was inconsistent with the information sought.

The first request made in your letter of February 26 confirms the point made in the previous paragraph. You requested the itemized budget of Junior High School 141, including the number of teachers generally, the number of teachers assigned to the "gifted" program and records of particular grants and funds directed to the sixth grade IGC program. In response, Mr. Goldberg sent you an organization sheet of Junior High School 141.

Clearly, the organization sheet is not reflective of the budget for the Junior High School. Moreover, any records of funding or expenditures relative to a particular school or school district are accessible. It is also clear that §87(3)(b) of the Freedom of Information Law requires that each agency compile a payroll record that indicates the name, public office address, title and salary of every officer or employee of the agency. In my view, it is likely that the payroll record required to be compiled would provide you with a great deal of the information in which you are interested.

Additionally, while there may be no "lists" or tabulations reflective of the information sought, the intent of your request is clear. Certainly, portions of existing records should in my view be made available to the extent that they are responsive to your request.

The second item sought is the yearly audit made by the Auditor-General's Office. Mr. Goldberg responded that the District had not yet received the audit. In this instance, if the District does not have possession of accessible records, there are no records to be made available. Nevertheless, if the record is in possession of the Auditor-General's Office, it should have been made available by that office.

My response must be the same with respect to the third request concerning portions of the audit that relate to Junior High School 141.

The fourth area of inquiry concerns a request for a list of all funds received by Community School District 10, including the source of funds and amounts. Mr. Goldberg stated in his letter that he transmitted the information to you. However, you have indicated that the materials sent were not responsive to your request. All that I can add is that if a line item budget or similar document exists, it should be made available.

The fifth request concerns a list of funds available to Community School District 10 for which no application was made or for which an application may have been rejected. Mr. Goldberg responded that "there are no documents that the District keeps under the normal course of business with

regard to this item." If Mr. Goldberg's assertion is correct, no violation of the Freedom of Information Law was committed. Nevertheless, members of the Board have apparently advised you to the contrary. In this regard, §89(3) of the Freedom of Information Law enables an applicant to request that an agency "certify that it does not have possession of such record or that such record cannot be found after diligent search." Similarly, §1401.2(6) of the Committee's regulations, which have the force of law, requires that a records access officer, upon failure to locate records, certify on request that "(i) the agency is not the custodian for such records, or (ii) the records of which the agency is a custodian cannot be found after diligent search." Consequently, if you believe that the District does indeed maintain custody of the records in question, you may request a certification in writing in which a representative of the District would certify that the District does not maintain custody of the records or that the records could not be found after diligent search.

In conjunction with Mr. Goldberg's statement that the District does not keep certain records "under the normal course of business," it is emphasized that the District cannot discard or dispose of records at will. Section 65-b of the Public Officers Law, which has been construed to apply to community school districts in New York City, prohibits any public officer from destroying or disposing of records without the consent of the State Commissioner of Education. In many instances, schedules have been developed for the orderly disposition of records. However, if there is no schedule extant for the disposal of the records to which Mr. Goldberg made reference, consent from the Commissioner of Education would be required for their disposal.

Your sixth question regarding the total number of students in the gifted and talented program in the sixth and seventh grade at Junior High School 141 were provided.

Copies of my response to you will be sent to Mr. Goldberg and Chancellor Macchiarola.

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: Mr. Goldberg
Chancellor Macchiarola

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1135

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

May 16, 1979

Mr. Gary E. Divis
15 Park Row - 18th Floor
New York, New York 10038

Dear Mr. Divis:

Your letter of April 30 addressed to Lieutenant Governor 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 the Lieutenant Governor is a member.

The correspondence appended to your letter indicates that you have unsuccessfully attempted to gain access to copies of "any and all press releases or statements issued, delivered, made or given by the New York City Transit Authority or the New York City Transit Police Department in connection with the death of Carmen Orsini...". In addition, you have requested regulations of the Transit Authority Police Department regarding the circumstances under which an officer of that department "may discharge his revolver or use other deadly force."

In my opinion, the records in which you are interested are available.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, including the Transit Authority and the Transit Authority Police Department, are available, except records or portions thereof that fall within one or more deniable categories of deniable information enumerated in paragraphs (a) through (h) of §87(2) of the Law.

First, with respect to the press releases, there is in my view simply no justifiable ground for withholding, for none of the exceptions to rights of access could appropriately be raised.

Second, the regulations that you are seeking are in my opinion available. Relevant to rights of access in this instance is §87(2)(g), which 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, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. The regulations in my opinion constitute instructions to staff that affect the public as well as the policy of the Transit Authority and its Police Department.

This contention is bolstered by the contents of a letter sent to me by Mark Siegel, the Assembly sponsor of the bill to amend the Freedom of Information Law in 1977. In discussing §87(2)(g), Assemblyman Siegel wrote that:

> "[T]he basic intent of the quoted provision is twofold. First, it is the intent that any so-called 'secret law' of any 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 soley reflective of the opinion of staff need not be made available."

In view of the foregoing, it appears that the regulations are clearly accessible, for they are reflective of the "secret law" of the agency.

Further, I agree that your citation of Westchester-Rockland Newspapers v. Moszydlowski, 58 A.D. 2d 235 (2d Dept. 1977) is appropriate, for the regulations were not compiled for law enforcement purposes, but rather in the ordinary course of business. Even if it could be argued that the regulations were compiled for law enforcement purposes, it would in my opinion be unlikely that any of the exceptions to rights of access appearing in §87(2)(e) could be asserted with justification.

Lastly, it is emphasized that the head of an agency or whomever may be designated to determine appeals must render determinations within seven business days of his or her receipt of an appeal. In addition, copies of appeals and the determinations that ensue must be transmitted to the Committee pursuant to §89(4)(a) of the Freedom of Information Law. Having reviewed my file regarding appeals, no documentation concerning your appeal has at this juncture been sent to the Committee.

A copy of this response will be sent to the Transit Authority. Perhaps its contents will serve to enable you to gain access to 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
Executive Director

RJF/kk

cc: Honorable Mario M. Cuomo
Honorable Harold Fisher
Office of Counsel, New York City Transit Authority

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1136

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

May 16, 1979

Mr. Hugh Max Furman
#78-A-2125
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Furman:

I have received your letter regarding a denial of access to records by the Orange County District Attorney's office relative to records concerning your criminal activity.

It is noted at the outset that your letter appears to be an appeal pursuant to 5 U.S.C. §§552 and 552a. Please be advised that your citations relate to the federal Freedom of Information and Privacy Acts respectively, neither of which would be applicable to your request. The two federal Acts pertain to records in possession of federal agencies. Relevant under the circumstances is the New York Freedom of Information Law, which is applicable to records in possession of New York state government. New York has not enacted a statute analogous to the federal Privacy Act.

In addition, this office merely acts in an advisory capacity with respect to the interpretation of the New York Freedom of Information Law. Although §89(4)(a) of the Law requires that agencies transmit to this Committee copies of appeals and the ensuing determinations, the Committee is not the appropriate office for filing appeals. The previously cited provision of the Freedom of Information Law states that a person may appeal to "the head, chief executive or governing body" of the agency or the person designated to determine appeals. Consequently, it is suggested that you attempt to find out who is responsible for determining appeals for Orange County. In the alternative, perhaps you should appeal directly to the County Legislature.

In terms of rights of access, it would be inappropriate to conjecture as to the propriety of the District Attorney's statement regarding access to records of your criminal activity without greater knowledge of their contents. It is possible that some of the records may be available if the harmful effects of disclosure described in §87(2)(e) of the Law would not arise. Nevertheless, it is also possible that there may in some instances be justifiable grounds for withholding. If you could provide more specific information regarding the records in which you are interested, perhaps I could give you more specific 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

cc: David Ritter, District Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1137

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

May 17, 1979

Mr. Joseph Medford
[redacted]

Dear Mr. Medford:

I have received your letter of May 15 regarding your unsuccessful attempts to gain access to an assessment card from the Nassau County Department of Assessment for housing plans that you submitted to the Department.

In my opinion, the assessment card is clearly available.

First, the 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 those records or portions thereof that fall within one or more categories of deniable information enumerated in paragraphs (a) through (h) of the cited provision (see attached). None of the grounds for denial may in my view be appropriately asserted.

Moreover, since the assessment card consists of factual data, it is available under §87(2)(g)(i) of the Law, which requires that agencies provide access to "statistical or factual tabulations or data" found within "intra-agency" materials.

Second, §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abridge rights of access previously granted by other provisions of law or judicial determinations. In this regard, the courts have long held that the assessment information in which you are interested is available. In

Sears, Roebuck and Company v. Hoyt, 107 NYS 2d 756 (1951), it was held that cards and records contained in a "Kardex System" as well as applications made by taxpayers for revisions of real property assessments are available to the public for inspection and copying. Similarly, in Sanchez v. Papontas, 303 NYS 2d 711 (1969), an appellate court found that pencil-marked data cards in possession of a board of supervisors used by county assessors to reappraise real property are publicly accessible, even though the cards were prepared by a third party, a private company.

In sum, I believe that there is no justification for a denial of access.

In terms of procedure, §89(3) of the Law permits an agency to require that an applicant submit a request in writing. The request need only "reasonably describe" the records sought. The agency then has five business days from its receipt of a request to grant or deny access, or acknowledge receipt of the request if a determination cannot be made within five business days. When a request is acknowledged, a grant or denial of access must be made within ten business days of the date of the acknowledgment. If for any reason a request is denied, the denial must be in writing, provide the reasons for the denial, apprise the applicant of his or her right to appeal and inform the applicant of the name of the person to whom an appeal should be directed. Further, the Freedom of Information Law, §89 (4)(a), requires that an agency transmit copies of appeals and the determinations that ensue to this Committee.

As noted earlier, a copy of the Freedom of Information Law is attached. In addition, enclosed are regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of 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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1138

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

May 17, 1979

Mr. Joseph Fournier
Box B
77-A-3575
Dannemora, NY 12929

Dear Mr. Fournier:

I have received your letter of May 15. As requested, enclosed are copies of the advisory opinions in which you are interested.

Your question concerns rights of access to information compiled by an insurance company for its insured, the City of White Plains. In this regard, since the Freedom of Information Law applies to agencies of government [see attached Freedom of Information Law, definition of "agency", §86(3)], records in possession of an insurance company would be outside the scope of the Freedom of Information Law.

If, however, the information is in possession of the insured, the City of White Plains, it would be subject to rights of access. Section 86(4) of the Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency, such as the City. Consequently, when the City gains possession of the records in question, the Freedom of Information Law would be applicable.

Nevertheless, without greater knowledge of the contents of the records, it would be inappropriate to conjecture as to rights of access. It is possible that one or more of the grounds for denial appearing in §87(2) of the Law could justifiably be asserted to withhold portions of the information. On the other hand, if none of the grounds for denial could appropriately be raised, the records would be available in their entirety.

If you could provide additional information regarding the contents of the records in possession of the City of White Plains, perhaps I could provide more specific 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

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1139

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

May 21, 1979

Stephen Kruger, Esq.
Schneider, Kleinick, Friedman,
Miller & Weitz
11 Park Place
10th Floor
New York, New York 10007

Dear Mr. Kruger:

I have received your letter of May 14 regarding disclosure of Attorney Registration Cards by the Office of Court Administration (hereafter "OCA").

Several calls have been made on your behalf and I have obtained the following information from the Office of Counsel for OCA.

First, there is general agreement that much of the information contained on the Attorney Registration Cards would if disclosed result in an unwarranted invasion of personal privacy under the Freedom of Information Law. Further, OCA has long contended that it is not subject to the Freedom of Information Law based upon the argument that it falls within the definition of "judiciary" in §86(1) of the statute. While I disagree with the OCA's contention regarding the applicability of the Freedom of Information Law to OCA, I agree with the stance that it has developed thus far with respect to disclosure of the Attorney Registration Cards.

Second, the attorneys with whom I spoke agreed that §90(10) of the Judiciary Law serves as the basis for the submission of a registration card and that the majority of the information contained in the card would be for the sole use of the various Appellate Divisions.

It is my understanding that on specific inquiry, the name, office address and office telephone number of a particular attorney or attorneys will be disclosed. In addition, the home address and home telephone number will be provided if there is no office address or telephone number given. Further, it is clear that no list of attorneys or their addresses, telephone numbers or similar identifying data will be disclosed. Again, that information is considered to be for the sole use of the OCA and the Appellate Division for which it serves as a custodian of the records in question.

If you have additional questions regarding the use or disclosure of the information contained within the registration cards, it is suggested that you contact Mr. William Bulman of OCA at 488-6540 in New York City.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: William Bulman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1140

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

May 21, 1979

Mr. Johathan Kwitny
Staff Reporter
The Wall Street Journal
22 Cortlandt Street
New York, New York 10007

Dear Mr. Kwitny:

I have received your letter of May 16 regarding your unsuccessful attempts to gain access to approved handgun license applications from the New York City Police Department. You have indicated that access has been denied officially by the Deputy Police Commissioner for Public Information, Ellen Fleysher, who apparently has informed you that she is acting on the advice of Lieutenant Edward Jordan of the Department's Legal Division and Kenneth Conboy, Deputy Commissioner for Legal Matters.

I respectfully disagree with the officials of the New York City Police Department and believe that the records in which you are interested are clearly available.

As you are aware, I have discussed the matter with Lieutenant Jordan, who stated that the legal basis for withholding is the decision rendered in Turner v. Codd, 85 Misc. 2d 483 (1975). While I agree with the holding in Turner, I believe that the decision may be distinguished from your situation. A review of Turner indicates that the statutory basis for the decision is subdivision (1) of §400.00 of the Penal Law. The court dealt with a factual situation in which plaintiffs were applicants for pistol licenses that had been preliminarily disapproved. The crux of the decision dealt with a demonstration of a "need" for a license. It had nothing to do with rights of access to records, but rather the "need" for a license. In sum, the controversy in Turner dealt with unapproved applications.

In my view, the records in which you are interested have no relation to subdivision (1) of §400.00 of the Penal Law, the focal point of the Turner decision. On the con-

trary, you have requested approved as opposed to unapproved applications for licenses. Consequently, the applicable provision of law under the circumstances is subdivision (5) of §400.00, entitled "[F]iling of approved applications", which states that:

> "[T]he application for any license, if granted, shall be a public record. Such application shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York and in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing authority of that county. A duplicate copy of such application shall be filed by the licensing officer in the executive department, division of state police, Albany, within ten days after issuance of the license."

It is important to emphasize that the first sentence of the provision quoted above states that "[T]he application for any license, if granted, shall be a public record." From my perspective, there is no room for interpretation of the provision, for its direction is clear and unequivocal.

Although I understand and appreciate the rationale for withholding as expressed by Lieutenant Jordan, I do not believe that the New York City Police Department or any other municipal department subject to subdivision (5) of §400.00 has discretion to reject requests for approved applications for permits. If the provision is troublesome, perhaps alteration by means of legislation would be the appropriate means of allaying the fears associated with disclosure. Nevertheless, until a different statutory direction is provided, the approved applications are in my opinion 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: Kenneth Conboy
Ellen Fleysher
Lt. Edward Jordan

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1141

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

May 21, 1979

Ms. Elsie Heyel
District Clerk
City School District
324 Midland Avenue
Rye, New York 10580

Dear Ms. Heyel:

I have received both your initial letter of May 7 and the ensuing letter of May 10, which includes minutes of an executive session held on January 30. In addition, as you are aware, the matter has been discussed to some extent with the Superintendent of Schools, Dr. Robert Hemberger.

The issue involves a request by Mr. Roger Stallings for records indicating "the appraised value of the Hewlett Ave. Property" and "the list of bids and the amount of each bid received by the Board of Education for this property".

You might remember that I made a phone inquiry with respect to your first letter due to a possible disagreement concerning disclosure of some of the information requested. My response has been delayed due to a change in circumstances evidenced by the minutes appended to your second letter.

Ordinarily I would have advised that, at the very least, the bids relative to the property in question be available, for disclosure would have no effect upon the ability of the District to obtain an optimal price for the property. Nevertheless, the minutes indicate that the Board determined that "in the best interest" of the District,

the property would be removed from the market and all offers received to date would be returned. The minutes further indicate that it is the intent of the Board to reoffer the property "at some future date."

Based upon the foregoing factual situation, it appears that there is justification for a denial of access to the records at this time based upon the Freedom of Information Law as well as case law.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the School District, are available, except those records or portions thereof that fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h) of the Law.

Relevant to the situation is §87(2)(c), which states that an agency may withhold records or portions thereof that "if disclosed would impair present or immient contract awards or collective bargaining negotiations...". Based upon my discussion with Dr. Hemberger, it appears that disclosure might place the District in an unfair bargaining position. Further, it appears that disclosure would "impair" the ability of the District to obtain an optimal price for the property in question.

In addition, there is case law which in my view might serve as precedent. Sorley v. Village of Rockville Centre, 30 A.D. 2d 822, held that records reflective of the valuation of real property and bids received could be withheld prior to the consummation of the transactions to which the records related if premature disclosure would effectively nullify the capacity of the agency to obtain an optimal price. Stated differently, the Court held that detriment of the public interest could result if the agency could not complete the transaction at a price most beneficial to the public due to premature 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
Executive Director

RJF/kk

cc: Roger Stallings

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1143

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

May 22, 1979

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

I have received your letter of May 10, which includes as an attachment a letter of denial from Paul A. DiNardo, Acting Assistant Chief of Police for the City of Binghamton.

You have contended that the denial does not mention any of the grounds for denial appearing in the Freedom of Information Law. Although I am in general agreement with your contention, I cannot conjecture as to the adequacy of the specific response, for I have no knowledge of the nature of records requested. If you feel that you have been improperly denied access, you may, as you are aware, appeal in accordance with §89(4)(a) of the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1144

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

May 22, 1979

Mrs. Shirley Paris
[redacted]

Dear Mrs. Paris:

I have received the copy of my letter that you returned with a notation and apologize for failing to be as responsive to your inquiry as I could have been.

However, the initial point made in my letter of May 10 must be restated. You have contended that the Freedom of Information Law "specifically proscribes" disclosure of lists, for example, for commercial use. In my view, the Law provides no such proscription. While the Law states that an agency may deny access to certain categories of information, there is no requirement that an agency must deny access to the information. Therefore, although an agency may deny a request for lists of names and addresses, it need not.

Nevertheless, I will notify the Insurance Department of your concerns. Perhaps the Department will be willing to take remedial action.

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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1145

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

May 22, 1979

Mr. Gerald C. Sternberg
Records Access Officer
City of Mount Vernon
Department of Law
City Hall, Roosevelt Square
Mount Vernon, NY 10550

Dear Mr. Sternberg:

I have received your letter of May 18 as well as the correspondence appended to it. Your inquiry concerns a request addressed to the City of Mount Vernon for inspection of CETA personnel files. In terms of background, you have stated that the City does maintain personnel records of CETA employees, but that the City does not administer the CETA program. On the contrary, it appears that the County is charged with the duty of administering the CETA program and that the City of Mount Vernon is merely a recipient of services provided by the U.S. Department of Labor through the County government.

In response to the request, you have stated that §89(2) of the Freedom of Information Law, which pertains to the protection of personal privacy, provides you with the right to deny a request for "unlimited access to personnel records." Second, you have stated that the request is not sufficiently specific to determine which portions of CETA personnel records have been sought for inspection. And third, you wrote that the local CETA administrator has no authority to make decisions regarding the eligibility of CETA employees. Consequently, you have referred the applicant to Westchester County's Office of Employment and Training to obtain that information.

I am in general agreement with your contentions.

With respect to the first question, §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy." In addition, §89(2)(b) lists five illustrative ex-

amples of unwarranted invasions of personal privacy. In all likelihood, personnel records indeed contain information which if disclosed would result in an unwarranted invasion of personal privacy. For example, social security numbers, employment histories, or personal references of applicants for employment would in my view result in an unwarranted invasion of personal privacy if disclosed [see also §89(2)(b)(i)]. Contrarily, other portions of personnel records may be available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy. Nevertheless, since a request to inspect if granted would result in a review of both accessible and deniable information, I believe that the request may justifiably be denied unless an accommodation can be reached.

For instance, if the request could be narrowed in order that particular portions of records sought could be identified, deletions of personal details which if disclosed would result in an unwarranted invasion of personal privacy could be made after copying records. In such a case, the City could assess a fee for photocopying and thereafter provide copies after having deleted appropriate portions of the records. In sum, I agree with your contentions that the Freedom of Information Law does not require the City to grant unlimited access by means of inspection to personnel records.

The second question regarding the specificity of the request has been considered indirectly by my response to your first question. If the request could be more specific, perhaps portions of records could be provided after having deleted identifying details to protect privacy. Further, it is emphasized that §89(3) of the Law requires that an applicant "reasonably describe" the records sought. If the request for personnel records is so broad that you cannot determine what has been requested, it is suggested that you attempt to negotiate with the applicant in order that his request reasonably describes the records in which he is interested.

And finally, based upon our conversation and the contents of your letter, it is clear that the City of Mount Vernon is merely a recipient of the services provided by the CETA program and that is has no authority to administer the CETA program. Consequently, if the City does not have possession of records regarding the eligibility of CETA employees or the administration of the CETA program, there are no records to be made available. From my perspective, you acted

appropriately by directing the applicant to the source of the information, in this case Westchester County. Moreover, you have no responsibility to obtain records from beyond the limit of the City's jurisdiction under the Freedom of Information Law. As such, it would appear that you engaged in a reasonable course of action, i.e. directing the applicant to the most appropriate source of the information requested.

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: Eugene Scancarelli, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1146

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

May 23, 1979

Mr. Joseph Fournier
Box B
77-A-3575
Dannemora, NY 12929

Dear Mr. Fournier:

As requested in your letter of May 21, I have enclosed the advisory opinions to which you made reference.

Your inquiry concerns rights of access to records in possession of the City of White Plains relative to a claim made against the City.

Again, to provide you with specific advice concerning rights of access, I would need more information regarding the records in which you are interested. Nevertheless, as you are aware, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the City of White Plains, are available, except those records or portions of records that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law. Based upon the information provided in your letter, it appears that the records in question were transmitted from an insurance company to the City. Consequently, it does not appear that any of the grounds for denial listed in the Law could appropriately be raised. However, as noted previously, without greater familiarity with the records, I must in good faith advise that there may be portions of the records that could justifiably be withheld. For example, there may be names of individuals which if disclosed would result in an unwarranted invasion of personal privacy.

It is suggested that you request the records. If you are denied, the denial must be in writing, provide the reasons and apprise you of the name and address of the person to whom an appeal should be directed. By being informed of

the reasons for a denial, more can be learned of the nature and contents of the records. In addition, if you are not satisfied with the City's response, I will be in a better position to attempt to mediate.

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

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-337
FOIL-AO-1147

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

May 24, 1979

Mr. Robert J. Whalen
[redacted]

Dear Mr. Whalen:

I have received your letter of May 23, which raises questions under both the Freedom of Information Law and the Open Meetings Law.

Your first question concerns rights of access to the time sheets of an internal auditor employed by the Brentwood School District. You are interested in reviewing time sheets of his work from January to the present.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a school district, are available, except those records or portions thereof that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law (see attached, Freedom of Information Law).

In my view, none of the exceptions to rights of access could appropriately be raised to withhold the time sheets that you are seeking.

While §87(2)(b) of the Law provides that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy," case law interpreting the privacy provisions of the Law in my view can be cited as a basis for disclosure. The courts have consistently determined that public employees require less protection in terms of privacy than the public generally. In brief, the courts have held that records that are relevant to the performance of the official duties of public employees are accessible, for disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g,, Farrell v. Village

Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees that have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Under the circumstances, a time sheet indicating when a public employee works is in my opinion clearly relevant to the performance of his official duties. Consequently, I believe that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

I would like to point out that information irrelevant to the performance of official duties found on the time sheet, such as a social security number, for example, may in my view be deleted from the time sheet. Nevertheless, the remainder should be disclosed.

The second question pertains to the action of the President of the Brentwood Board of Education, who, according to your letter, takes official votes without permitting the remaining members of the Board to state "whether they are in favor or against or abstaining from the motion being presented." You have also indicated that "the President has voted in behalf of all the trustees" with respect to "several motions critical to the School District."

In my opinion, a single member of a board, regardless of his or her title as president or chairman, cannot act singly on behalf of the remaining members of a board.

The actions taken by a school board are governed in part by the provisions of the Open Meetings Law, which is applicable to all public bodies that are required to act by means of a quorum [see attached, Open Meetings Law, §97(2)].

In this regard, other statutes make clear that only a majority of the total membership of a public body, including the School Board, may act on behalf of the body. Specifically, I direct you to the definition of "quorum" which is defined in §41 of the General Construction Law as follows:

> "[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 an 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."

The quoted provision clearly applies to school boards. Consequently, the Brentwood Board may act only by means of a quorum, a majority vote of its total membership.

Moreover, it is clear that the language in the Education Law evidences an intent that a group of individuals acts as a corporate board of directors for a school district, a public corporation. Specifically, §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 school district, central school district, central high school district, or of a city school district."

By means of the reference to a "body," it is clear that no single member of a board of education has a greater vote or authority than any other member of a board of education. Consequently, the President of the Board cannot in my opinion act individually on behalf of the Board as a whole.

Lastly, it is also important to note that the Freedom of Information Law, §87(3)(a), requires that the School District compile a record of votes identifiable to each member in every instance in which a vote is taken.

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

Encs.

cc: Guy DiPietro
Anthony Felicio, President

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1148

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

May 24, 1979

Mr. David Dudenhoefer
[redacted]

Dear Mr. Dudenhoefer:

I have received your letter of May 20, which indicates that you have unsuccessfully attempted to gain access to reports of investigators of the Nassau County Probation Department. According to your letter, the reports are provided to the court in order to assist it in making a determination regarding custody. You have also stated that the Probation Department contends that §390.50 of the Criminal Procedure Law makes the report confidential.

Although I disagree with the basis for the denial offered by the Probation Department, it appears that there is right of access to the reports.

As you are aware, §390.50 of the Criminal Procedure Law concerns pre-sentence reports of individuals who have been convicted of crimes. Having discussed the matter with Counsel to the New York State Division of Probation on your behalf, we agreed with your contention that the Criminal Procedure Law cannot be cited to withhold the reports in question. Counsel also stated in passing that investigations are conducted by unbiased professionals.

Most relevant under the circumstances are the provisions of Family Court Act. Specifically, §166 of the Family Court Act states that the court shall not permit "indiscriminate" access to Family Court records. Stated differently, a Family Court has broad discretion to grant or deny access to records based upon the circumstances surrounding a request.

However, I have been informed by the Division of Probation that, as a matter of practice, attorneys for the parties are generally granted access to the investigative reports in

which you are interested. Therefore, although you may not have the capacity to inspect the reports, it is possible that your attorney may do so on motion before the Court. Perhaps you can suggest to your attorney that he or she take appropriate steps to seek inspection of the reports.

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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1149

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

May 28, 1979

Ms. Barbara Letvin
Town of Gates
1605 Buffalo Road
Rochester, NY 14624

Dear Ms. Letvin:

I have received your letters of May 16 and May 22 regarding your unsuccessful attempts to gain access to records from the Town of Gates, Your inquiry pertains to a request to inspect the "audit results done by the Finance Director...on the bail and fine accounts of Justice Michael Cerretto."

As you have described the situation, it appears that despite your position as a member of the Town Board, you have met with resistance from each of the town officials encountered in your efforts to inspect the records.

For the reasons offered in the ensuing paragraphs, I believe that the records in which you are interested are accessible to you as a member of the Town Board and to any person under the Freedom of Information Law.

First, it appears that the Town Clerk is the only records access officer for the Town. In response to your request, he wrote that he did not have in his office or in the files of the Town Clerk's Department any of the information requested. In this regard, since the Town Clerk is the sole records access officer, he has specific responsibilities under the regulations promulgated by the Committee on Public Access to Records, which have the force and effect of law. As records access officer, even though the Clerk may not have the records sought in his physical possession, he is responsible for coordinating the Town's response to requests and for locating records [see attached regulations, §1401.2(a) and (b)]. Therefore, if the records sought are in possession of the agency, the Town, the Clerk as records access officer is responsible for locating them and responding appropriately.

Your letter indicates that "the Town does indeed have copies or originals of the reports regarding the audit as acknowledged by Mr. Asam." Nevertheless, in response to your request, the Clerk stated that he did not have the records in his office and that the records constituted an "internal matter". In my opinion, if the records are in possession of the Town they are clearly subject to rights of access.

In this regard, §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 breadth of the definition, it is clear that any information in possession of an agency, including the Town, is subject to rights of access. The fact that records may be characterized as an "internal" or may relate to an "internal matter" is irrelevant.

Moreover, 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 available, except those records or portions thereof that fall within one or more specific categories of deniable information.

Under the circumstances, it would appear that audit results and related documentation are accessible. Relevant to the situation is §87(2)(g), which 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, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. To the extent that the information regarding the audit constitutes "statistical or factual tabulations or data," it is clearly available.

Another allegation concerns the contention of Mr. Cerretto that the bail account "is his personal account." You stated further that you questioned whether "a public official can receive moneys into a private account and have this closed." Again, to the extent that the Town maintains custody of the records in question, they fall within the definition of "record" and therefore are subject to rights of access.

It is noted at this juncture that courts and court records are not subject to the Freedom of Information Law [see §86(1) and (3) regarding the definitions of "judiciary" and "agency" respectively.] However, this is not to be construed to mean that court records are confidential, for the vast majority of court records are accessible. For example, §2019-a of the Uniform Justice Court Act requires justices subject to that Act to maintain criminal dockets which "shall be at all times open for inspection to the public." The cited provision also states that "[S]uch docket shall be and remain the property of the village or town of the residence of such justice..." Section 2019-a further states that:

> "[I]t shall be the duty of every such justice, at least once a year and upon the last audit day of such village or town, to present his records and docket to the auditing board of said village or town, which board shall examine the said records and docket, or cause same to be examined and a report thereon submitted to the board by a certified public accountant, or a public accountant and enter in the minutes of its proceedings the fact that they have been duly examined, and that the fines therein collected have been turned over to the proper officials of the village or town as required by law. Any such justice who shall willfully fail to make and enter in such records and docket forthwith, the entries by this section required to be made or to exhibit such records and docket when reasonably required, or present his records and docket to the auditing board as herein required, shall be guilty of a misdemeanor and shall, upon conviction, in addition to the punishment provided by law for a misdemeanor, forfeit his office."

In view of the foregoing, the results of the audit must be submitted to the Town "auditing board". Consequently, it

appears that town officials must gain possession of the records in which you are interested.

In addition to the provisions quoted above, §255 of the Judiciary Law states 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 to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

It is noted that I have contacted the Legislative Counsel of the Office of Court Administration on your behalf, who has confirmed my contention that §255 is applicable to records in possession of justice courts. Consequently, even though the Freedom of Information Law may not be applicable to records in possession of a court, statutes within the Judiciary Law and the Uniform Justice Court Act indicate that the records in question should be made available to the public.

With respect to the ability of the Town Justice to use a personal account for the purpose of conducting official business, I can only suggest that the matter should be raised before either the State Department of Audit and Control or the Office of Court Administration, for I have no expertise regarding requirements relative to accounting. Nevertheless, it is noted that in a situation in which a public official maintained that notes taken at a meeting were personal property, even though they were preserved as a reference in the course of his official duties, it was judicially determined that the notes were "records" subject to rights of access granted by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. Therefore, to reiterate, if the records are in possession of an "agency" as defined by the Freedom of Information Law or a clerk of a court under §255 of the Judiciary Law, they are in my view subject to rights of access.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Jack Hart
Justice Michael Cerretto

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-338
FOIL-AO-1150

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

May 28, 1979

Mr. Arthur G. Wood
[redacted]

Dear Mr. Wood:

I have received your letter of May 22. Your inquiry has been presented in chronological order, and my comments will appear in like manner.

The first question concerns closed meetings held by "Party A", which is represented by all five members of the Village Board of Trustees. Stated differently, all of the members of the Village Board of Trustees are members of a single political party. Therefore, the question is whether the gatherings that you described are "political caucuses" exempt from the Open Meetings Law, or meetings subject to the Law.

Section 103(2) of the Law states that the Law does not apply to "deliberations of political committees, conferences and caucuses." It is noted at this juncture that in the past it has been advised that public bodies represented by a single political party do not engage in "political" caucuses when they are discussing the business of the public body rather than business of a political party nature. If, as in the example that you described, there was a work session held to discuss the budget prior to its adoption, I believe that such a gathering was held for the purpose of discussing public rather than political party business. As such, it should in my view have been open to the public.

It is emphasized that the definition of "meeting" appearing in §97(1) of the Law has been construed broadly by the courts. Specifically, the Court of Appeals, the state's highest court, affirmed an Appellate Division decision which held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in

which it may be characterized (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947). The focal point of both appellate decisions was the statement of intent in the Law (see §95), which indicates that every step of the decision-making process is intended to be subject to the Law. From my perspective, to close the deliberative process and preclude public observance of the performance of public officials by classification of a meeting as a political caucus would contradict the stated purpose of the Law as evidenced in the statement of intent. Therefore, in my opinion, a meeting of the entire membership of the Board of Trustees for the purpose of discussing public business cannot be characterized as a political caucus, thereby nullifying the requirements of the Open Meetings Law. On the contrary, I believe that such a gathering is a meeting subject to the Law in all respects.

In addition, §99 of the Law requires that all meetings must be preceded by notice. If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to the meeting. If the 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. As such, notice must be given prior to all meetings, whether regularly scheduled or otherwise.

Your last comment concerns your attempts to study the Village's tentative budget. Although the Village Clerk said that you were "welcome" to review the tentative budget, you wrote that you were informed later that you could not keep copies of the tentative budget prepared for the public hearing unless you paid twenty-five cents per page. In this regard, once you have obtained a record, I believe that it is your property. I do not believe that a Village official can refuse to permit you to keep it unless you pay a fee. The Freedom of Information Law permits an agency to assess a fee of no more than twenty-five cents per photocopy. Consequently, in most circumstances, I would agree that the Village could charge on that basis. However, there are special provisions in the Village Law pertaining to the tentative budget. Section 5-504 of the Village Law requires that the budget officer for a village "shall furnish a copy of the tentative budget and the budget message, if any, to each member of the board of trustees and he shall reproduce for public distribution as many copies as he may deem necessary."

Although the quoted provision does not state how many copies of the tentative budget must be reproduced or that they should be made available free of charge, it would appear that the purpose of disclosing a tentative budget is to permit the public to become familiar with its contents. It appears further that there is an intent in the Village Law that a number of copies of a tentative budget be made available to the public free of charge. Since I am unaware of the numbers of copies prepared or members of the public that requested copies, I cannot appropriately comment with respect to the requirement of a fee under the circumstances. Nevertheless, it appears that the intent of the provision concerning the tentative budget and its disclosure is to enhance the ability of the public to learn the nature and contents of a tentative budget.

You also mentioned "reports from reliable sources" of gatherings of the members of the Board in the Village Hall without notice to the news media or the public. Again, I must emphasize that the state's highest court held that any gathering of a quorum of a public body for the purpose of discussing public business is a meeting. Whether the meeting is characterized as "formal" or "informal" is irrelevent when the ingredients described in the judicial decisions are present.

The next situation that you described concerns the firing of the acting fire chief and the selection of his successor. You indicated that a Civil Service examination was given and that the single individual who passed was neither chosen nor interviewed. I have contacted the Director of the Division of Municipal Affairs of the State Department of Civil Service on your behalf. He informed me that there is no requirement that the chief be chosen from a list consisting of one who passed an examination. In essence, based upon the information given to me, the Village did not act improperly with respect to its selection of a new fire chief.

Although the action taken regarding the fire chief may have been proper, it is important at this juncture to describe the structure of the Open Meetings Law. As noted earlier, the term "meeting" has been construed broadly by the courts. Further, §98(a) of the Law requires that all meetings be convened as open meetings. While executive sessions may be held to discuss certain subject matter, it is clear that an executive session is a portion of an open meeting during which the public may be excluded; it is not separate and distinct

from a meeting [see §97(3)]. Moreover, the Law sets forth a procedure for entry into executive session. Specifically, §100(1) of the Law 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, a public body must take the steps described above in order to hold an executive session. Additionally, discussion in executive session is restricted to the subjects described in paragaphs (a) through (h) of §100(1). Consequently, a public body cannot go into executive session to discuss the subject of its choice; it may do so only in accordance with the provisions of §100 of the Open Meetings Law.

Lastly, you have asked what can be done to insure that the Open Meetings Law is followed. Generally, I believe that the public and the news media by being present, interested and informed can do much to insure compliance with the Law. In terms of legal remedies, if, for example it is known in advance that a closed meeting will be held, injunctive relief may be sought which would preclude a public body from holding a closed meeting. If, for example, a public body takes action behind closed doors that should have been taken during an open meeting, a court has the authority to make the action taken in violation of the Law null and void. A court also has discretionary authority to award reasonable attorney fees to the party that prevails.

A copy of my response to you will be sent to the Village Board of Trustees. Although an opinion of this Committee is not legally binding, the courts have in many instances cited the opinions as the basis for their own. Consequently, while the Committee has no power to enforce the Law, the courts have often given great weight to opinions of 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:jm
Enc.
cc: Village Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1151

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

May 29, 1979

Mr. Dennis Dalrymple
[redacted]

Dear Mr. Dalrymple:

Your letter addressed to the Honorable Robert Abrams has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

It is noted that Mr. Abrams is not the Secretary of State, but the Attorney General for the State of New York.

You have requested "a copy of all police records in the possession of the state." You have further indicated that your request "should include all police intelligence data gathered by the State Police, the New York City Police Department and the notorious Bureau of Special Services, legally or illegally."

There are several comments that I would like to make regarding your request.

First, the Freedom of Information Law requires that an applicant "reasonably describe" the records in which he or she is interested. In my opinion, a request for all police records in the state does not meet this requirement.

Second, the Law provides that certain types of records may be withheld. For example, records compiled for law enforcement purposes which if disclosed would interfere with an investigation may justifiably be withheld. Certainly many police records, particularly those related to ongoing investigations, could be withheld.

Third, every agency in the state is required to designate a "records access officer" for the purpose of responding to requests. As such, any requests that are made should be directed to the records access officers of the agencies in possession of the records in which you are interested. There is no single agency that maintains custody of all police records.

Fourth, the Freedom of Information Law states that an agency may assess a fee of up to twenty-five cents per photocopy. In addition, the agency may require that the fee be paid in advance. Consequently, if your request is voluminous, it is possible that the cost to you will be high.

In short, it is suggested that you attempt to narrow your requests to particular areas or aspects of police records and transmit them to the agencies in possession of the records. To enhance your understanding of the operation of the Freedom of Information Law, I have enclosed a copy of the Law as well as 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1152

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

May 29, 1979

Mr. Robert Gagne
[redacted]

Dear Mr. Gagne:

I have received your letter of May 1, which was delivered to this office on May 22. Although the offices of the Committee have been moved to 99 Washington Avenue, that address is considered an "annex" of the Department of State. Consequently, all correspondence with the Committee should continue to be addressed to 162 Washington Avenue, Albany, New York 12231.

Your first question concerns the status of the New York City Office of the Ombudsman under the Freedom of Information Law. Specifically, you have asked whether the Office of the Ombudsman is subject to the Law.

In my opinion, the Office of the Ombudsman clearly falls within the framework of 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."

Under the definition, the Office of the Ombudsman is a municipal office as well as a governmental entity performing a governmental function for a municipality the City of New York.

Further, since New York City is a public corporation, the regulations promulgated by the Office of the Mayor are applicable to the Office of the Ombudsman in conjunction with the requirements contained within §87(1)(a) of the Freedom of Information Law.

Based upon the same reasoning, I believe that each of the "bureaus, offices, divisions, departments, etc." to which reference is made in the Master Index are subject to the Freedom of Information Law and the uniform rules pertaining to the administration of the Freedom of Information Law, with certain exceptions. As you are aware, the definition of "agency" specifically excludes the "judiciary", which is defined in §86(1) to mean the courts of the state. Therefore, any courts included in the Master Index are not subject to the Freedom of Information Law.

Lastly, you have questioned whether rule 5(d) contained in the "Uniform Rules" is contrary to the Freedom of Information Law. Having reviewed the provision that you cited, I believe that it is similar to and in compliance with §1401.5(d) of the regulations promulgated by the Committee, which states that:

> "[I]f 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 view of the foregoing, I do not believe that §5(d) of the Uniform Rules is 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/kk

cc: Office of the Ombudsman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1153

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

June 6, 1979

David Greenberg, Esq.
Greenberg & Wanderman
35 North Madison Avenue
Spring Valley, New York 10977

Dear Mr. Greenberg:

I have received your letter of May 22. Your questions involve the interpretation of both the New York State Freedom of Information Law and the Family Education Rights and Privacy Act, commonly known as the "Buckley Amendment".

The first question concerns a situation in which three classes of the same grade are located in a single school building and in which test scores are tabulated by class and set forth alphabetically. You have indicated that there are approximately twenty-five students in each class. Your question is whether the test scores must be made available if the names on the tabulation sheets are deleted.

In my opinion, even if identifying details are deleted, the tabulations may be withheld, because scores listed alphabetically could identify particular students if disclosed. In this regard, §99.3 of the regulations promulgated by the United States Department of Health, Education and Welfare pursuant to the Buckley Amendment (Federal Register, Vol. 41, No. 118, June 17, 1976) defines "education records" to include records that "are directly related to a student and are maintained by an educational agency or institution..." Further, the same provision defines "disclosure" to include the "communication of education records of the student or the personally identifiably information contained therein, orally or in writing, or by electronic means, or by any other means to any party." Since the Buckley Amendment prohibits

the disclosure of education records that would identify a particular student or students to all but specific persons, the alphabetical listing may in my view be withheld. Again, even if identifying details are stricken from a tabulation of test scores, it is likely that some students could be identified if the scores appear alphabetically.

Your second question is whether my response would be different if the twenty-five names in each class were not listed alphabetically. My answer must be in the affirmative, for a list of test scores that could not in any way identify a particular student or students would not in my opinion if disclosed violate either the Buckley Amendment or the Freedom of Information Law. Under those circumstances, I believe that such a listing would constitute a "factual tabulation" accessible under the Freedom of Information Law.

Your last question is whether there is any obligation on the part of a municipality to "scramble a listing" in order that "the names are not set forth in the same sequence as in the original document." In this regard, the Freedom of Information Law, §89(3), specifically states that an agency need not create a new record in response to a request. Since the "scrambling" of information contained in the list would involve the creation of a new record, I do not feel that a municipality is obliged to do so. Additionally, there is no provision of which I am aware in either the Buckley Amendment or the regulations promulgated thereunder that would require the compilation of a new record in such a manner that students would not be identified.

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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1154

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

June 6, 1979

Mr, Kevin McGraw
Room 519
Capitol
Albany, NY 12224

Dear Mr. McGraw:

Thank you for seeking my views regarding A. 7112 and its counterpart, S. 6089. The proposal deals largely with disclosure of trade secrets and would, if enacted, amend the Public Officers Law, the Penal Law and the Executive Law.

As Executive Director of the Committee on Public Access to Records, which is charged with the duty of advising with respect to the Freedom of Information Law (Public Officers Law, §§84-90), my comments will be directed only to those portions of the bill that pertain to the Public Officers Law.

It is emphasized at the outset that the bill in my opinion is defective in several areas.

First, the general thrust of the proposal is contradictory to both statutory and common law. Section 5 of the bill would place the burden on the government to demonstrate that records should not be considered trade secrets and, therefore, "exempted" from disclosure. Stated differently, while government through the years has been required to prove why it should not disclose, here it would be required to prove why it should disclose. Moreover, from an historical perspective, long before the enactment of the Freedom of Information Law in 1974, the courts held that a request for or a stamp of confidentiality or privilege regarding records submitted to government by third parties is all but meaningless. "[T]he concern...is with the privilege of the public officer, the recipient of the communication." [Langert v. Tenney, 5 A.D. 2nd 586, 589 (1958); see also People v. Keating, 286 App. Div. 150 (1955); Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974).] The passage of the Freedom of Information Law confirmed this principle by placing the burden of defending secrecy on the government, the custodian of records, rather than a third party that may have submitted records to the government.

Second, and perhaps most important, the proposed §89(5)(f) would prohibit an officer, employee or agent of an entity subject to the Freedom of Information Law from disclosing information designated as a "trade secret". The problem here is that once a record is designated a trade secret, it could forever remain a trade secret and exempt from disclosure. Today's trade secret may be tomorrow's common knowledge. As stated in a recent congressional study of the federal Act's trade secret exemption, "commercial or financial information loses its confidential character over time and a determination of confidentiality made at an earlier time can become meaningless" [House Report No. 95-1382, Freedom of Information Act Requests for Business Data and Reverse - FOIA Lawsuits, p. 35 (1978)]. The proposal would needlessly and even harmfully block disclosure of records once, but no longer, justifiably deniable.

Additionally, Congress has considered and rejected the possibility of incorporating an agency's promise of confidentiality into a statutory framework:

> "[T]he promise of confidentiality test... establishes no standards for deciding when a promise should be made and agencies would appear to have complete discretion. Yest, as experience with the predecessors of FOIA demonstrated, agencies have no inherent interest in making documents public. Thus, it is likely that promises of confidentiality would have been bestowed freely upon all who asked, especially when sought be those who regularly did business with the agency. As a result, the promise of confidentiality test could have led to the withholding of almost all documents submitted to an agency. In addition, the test provides no guidance in cases where the confidentiality issue was not initially contemplated by either party." (id. at 17)

I prefer the standard contained in the existing Freedom of Information Law, for it provides flexibility as well as a test that is readily understood. Specifically, §87(2)(d) of the Freedom of Information Law provides that an agency may withhold records 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."

Under the existing standard, the test involves a finding that disclosure "would cause substantial injury" to the subject of the records. The language is suitably flexible to withhold trade secrets now, but disclose the same records when the harmful effects of disclosure disappear over the course of time and the expansion of general knowledge of matters that may initially be known by few.

Again, the proposal would effectively handcuff government.

It is also noted that although the New York Freedom of Information Law is similar to the federal Act in structure, the State Legislature recognized many of the drawbacks of the federal Act and corrected them. For example, the "trade secret" exemption in the federal Act states that a federal agency may withhold:

> "trade secrets and commercial or financial information obtained from a person and privileged or confidential" [5 U.S.C. §552(b)(4)].

Due to the vagueness of the quoted provision, it has been the subject of virtually hundreds of lawsuits.

By incorporating the "substantial competitive injury" test developed by the federal courts in the New York Freedom of Information Law, many of the problems faced by federal agencies have been eliminated in New York. In fact, I am aware of only one suit in New York that has focused on the trade secret exception. In that case, a denial by the Insurance Department was upheld [see Matter of Belth, 406 NYS 2d 649 (1978)].

In view of the foregoing, there is absolutely no evidence to which one can point that indicates a need for this legislation in New York. Unlike the federal experience, to my knowledge, no "reverse" freedom of information cases have been initiated. In short, it appears that government in New York is sensitive to the needs of corporate enterprise, and that the Freedom of Information Law is working as intended.

Third, paragraph (g) of the proposed §89(5) would require "each entity" subject to the Freedom of Information Law to promulgate detailed rules and regulations concerning the treatment of trade secret information. In my opinion, the provision is unnecessary and potentially costly to government. "Each entity" would include every county, city, town, village, school district, state agency, commission, board and any orther entity performing a governmental function [see Freedom of Information Law, §86(3)]. Thousand of entities, many of which might never gain custody of trade secrets, would nonetheless be required to expend time and perhaps legal fees in the preparation and promulgation of rules and regulations concerning trade secrets.

In sum, I believe that more thought, study and proof of the necessity of greater protection in the area of disclosure of trade secrets should be gained prior to passage of the bill in question or any analogous proposal. Passage of the bill would in my view be premature and potentially harmful to the government and the public interest generally.

Once again, I thank you for seeking my comments. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1155

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

June 7, 1979

Mr. Joseph Zuckerman
[redacted]

Dear Mr. Zuckerman:

I have received your letter of May 25 regarding the absence of procedures adopted by the Office of Court Administration ("OCA") under the Freedom of Information Law. You have asked further whether the Committee has the authority to compel OCA to comply with the Freedom of Information Law.

First, the Committee has no power to enforce the Freedom of Information Law; its authority is solely advisory.

Second, OCA has long contended that it is not subject to the Freedom of Information Law, for it falls outside the definition of "agency" appearing in §86(3) of the Freedom of Information Law.

I disagree with OCA's contention based upon the following argument.

"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." The term "judiciary" is defined in §86(1) of the Freedom of Information Law to include "the courts of the state, including any municipal or district court, whether or not of record."

While the OCA is connected to the courts, it is not a court itself; it has no authority to interpret the law, as in the case of a court of record. OCA is not "judicial," but rather is the administrative arm that

manages the court system. Consequently, the exemption in the Freedom of Information Law regarding the "judiciary" does not in my view include administrative agencies such as OCA.

Despite the rationale presented above, OCA has consistently refused to accept the notion that it is not a court, but rather an "agency."

In view of the foregoing, I regret that there is little that I can do to assist you further.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Honorable Herbert Evans

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1156

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

June 7, 1979

[redacted]

Dear [redacted]:

I have received your letter of May 28 regarding your unsuccessful attempts to gain access to court orders, Social Service reports, your own medical records and similar documents related to divorce and custody proceedings.

It is noted at the outset that the Freedom of Information Law does not apply to records in possession of the courts. However, I believe that many of the court records in which you are interested should be made available to you. For example, enclosed is a copy of the Domestic Relations Law, §235, which generally restricts access to records pertaining to matrimonial proceedings to the public, but clearly grants access to a party, such as yourself.

With respect to records that may be in possession of a Family Court, §166 of the Family Court Act states that records in possession of a Family Court shall not be open to "indiscriminate" public inspection. Under the circumstances, I believe that you should attempt to go before a Family Court judge, explain your situation and seek access to the records in which you are interested by means of a plea to the judge.

In all honesty, I do not know what more can be suggested. However, I do recommend that you seek to discuss the matter with your attorney once again, or seek another form of legal aid.

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/kk

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1157

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

June 7, 1979

Mr. Richard White
Chenango Valley Central
School District
Social Studies Department
768 Chenango Street
Binghamton, New York 13901

Dear Mr. White:

I have received your letter of May 26 concerning your research regarding an Indian settlement known as "Ganienkeh". You have indicated that you are particularly interested in State Police records.

It is noted at the outset that the Committee on Public Access to Records is charged with the responsibility of providing advice with respect to the Freedom of Information Law. It does not have possession of records, nor does it have the capacity to compel agencies to grant access to records or otherwise comply with the Freedom of Information Law. Further, requests for records should be directed to the "records access officers" of the agencies in possession of the records in which you are interested.

To assist you, I have enclosed copies of the Freedom of Information Law, the regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law, and an explanatory pamphlet on the subject. In addition, it is suggested that you contact Mr. Robert Batson of the Division of Legal Affairs at the Department of State and Jeremiah Jochnowitz of the Department of Law. Both have been involved in Indian land claims and may be able to provide you with direction.

In terms of the specific records that you mentioned, I have no knowledge of whether the information that you are seeking exists. With respect to historical research, perhaps either Mr. Batson or Mr. Jochnowitz could provide assistance. Similarly, the same individuals would know whether yearly summary reports on the subject exist.

Finally, you asked for "contingency plans to handle violence or an armed raid on the Indian settlement while it was at Moss Lake." In my opinion, it is possible that such records may to an extent be justifiably denied under the Freedom of Information Law.

For example, under §87(2)(e) of the Law, an agency may deny access to records compiled for law enforcement purposes under certain circumstances. In addition, §87(2)(f) of the Law provides that records may be withheld if disclosure would "endanger the life or safety of any person." As I mentioned before, although I do not know whether the records in question exist, it is possible that the effects of disclosure might be harmful.

Once again, it is suggested that you direct your request to the agencies in possession of the records and contact the individuals to whom reference was made earlier.

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/kk

Encs.

bcc: Robert Batson

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1158

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

June 7, 1979

Mr. and Mrs. Elton Cooper
[redacted]

Dear Mr. and Mrs. Cooper:

You have asked for my opinion regarding the adequacy of a request made under the Freedom of Information Law, a copy of which you sent to this office.

In your request, it was indicated that you applied for "a copy of the job descriptions and duties of our Superintendent of Schools."

In my opinion, the request was adequate, for §89(3) of the Freedom of Information Law states in relevant part 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 respond in accordance with the remaining provisions of §89(3). In my view, since the request is reflective of a "record reasonably described," you have met your burden under the Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1159

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

June 8, 1979

Mr. and Mrs. Elton Cooper
[redacted]

Dear Mr. and Mrs. Cooper:

I have received your letter of June 5 regarding a denial by the Andover Central School District of your request for a copy of the contractual agreement entered into between Curville Jordan, the Superintendent of Schools, and the Board of Education. The correspondence appended to your letter indicates that Mr. Jordan has contended that disclosure of the contract would result in an unwarranted invasion of personal privacy.

In my opinion, the contract or contract in which you are interested should be made available.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a school district, are accessible, except to the extent that records or portions of records fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h). Under the circumstances, I do not believe that any of the grounds for denial may appropriately be raised.

While §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy," case law interpreting the privacy provisions of the Law in my view can be cited as a basis for disclosure. The Courts have consistently determined that public employees require less protection in terms of privacy than the public generally. In brief,

the courts have held that records that are relevant to the performance of the official duties of public employees are accessible, for disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees which have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Under the circumstances, a contract which determines the relationship between a School Board and the Superintendent of Schools and sets forth the parameters of the duties of a superintendent would clearly be relevant to the performance of the official duties of both a superintendent and the board. Consequently, I believe that any contract between a superintendent and a board of education is clearly available under the Freedom of Information Law.

Moreover, §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abridge rights of access previously granted by other provisions of law or by means of judicial determination. In this regard, §51 of the General Municipal Law has for decades provided that contracts to which a public corporation, including a school district, is a party are available. In addition, §2116 of the Education Law has since 1947 stated that:

> "[T]he records, books and papers belonging or appertaining to the office or 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 foregoing, I do not believe that any provision of the Freedom of Information Law can effectively be cited to restrict rights of access to records that had been available long before the passage of the Freedom of Information Law.

In sum, the contracts in which you are interested are in my opinion accessible.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Richard Godown
Curville Jordan
Bruce Lehman
Paul McCormick
Virginia Milligan
Helen Terry
Mary Kay Slade

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1160

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

June 11, 1979

Alvin Stirling
76A 1777
Fishkill Correctional Facility
Box 307
Beacon, New York 12508

Dear Mr. Stirling:

I have received your letter of May 29 concerning allegations that the contents of your presentence report are inaccurate. You stated further that your letter should be deemed an appeal of a denial by the Department of Probation in Brooklyn.

It is noted at the outset that the Committee on Public Access to Records is charged with the responsibility of advising with respect to the Freedom of Information Law. Although agencies are required to transmit appeals and the determinations that follow to the Committee, the Committee is not the appropriate agency for determining the appeal to which you made reference. On the contrary, your appeal should be sent to the agency to which your initial request was directed.

In addition, I have made several inquiries on your behalf in order to provide a proper response. Having discussed the matter with the Counsel to the New York State Division of Probation, I was informed that the most applicable provision of law under the circumstances is §400.10 of the Criminal Procedure Law, a copy of which is attached. In brief, the cited provision states that a presentence conference may be held in an open court or in chambers in order to "resolve any discrepancies between the pre-sentence report, or other information the court has received, and the defendant's pre-sentence memorandum submitted pursuant to section 390.40..." As such, it appears that discrepancies in the presentence report should have been brought to the attention of the court before the pronouncement of sentence. Based upon my discussion with the Counsel to the Division of Probation, it appears unlikely that a court will reopen the case to review the matter.

Nevertheless, it may be worth your while to write to the court in which you were sentenced and contact an attorney to assist you. Perhaps you can contact the local office of Prisoners Legal Services.

Lastly, it is noted that the Probation Department in Brooklyn could not have legally provided access to the records in question, for only a court can do so under the provisions of §390.50 of the Criminal Procedure Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1161

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

June 11, 1979

Mr. Ralph DeHart
President
CONCERN
Box 621
Port Jefferson, NY 11777

Dear Mr. DeHart:

I have received your letter of June 4, in which you inquired whether the Central Islip Psychiatric Center "is exempted in any way from the requirements of the Freedom of Information Act." You also asked whether the Center is required to have an application form for the purpose of making requests.

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject. Relevant to your inquiry is §86(3) which defines "agency" to include any "governmental entity" performing a "governmental" function. Consequently, I believe that the Central Islip Psychiatric Center is an "agency" subject to the Freedom of Information Law in all respects.

Nevertheless, it is noted that provisions of the Mental Hygiene Law, such as §33.13, a copy of which is attached, require that records identifiable to patients be kept confidential, except under specified circumstances. Therefore, if any of the records that you have requested identify patients, they may in my view be withheld under the Mental Hygiene Law. However, if your requests deal with policies and procedures, for example, the records sought should in my view be available.

With respect to an application form, §89(3) of the Freedom of Information Law merely requires that an applicant "reasonably describe" the records sought in writing. There is no requirement that a specific form be completed. In fact, the Committee has consistently advised that a

failure to complete a prescribed form cannot constitute a valid ground for a denial of access, and that any written request that reasonably describes the records requested should suffice.

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

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1162

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

June 11, 1979

Vincent Assini, Esq.
Town Attorney
Town of Gates
1605 Buffalo Road
Rochester, New York 14624

Dear Mr. Assini:

Thank you for your letter of June 1 relative to requests made by Barbara Letvin concerning reports regarding the Town and the Town Justice.

As you indicated, one or more among several provisions of law may be applicable with respect to rights of access to the records in question. I merely wish to state in this regard that Ms. Letvin or any other member of the public in my view has the right to inspect and copy the records, regardless of the provision of law under which the records must be made available. Whether the Freedom of Information Law, §255 of the Judiciary Law or §2019-a of the Uniform Justice Court Act might appropriately be cited to gain access to the records is largely a technicality, for the records are in my view accessible under one or more of those statutes.

In terms of your discussion of the term "audit", I do not feel that the term is particularly significant. While the original Freedom of Information Law made specific reference to "audits" in its list of accessible records [see original Freedom of Information Law, §88(1)(d)], the New Freedom of Information Law, effective January 1, 1978, no longer makes reference to audits due to a reversal of the presumption in the statute. In brief, the original Law provided access to specified categories of records to the exclusion of all others. The amended statute, however, provides that all records are available, except those records or portions thereof that fall within one or more categories of deniable information listed in §87(2)(a) through (h). Moreover, the significance of the term audit is further minimized by the definition of "record"

appearing in §86(4) of the Law. As you are aware, "record" is defined to include any information "in any physical form whatsoever" in possession of an agency. Therefore, the only question that an agency may ask when it receives a request for records is the extent to which records sought fall within the categories of deniable information, if any.

In conjunction with the factual situation that you presented, you wrote that Ms. Letvin has demanded a copy of the record from the Town under the Freedom of Information Law, but that the Justice insisted that it is not a Town but a Court record available only from him under §255 of the Judiciary Law. According to your letter, it is your view that "any records related to the reconciliation of the Justice Court, Bail and Fine Accounts are Justice Court Records" and, therefore, access is governed by §255 of the Judiciary Law.

If the record in question is in the possession of the Town, I respectfully disagree with your contention. As noted earlier, under the definition of "record", once information is in possession of the Town, it is subject to rights of access granted by the Freedom of Information Law. If, on the other hand, the records have been and continue to be in possession of the Town Justice, I would agree that §255 would be the statute appropriately cited for the purpose of gaining access.

In sum, if the record or records are in possession of the Town rather than the Town Justice, or both, I believe that they are 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/kk

cc: Supervisor Hart
Judge Cerretto
Councilwoman Letvin

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1163

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

June 12, 1979

Mr. Peter R. Sportello
[redacted]

Dear Mr. Sportello:

Your letter addressed to Lieutenant Governor Cuomo has been transmitted to the Committee on Public Access to Records, of which the Lieutenant Governor is a member, and which is responsible for advising with respect to the Freedom of Information Law. Please be advised that the correspondence was delivered to this office on June 7.

Having reviewed your letter and the correspondence, I contacted Eugene Fox, Corporation Counsel to the City of Yonkers on your behalf. Mr. Fox informed me that the City has responded to your requests to the extent possible, and that you were given an opportunity to review all of the summonses issued on March 3, 1979.

With respect to your other request for the names, shield numbers and tours of duties of individual officers assigned on a particular date, it is noted that §89(3) of the Freedom of Information Law specifically states that an agency need not create a record in response to a request. Therefore, if no record reflective of the information requested exists, the City of Yonkers need not compile or tabulate such a record on your behalf.

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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1164

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

June 12, 1979

Mr. Harold Richardson
[redacted]

Dear Mr. Richardson:

I have received your letter of June 6 as well as the correspondence appended to it.

In a letter dated May 15 addressed to the Supervisor of the Town of Geddes, you requested customers' account records for 1978 and 1979, the annual budget for the years 1978 and 1979, and ledger accounts and copies of paid vouchers and checks for the same years regarding the Westvale Water District.

In response to your inquiry, the Supervisor advised you that the Town would be unable to comply with any of the requests "because of the amount of work that has to be done at the present time." In addition, in a letter dated June 4, the Town Attorney advised you that each of the requests, except those dealing with the budgets, would be denied on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Without additional information regarding the contents of the records in question, it is difficult to provide specific advice. Nevertheless, I believe that the denials may be overly broad.

Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof the disclosure of which would result in an "unwarranted invasion of personal privacy." However, since there may be "unwarranted" invasions of personal privacy there must also be permissible invasions of personal privacy. In this regard, there are other statutes which

specifically grant access to vouchers, checks and similar documentation. 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..."

In my view, implicit in the provision quoted above is the notion that disclosure of certain documents would result in a permissible as opposed to an unwarranted invasion of personal privacy.

Moreover, by means of analogy, one can reach a similar conclusion with respect to other records. For example, although the Town's assessment roll contains personally identifiable information and indicates the tax on a parcel of real property and whether or not the tax has been paid, the courts have long held that such information is available to the public. In that instance, I believe that the establishment of rights of access to assessment records indicates that disclosure of some personal details would result in a permissible rather than an unwarranted invasion of personal privacy. If the records sought in your case are similar to the assessment records, I believe that they should be made available to you.

In the alternative, if disclosure of identifying details would result in an unwarranted invasion of personal privacy, the Town would in my opinion be required to delete identifying details in a situation in which copies are requested. It is noted, however, that an agency, such as the Town may charge up to twenty-five cents per photocopy. In addition, the Town may request payment in advance. Consequently, it is possible that the request for copies of all of the documents in which you are interested would result in a sizeable fee.

Lastly, it is possible that the Town would be more willing to grant access if the requests could be somewhat narrowed.

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: Manuel M. Martinez, Town Supervisor
David Rollinson, Town Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1165

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

June 14, 1979

[redacted]

Dear Mr. Krolikowski:

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

Your first question concerns rights of access to records of former or current patients by patients themselves at New York State psychiatric centers. You also asked whether patients have the right to review the records and "legally order" corrections regarding "entries they consider to be biased."

The Freedom of Information Law states that all records in possession of government are available, except those which fall within one or more enumerated categories of deniable information [see attached Freedom of Information Law, §87(2)]. However, one of the exceptions provides that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." With respect to the records in which you are interested, there is a provision in the Mental Hygiene Law, §33.13, that requires the confidentiality of patient records, except under the circumstances described in that section (see attached). Having reviewed the cited provision, if you are interested in records pertaining to yourself, for example, I believe that the most appropriate means of seeking records would involve a request directed to the Commissioner. In brief, patients do not have rights to records pertaining to themselves, except as provided in §33.13. Similarly, there is no "right" to seek alteration of the contents of the records. Nevertheless, it is possible that amendments might be added to the records if it can be demonstrated that the records are inaccurate.

Your second question concerns rights of access by the subjects of the records from the Office of Vocational Rehabilitation. In this regard, §1007 of the Education Law prohibits the disclosure of records concerning vocational rehabilitation. However, I believe that the regulations promulgated by the Education Department have been recently altered to permit the subjects of records to inspect and copy them. It is suggested that you contact the Office of Vocational Rehabilitation at the State Education Department to obtain more specific advice regarding rights of access.

Lastly, you have asked for a rendition of the purposes, duties and obligations of the Mental Health Information Service. Enclosed for your consideration are copies of §29.09 of the Mental Hygiene Law, which describes the duties of the Mental Health Information Service. In addition, also enclosed is a copy of §9.07 of the Mental Hygiene Law, which requires that patients be given a notice of their rights and the availability of the Mental Health Information Service.

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.

Municipal Law, §51 and County Law, §208).

Lastly, I cannot see how disclosure could impair future negotiations regarding eminent domain, for there are but two parties, the County and a landowner. Therefore, third parties would not have the capacity to disrupt negotiations by making additional or different offers, whether higher or lower. In short, based upon the circumstances of which I am aware, disclosure would not in my opinion likely diminish the government's ability to enter into a favorable 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
Executive Director

RJF:jm

cc: James G. Sweeney, County Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1166

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

June 14, 1979

Gerald A. Lennon, Esq.
Jacobowitz and Gubits
158 Orange Avenue
P.O. Box 367
Walden, NY 12586

Dear Mr. Lennon:

I have received your correspondence of June 11 and your request for an advisory opinion. According to the materials as well as our telephone conversation, you have unsuccessfully attempted to gain access to three appraisals in possession of Orange County.

In my opinion, the appraisals, which relate to the acquisition of real property, are available.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as Orange County, are available, except those records or portions thereof that fall within one or more enumerated categories of deniable records appearing in §87(2)(a) through (h) of the Law. None of the exceptions could in my view under the circumstances be effectively cited to withhold the appraisals in which you are interested.

In our conversation, you emphasized that the three appraisals relate to parcels of real property for which title has already closed. Thus it is clear that the transactions to which the appraisals relate have been consummated. You have further indicated that, to the best of your knowledge, there is no possibility of the initiation of litigation regarding the three parcels under the Eminent Domain Law. This factual background is important, for the exceptions in the Freedom of Information Law are based largely upon the effects of disclosure.

The County has argued that the appraisals constitute materials prepared for litigation and therefore would be exempted from disclosure pursuant to §87(2)(a) of the Freedom of Information Law when read in conjunction with §3101(d) of the Civil Practice Law and Rules. In this regard, it appears that the appraisals were created in the ordinary course of business. Although it is possible that particular appraisals or similar documents might relate or be relevant to litigation that could ensue, it does not appear that they were compiled solely for the preparation of litigation. If this contention is accurate, neither §87(2)(a) of the Freedom of Information Law nor §3101(d) of the Civil Practice Law and Rules could in my opinion be cited appropriately as a ground for denial.

As stated in your petition, the extant case law on the subject tends to confirm this argument. In Westchester-Rockland Newspapers v. Mosczydlowski (58 AD 2d 234), the Appellate Division held that records compiled for multiple purposes, one of which might be litigation, would not qualify for the exception in question.

Although case law has held that records reflective of "inchoate" or uncompleted transactions might justifiably be denied, since those records relate to transactions that have not been consummated, the records in question in this instance pertain to transactions that have been consummated [see Sorley v. Village of Rockville Centre, 30 AD 2d 882 (1968)].

The only remaining exception to rights of access that might have relevance to the controversy is §87(2)(c), which states that an agency may withhold records or portions thereof which "if disclosed would impair present or imminent contract awards..." In my view, it is doubtful that the County could meet its burden of proving that disclosure of appraisals relating to transactions that have been consummated would impair its ability to engage in contractual relationships in the future as required by §89(4)(b) of the Freedom of Information Law (see Church of Scientology v. The State, 46 NY 2d 906), for any contractual agreements arrived at pertaining to the three parcels are in my view now available under the General Municipal Law, §51, the County Law, §208, and the Freedom of Information Law. In addition, related or similar documents would also be accessible from the County due to its financial and accounting requirements and responsibilities (see General Municipal

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-
FOIL-AO- 1167

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

June 15, 1979

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

I apologize for the delay in responding to your letter. Your question concerns the application of the Freedom of Information Law to records in possession of the State Legislature and the status of committee of a public body under the Open Meetings Law.

First, you have asked whether the Freedom of Information Law requires the State Legislature "to disclose all information about the workings of the legislature", including a detailed line item budget and a monthly list of staff assignments, for example. In this regard, I direct your attention to §88 of the Freedom of Information Law, which describes the obligations of the State Legislature under the Law. Specifically, §88(2) lists the categories of records in possession of the State Legislature that must be made available. Since budgets, for instance, are passed in the form of bills, such records are available pursuant to paragraph (a) of the cited provision. In addition, paragraph (f) provides access to:

> "internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law..."

Therefore, statistical or factual tabulations that relate to the budget, the budget process, and the "workings" of the Legislature in which you were interested are in my view available. Additionally, §88(3)(b) requires each house of the Legislature to maintain "a record setting forth the

name, public office address, title and salary of every officer and employee." Therefore, one can determine who works for the Legislature and how much legislative employees are paid.

It is emphasized, however, that §89(3) of the Freedom of Information Law states that an entity subject to the Law need not create a record in response to a request. Consequently, if there is no line item budget in existence, for example, the Legislature would have no obligation to create such a list on your behalf.

With respect to meetings of committees of a public body, this Committee has consistently advised that such entities are public bodies subject to the Open Meetings Law in all respects. While committees and subcommittees might not consist of a quorum of a governing body, they are in the Committee's view entities separate and distinct, which themselves must act by means of a quorum, a majority of their total membership.

Nevertheless, the only appellate court decision rendered to date on the subject held that committees and subcommittees that have no power to take final action, but merely the authority to recommend, do not "transact" public business and therefore are not public bodies subject to the Open Meetings Law (Daily Gazette Co., Inc. v. North Colonie Board of Education, 412 NYS 2d 494).

The ramifications of the Daily Gazette decision are discussed in the Committee's third annual report to the Legislature on the Open Meetings Law, a copy of which is attached. In the report, legislation was recommended to remedy the situation and to give effect to the clear intent of the Legislature as evidenced in the debate that preceded passage of the Open Meetings Law. At the present time, a bill to amend the Open Meetings Law which if enacted would clearly include committees and subcommittees within the definition of "public body" has passed the Assembly and is now before the Senate. I am hopeful that the bill will be passed by the Senate this session. I have enclosed a copy of the bill for your consideration.

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
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1168

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

June 19, 1979

Daniel J. Kryston, Esq.
[redacted]

Dear Mr. Kryston:

I have received your letter of June 15 in which you made reference to an opinion previously rendered at the request of David Greenberg and have raised questions concerning the Freedom of Information Law and the Family Educational Rights and Privacy Act (20 USC 1232g), which is also known as the "Buckley Amendment."

As you are aware, although I have engaged in discussions regarding the issue with you and Mr. Greenberg for several weeks, I did not realize until recently that both of you were concerned with the same controversy.

It is noted that my response to Mr. Greenberg was based upon apparently hypothetical questions that he raised. While I do not want to provide what may appear to be conflicting responses, I do not believe that the advice contained in the opinion rendered at the request of Mr. Greenberg and the advice appearing in the ensuing paragraphs are mutually exclusive or in conflict. In short, answers often, as in this instance, depend upon the manner in which the questions are phrased.

To lay the groundwork, it is emphasized at the outset that the Freedom of Information Law is applicable to records in possession of government in New York. The Law states that all records are available, except those records that fall within one or more categories of deniable information enumerated in the Law. Relevant to the issues is §87(2)(a), which states that an agency may withhold records or portions of records that are "specifically exempted from disclosure by statute. A relevant statute in this case is the Buckley Amendment, which generally pro-

And finally, your third question concerns what must be done to provide access in a situation in which a school district, upon request for records, reveals "an alleged identifying detail of a test scores (sic.) tabulations which was unknown to the requestor and then utilize that revelation to deny access?" In my view, if, for example, a record is requested and it is later determined that the record contains identifying details, even though the identifying details may be unknown to the applicant, an agency may nonetheless withhold the records if there is an appropriate ground for denial found in a statute such as the Freedom of Information Law or the Buckley Amendment. In such a situation, as suggested earlier, perhaps multiple copies of a single record could be made in order that individual scores could be made available on separate sheets while deleting identifying details regarding the remainder of the information that appears on the original document.

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: David Greenberg

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1169

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

June 20, 1979

Mr. Eugene J. Corsale
Assessment Department
City of Saratoga Springs
Office of Commissioner of
Accounts
Room 5 - City Hall
Saratoga Springs, NY 12866

Dear Mr. Corsale:

I have received your letter of June 8 as well as the forms appended to it. Your question is whether the income information on an application form for a real property tax exemption must be shown to the public on request.

It is noted at the outset that the Freedom of Information Law states that all records in possession of government are available, except those records or portions of records that fall within one or more enumerated categories of deniable information.

Relevant to your inquiry is §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy." Having reviewed the application, I believe that portions may be withheld on the basis of the direction provided by §87(2)(b). For example, item 9, which makes reference to funds paid to the applicant by the United States Government, the State of New York, as well as insurance dividends retained by the United States Government, could in my opinion be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Analagous information required to be submitted to the Internal Revenue Service and the State Department of Taxation and Finance are confidential on the basis of privacy. Similary, I believe that all of the information contained within item 10, except the full purchase price of the property to which reference is made on line 1, may be denied. Lastly,

item 2 on the "Renewal Application for Partial Tax Exemption for Real Property of Aged Persons" also requires a listing of the income of the applicants. This item, too, may in my view be justifiably withheld.

In a case in which a member of the public requests copies of the records, it is suggested that copies be made from which the appropriate portions could be deleted. By so doing, the public could gain access to basic information regarding an application for an exemption, while the protection of the privacy of the applicant would concurrently be protected.

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-1170

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

June 21, 1979

Mr. Robert H. Harper
[redacted]

Dear Mr. Harper:

I only recently received your letter of May 31 regarding the Freedom of Information Law (see attached). Please note that the mailing address of the Committee has been changed and that Mr. Tomson has not been employed by the Committee for almost four years.

Your letter concerns unsuccessful attempts to gain access to records in possession of the Village of Ossining relative to the acquisition and demolition of the Starlin Building. You have asked what action may now be taken and whether there is an appeal procedure.

First, having reviewed your request, it appears that much of the information in which you are interested is available. As you are aware, rights of access are substantial under both §51 of the General Municipal Law and the Freedom of Information Law, which is based upon a presumption of access. In brief, §87(2) of the Law states that all records in possession of an agency are available except those records or portions thereof that fall within one or more categories of deniable information.

Under the circumstances, rights of access to some of the records might be contingent upon whether the transaction relative to the Starlin Building has been consummated. If there are details yet to be resolved concerning the property, it is possible that portions of the records might justifiably

be withheld under §87(2)(c) of the Law which provides that an agency may withhold records or portions thereof which if disclosed would "impair present or imminent..." contract awards. If, for example premature disclosure would preclude an agency from completing a transaction, to that extent records may likely be denied [see e.g., Sorley v. Village of Rockville Centre, 30AD 2d 822 (1968)]. However, if the transactions to which the records relate have been consummated, the exception to which reference was made would not in my opinion be applicable.

The only other ground for denial that I can envision as applicable is §87(2)(g), which 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 an agency may withhold intra-agency or inter-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records.

In terms of procedure, both the Law [§89(3)] and the regulations promulgated by the Committee (see attached), which have the force and effect of law, require that an agency respond to a request within five business days of its receipt. The response can take one of three forms. First, an agency can grant access. Second, an agency may deny access. And third, an agency may within five business days acknowledge receipt of the request and take ten additional

business days to grant or deny access. If for any reason any portion of a request is denied, the denial must be stated in writing, providing the reasons therefor, apprising the applicant of his or her right to appeal and including the name and address of the person or body to whom the appeal should be directed. On receipt of an appeal, the appeals person or body has seven business days to render a final determination in writing. In addition, §89(4)(a) of the Law requires that appeals and the determinations that ensue must be transmitted to the Committee. In a situation in which no response is received within the time limits discussed, the request may be considered denied and you may appeal. An appeal may be made within thirty days of an initial denial.

Should an agency deny access on appeal, you may challenge the denial by means of the initiation of an Article 78 proceeding. However, it is emphasized that §89(4)(b) of the Law requires that the agency prove that the records withheld in fact fall within one or more of the ground of deniable information appearing in §87(2).

Finally, it is suggested that you renew your request in order that the appeals procedure described above can be followed. Since more than thirty days have transpired since your request was made, perhaps it would be most appropriate to renew 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/kk

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1171

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

June 21, 1979

Mr. and Mrs. Donald G. Schafer
[redacted]

Dear Mr. and Mrs. Schafer:

Your letter addressed to Lieutenant Governor Cuomo has been transmitted to the Committee on Public Access to Records, of which the Lieutenant Governor is a member, and which is responsible for advising with respect to the Freedom of Information Law. Your questions concern a series of events regarding a proceeding initiated in the Steuben County Family Court. In addition, you have indicated that you are not sure whether the decision initially rendered has been appealed.

It is noted at the outset that the Freedom of Information Law, a copy of which is attached, specifically excludes the courts and court records from its coverage [see definition of "agency" §86(3); definition of "judiciary" §86(1)]. However, the Judiciary Law and various court acts provide substantial rights of access to records in possession of the courts and court clerks.

First, §166 of the Family Court Act provides that a Family Court shall not permit "indiscriminate" public access to its records. Under the circumstances, it is suggested that you attempt to go before the Family Court Clerk or a Family Court Judge and explain the basis for your request. In addition, virtually all records submitted to an appellate court are available under §255 of the Judiciary Law. In this regard, I suggest that you contact the clerk of the Appellate Division, Fourth Department, to determine whether an appeal has been filed and, if so, you should request to

inspect the records filed with the Court in conjunction with the appeal.

If no appeal has been filed and you have been misled, perhaps you should contact your local bar association and its grievance 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/kk

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1172

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

June 21, 1979

Mr. Walter Koupash
[redacted]

Dear Mr, Koupash:

I have received your letter of June 12 concerning your unsuccessful attempts to gain access to records in possession of the Bolton Central School District. Specifically, you have requested minutes of meetings of the Board of Education and information regarding legal fees paid by the District over a "period of time."

In my opinion, the records in which you are interested are clearly available.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, including a school district, are available, except those records that fall within one or more enumerated categories of deniable information appearing in §87 (2)(a) through (h) of the Law (see attached). Under the circumstances that you described, none of the records in which you are interested could in my opinion be justifiably denied.

Minutes of meetings are accessible under the Freedom of Information Law, as well as §51 of the General Municipal Law and §2116 of the Education Law, both of which have long granted access to such records.

Although a school board may engage in an attorney-client relationship with its attorney, the courts have held that records reflective of fees paid by a client to an attorney fall outside the scope of the privilege and therefore are available [see People v. Cook, 372 NYS 2d 10 (1975)].

With respect to procedure, §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law, provide that an agency must respond to a request made in writing within five business days of its receipt of the request. Within the five day period the agency may grant access, deny access or acknowledge receipt of the request. When the request is acknowledged in writing, the agency has ten additional business days to grant or deny access. If no response is given within the time periods described above, the request is considered a denial that may be appealed to the head or governing body of the agency or whomever has been designated to determine appeals. If the District responds by means of a denial, the denial must be in writing giving the reasons therefor, and it must apprise the applicant of his or her right to appeal and provide the name and address of the person or body to whom an appeal should be directed. An appeal may be made within thirty days of a denial. On receipt of the appeal, the appeals person or body has seven business days to render a determination fully in writing. In addition, copies of appeals and the determinations that ensue must be transmitted to the Committee.

Lastly, in the event that an agency denies access on appeal, you may challenge a denial by means of the initiation of an Article 78 proceeding. In such a proceeding brought under the Freedom of Information Law, the agency has the burden of proving that records withheld fall within one or more of the grounds for denial appearing in §87(2).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Lois Hiser, Clerk of the Board
Patricia Ann Lamb, Business Manager
Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1123

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

June 21, 1979

Ms. Frances Zamnik
[redacted]

Dear Ms. Zamnik:

I recently received your letter of June 7 concerning the status of a program, such as "Assistance for U.S. Citizens returned from Abroad", that is funded in toto by the federal government. Your question concerns whether such a program is subject to the New York State Freedom of Information Law or the Federal Privacy or Freedom of Information Acts.

It is noted at the outset that I have made numerous telephone calls on your behalf to attempt to determine the nature of the program to which you made reference. None of the federal agencies that I contacted, including the Department of State and the Immigration and Naturalization Service, were aware of the existence of the program under the name that you gave or any similar title.

Notwithstanding my lack of success, the application of each of the statutes that you mentioned is dependent upon whether such an office is considered an "agency" or a part of an agency as defined in the New York Freedom of Information Law, §86(3), or under 5 USC §551.

Section 86(3) of the New York 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 therof, except the judiciary or the state legislature."

Section 55(1) defines agency to mean "each authority of the Government of the U.S. whether or not it is within or subject to review by another agency..." The provision quoted above goes on to state that it does not include the Congress or the courts, for example.

Any office that falls within either of the definitions would be subject to the New York Law in the case of a New York State agency and both the Federal Freedom of Information and Privacy Acts in the case of a federal agency.

Lastly, it is noted that the receipt of government funding alone does not bring an office or a program within the scope of the statutes cited. However, if a program receives federal funding, it is likely that many records concerning the program would be available from the agency that funds 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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1174

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

June 25, 1979

Mr. Edward B. Meade
79A1396
Box B
Dannemora, New York 12929

Dear Mr. Meade:

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 tried unsuccessfully to gain access to a copy of a search warrant issued by the Town of Wawarsing Justice Court.

I have contacted the Office of Court Administration on your behalf and have been informed that the District Attorney, not the Justice Court, likely has possession of the record in which you are interested. I was also informed that your attorney might also have a copy.

In view of the foregoing, it is suggested that you direct your request to the District Attorney of the county in which you were convicted. Further, it might be worthwhile to attempt to gain assistance from a representative of Prisoners' Legal Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1175

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

June 25, 1979

Steven G. Asin, Esq.
Special Litigation Unit
The Legal Aid Society
Criminal Defense Division
15 Park Row
New York, New York 10038

Dear Mr. Asin:

I have received your letter of June 12 and the correspondence appended to it regarding your unsuccessful attempts to gain access to records regarding the reported suicide of an individual while housed at the New York City Central Booking Facility.

Although I have not yet received a copy of the final determination rendered on appeal by the New York City Police Department, you informed me that a final denial has in fact been rendered.

As we discussed, it is emphasized that the situation and the reports related to the factual circumstances you described are similar to, if not exactly the same as, those discussed in Westchester Rockland Newspapers v. Mosczydlowski [58 AD 2d 234 (1977); hereafter cited as "Westchester Rockland"]. That decision was rendered under the original Freedom of Information Law, which was less expansive in terms of rights of access and less specific in terms of grounds for denial than the amended Freedom of Information Law, which became effective January 1, 1978. In my opinion, the issues surrounding the case in which you are interested and the Westchester Rockland case should be decided in similar fashion.

In Westchester Rockland, a request was made for records involving a suicide committed by an inmate at a city jail. In response to the request, the City of Yonkers argued that the records were prepared for litigation and therefore were exempt. Arguments were also made that the records were "part of investigatory files compiled for law enforcement purposes" and as such should be withheld under the former §88(7)(d).

Notwithstanding those contentions, the court granted access to the majority of the information sought.

Under the amended Freedom of Information Law, I believe that much of the information requested is accessible. Nevertheless, the following arguments might be raised.

First, while it might be offered that the records in question were prepared for litigation, it is likely that the records, as in the Westchester Rockland case, were compiled for multiple purposes and were not prepared "solely" for litigation, but rather in the ordinary course of business. If that is the case, §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are "exempt from disclosure" by statute, cannot be cited as a basis for denial when read in conjunction with §3101 of the Civil Practice Law and Rules, which makes confidential material prepared for litigation.

A second ground for denial that might be raised 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;
>
> 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 provision quoted above would not be applicable at all if the records were compiled not for law enforcement purposes but in the ordinary course of business. Even if it could be argued with merit that the records were compiled for law enforcement purposes, it is questionable whether any of the bases for denial appearing in subparagraphs (i) through (iv) could appropriately be raised under the circumstances.

The only remaining ground for denial that might be cited is §87(2)(g), which 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 determination..."

The quoted provision contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must grant access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials.

Rights of access granted by §87(2)(g) of the amended Freedom of Information Law are consistent with the holding in Westchester Rockland as well as the stated intent of the sponsor of the original Freedom of Information Law, Senator Ralph J. Marino, who also sponsored the amendments to the Law. The court in Westchester Rockland instructed the lower court to review the records in camera and directed disclosure of "all severable portions consisting solely of factual matter" (id. at 239). As such, the court gave effect to the thrust of §87(2)(g) as it is now constituted even prior to its enactment. Similarly, factual information found in the records, or portions of the records reflective of Department policy or determinations, for example, should be made available.

In sum, the provisions of the amended Freedom of Information Law tend to reinforce the determination made in an analogous factual situation by the Appellate Division, Second Department, in Westchester Rockland. Consequently, I believe that the records in which you are interested should be made available in accordance with both prior case law and the direction provided in the amended Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Deputy Commissioner Conboy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1176

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

June 26, 1979

Francis J. Offermann, Jr., Esq.
Offermann, Fallon, Mahoney & Cassano
1776 Statler
Buffalo, New York 14202

Dear Mr. Offermann:

I have received your letter of June 14, in which you have requested an advisory opinion regarding a denial of access to records by the State Health Department and its State Board for Professional Medical Conduct.

Four groups of records were requested, each of which has been denied, based upon §87(2)(a), (b), (e) and (g) of the Freedom of Information Law and §50 of the Administrative Rules and Regulations promulgated by the Commissioner of Health.

It is noted at the outset that the powers and duties of the State Board for Professional Medical Conduct are set forth in §230 of the Public Health Law. Subdivision (9) of the cited provision states that "[N]either the proceedings nor the records..." of a committee on professional conduct "shall be subject to disclosure under article thirty-one of the civil practice law and rules..." except as otherwise provided. Despite the prohibition in §230(9) regarding the use of disclosure devices found in Article 31 of the Civil Practice Law and Rules, there is no analogous prohibition regarding confidentiality in general or an abridgment of rights that may exist under the Freedom of Information Law. Consequently, although rights of access granted by the Freedom of Information Law regarding records compiled pursuant to §230 of the Public Health Law may be uncertain, a distinction may be made between the prohibition of the use of the discovery and the potential to deny access under the Freedom of Information Law.

Among the grounds for denial that have been cited by the Health Department, only two in my view can be justified.

The first ground for denial is §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are "exempt from disclosure by state or federal statute." I do not believe that there is any statute which, under the circumstances, exempts the records in question from disclosure. Again, §230(9) of the Public Health Law exempts certain records from discovery by means of the vehicles generally available in Article 31 of the Civil Practice Law and Rules. While the use of those vehicles may be prohibited, there is no statement in the law that the records are confidential or otherwise exempt if a different vehicle may be employed, such as the Freedom of Information Law.

Another ground for denial is §87(2)(e) of the Freedom of Information Law, which 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 determinations rendered under both the original Freedom of Information Law and the amended Law, the courts held that the "law enforcement purposes" exception can appropriately be raised only by criminal law enforcement agencies [see Young v. Town of Huntington, 388 NYS 2d 978 (1976); Broughton v. Lewis,

Sup. Ct., Albany Cty. (1978)]. Although the State Board for Professional Medical Conduct may engage in investigations, I do not believe that it could be characterized as a "criminal" law enforcement agency. Therefore, §87(2)(e), based upon the case law rendered to date, could not in my opinion be cited as a valid ground for denial.

A third ground for denial that has been cited is §50 of the Administrative Rules and Regulations of the Commissioner of Health. In this regard, it has been held that rules and regulations adopted by an agency cannot be more restrictive than or abridge rights granted by a statute. In this instance it appears that the rules and regulations promulgated by the Commissioner, which do not constitute an exemption by "statute", may be more restrictive than the Freedom of Information Law. To that extent, the rules and regulations would in my view be of no effect [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405].

The remaining two grounds for denial, §87(2)(b) and (g), may to some extent have been properly cited by the Health Department to withhold the records sought. However, it is noted at this juncture that the introductory language of §87(2) of the Freedom of Information Law, the focal point of the Law, states that an agency may withhold "records or portions thereof..." in accordance with the eight grounds for denial that ensue in paragraphs (a) through (h). As such, it is implicit that there may be situations in which records may be both accessible and deniable in part. Further, the agency has the responsibility of reviewing the records sought to determine which portions, if any, may be withheld.

Section 87(2)(g) of the Freedom of Information Law could in my opinion be cited as a ground for denial only with respect to one group of the records sought. 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..."

The language quoted above contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must disclose statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials.

In this regard, item 2 of your request concerning notes or memoranda made by the investigating committee or its designee of interviews with patients would likely constitute intra-agency materials. Under subparagraphs (i), (ii), and (iii) of §87(2)(g), portions of records would be available unless another ground for denial could be cited.

The remaining three categories of information sought concern records provided to the investigating committee or its designee by third parties, such as patients and physicians. As such, those records would not constitute of inter-agency or intra-agency materials.

The remaining ground for denial might be applicable with respect to the three groups of records to which reference was made in the preceding paragraph and perhaps the fourth group of records, the intra-agency materials. Relevant in each instance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy." Additionally, §89(2)(b) of the Law enables the Committee on Public Access to Records to promulgate guidelines regarding the deletion of identifying details within records, and lists five illustrative examples of unwarranted invasions of personal privacy. The Committee has never promulgated guidelines regarding privacy, for the problems of interpretation regarding privacy have been both continual and perplexing. In essence, subjective judgments must in many instances be made to determine whether disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy, and the issuance of guidelines in the Committee's view would likely diminish the flexibility that must exist.

Without greater knowledge of the contents of the records, it would be inappropriate to conjecture as to the degree to which privacy might be invaded by means of disclosure, or the ability to delete identifying details to protect privacy. If, for example, identifying details within records regarding patients can be deleted from the records to the extent that the remainder would not identify those who made the statements, the remainder of the records would in my view be accessible if no other grounds for denial could be cited. On the other hand, if the persons who made statements could be identified even after deleting identifying details, a record might be withheld in its entirety on the basis of the privacy provisions.

With respect to the three ancillary questions appearing at the end of your letter, I believe that responses have been given implicitly with respect to the last two. The first question involves how your request for medical records could be denied as an unwarranted invasion of personal privacy of the patients to whom the records relate "when the individual seeking such medical records is the patients' doctor himself". I tend to agree with your intimation, for the subject of the investigation presumably would have or have had free access to the records in question. As such, if it could be demonstrated that disclosure would result in an unwarranted invasion of the patients' privacy regarding an aspect of their lives other than their medical history, §87(2)(b) might properly be asserted as a ground for denial. If, however, the invasions of privacy concern only the disclosure of medical information with which your client has been familiar, §87(2)(b) could not in my view be cited as a ground for denial.

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/kk

cc: Kearney L. Jones, Counsel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1177

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

June 26, 1979

Mr. Ronald F. Rine
School Business Administrator
Southwestern Central
School District
600 Hunt Road
Jamestown, New York 14701

Dear Mr. Rine:

I have received your letter of June 13 regarding the disclosure of records reflective of the amount of tax on particular homes and whether the tax has been paid.

You have indicated that it is your opinion that the payment of or the failure to pay taxes is "personal and private", and therefore records concerning the payment of taxes may be withheld.

While I might personally agree to some extent with your contention, both statutory and case law provide direction to the contrary.

From the perspective of case law, the courts have long held that practically any information in possession of local government regarding real property and its assessment is available [see e.g. Sears, Roebuck and Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1969)]. By implication, the courts have held that disclosure of some details regarding individuals results in a permissible as opposed to an unwarranted invasion of personal privacy, as in the case of the ownership of real property, its assessment and the tax paid thereon.

In addition, §51 of the General Municipal Law has for decades provided access to "[A]ll books of minutes, entry or account, and the books, bills, vouchers checks..." and other papers "connected with or used or filed in the office of..." a municipality. Since §89(5) of the Freedom

of Information Law states that no provision of that statute shall abridge existing rights of access, I believe that the records to which you made reference 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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1128

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

June 26, 1979

Mr. Charles Roda
[redacted]

Dear Mr. Roda:

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

Although your inquiry does not deal specifically with the Freedom of Information Law, I have researched the appropriate provisions of the Law in New York on your behalf.

You have asked whether a credit agency in New York may assess a fee for a search of credit records pertaining to you, whether or not it maintains a confidential file regarding your credit rating.

The New York Fair Credit Reporting Act states in §380-e(e) of the General Business Law that a consumer reporting agency "may impose a reasonable charge" for searching for records, "provided that such charges are indicated to the consumer prior to making disclosure." However, the cited provision also states that disclosures shall be made "without charge to any person who receives a notification of adverse action..." from a consumer credit agency or a debt collection agency, for example.

In sum, it appears that the fee sought to be charged is legal, unless you have received notification of adverse action.

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1129

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

June 28, 1979

Ms. Blanche Block
[redacted]

Dear Ms. Block:

I have received your letter regarding fees assessed by the City of New York, and in particular the Department of Records and Information Services, regarding fees for searching and copying records.

Unless the fees to which you made reference have a basis in law of which I am unaware, it appears that they violate the Freedom of Information Law.

Section 87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge no more than twenty-five cents per photocopy for records not in excess of nine by fourteen inches or the actual cost of reproducing any other record, "except when a different fee is otherwise prescribed by law."

The regulations promulgated by the Committee, which have the force and effect of law, similarly provide that no search fee may be assessed unless a fee has been established by some other provision of law.

Having reviewed the New York City Charter, I have been unable to locate any provision that specifically permits either the Health Department or the Municipal Archives to charge at the rates described in your letter. There is, however, a provision in the Charter, §576-4.0(b), which enables the Board of Health to establish reasonable fees for the services it performs in relation to searching and reproducing vital records. Nevertheless, no specific fee is mentioned in the City Charter.

I will attempt to obtain fee schedules from both the Health Department and the Municipal Archives to determine the basis upon which they have been adopted.

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: Eugene Bockman, Municipal Archives
New York City Department of Health

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1180

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

June 28, 1979

Mr. Michael Desmond
Buffalo Courier Express
785 Main Street
Buffalo, New York 14240

Dear Mr. Desmond:

I have received your letter of June 24 regarding a situation in which you were given permission by the Clerk of the Niagara Falls City Court to inspect affidavits appended to an arrest report, but were refused permission to photocopy the affidavits.

In my opinion, you were improperly denied the right to make copies of the records in question.

It is noted at the outset that the Freedom of Information Law is not applicable to the courts and court records, for §86(3) of the Law, which defines "agency", specifically excludes the "judiciary" from the coverage of the Law [see also §86(1), definition of "judiciary"].

Nevertheless, the Judiciary Law and various court acts provide substantial rights of access to court records. For example, §255 of the Judiciary Law states 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 to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Further, the courts have long held that the right to make copies of records is concomitant with the right to inspect [see e.g. In re Becker, 200 AD 178 (1922); New York Post Corp. v. Moses, 12 AD 2d 243, reversed on other grounds, 10 NY 2d 199 (1961)].

It is true that records, fingerprints, and similar data might be destroyed eventually pursuant to §160.50 of the Criminal Procedure Law should an order be made upon termination of a criminal action in favor of the accused. However, until such records are purged or returned to an accused, they remain subject to rights of access granted pursuant to the provisions of the Judiciary Law quoted earlier.

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: Angelo DelSignore

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1181

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

June 29, 1979

Sally Mendola, Esq.
The Legal Aid Society
Parole Revocation Defense Unit
15 Park Row - 20th Floor
New York, New York 10038

Dear Ms. Mendola:

I have received your letter of June 21 in which you requested an opinion regarding the legality of §8008.2(h) of the rules promulgated by the New York State Division of Parole.

The regulations in question pertain to what is generally known as the "subject matter list" required to be compiled pursuant to the Freedom of Information Law. Most relevant under the circumstances is §87(3)(c) of the Freedom of Information Law, which directs 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 its regulations, the Division of Parole has defined the term "subject matter list" to mean:

> "...a current list of all records maintained by the Division on or after January 1, 1978, except cases and employee records, regardless of whether the documents denoted on such list are available to the public."

In my opinion, the definition of "subject matter list" appearing in the regulations promulgated by the Division of Parole fails to conform with the requirements set forth in the Freedom of Information Law.

It is noted that the subject matter list is not a compilation that makes reference to every record in possession of an agency; on the contrary, I believe that it is intended to be reflective of an index to records which, in the language of the statute, must be "reasonably detailed...by subject matter." It is clear that the index itself has little to do with rights of access, but rather is a reflection of the nature of records generally kept by an agency. Since the subject matter list is merely an index, it is also clear that the language of the statute does not permit exceptions or exclusions, notwithstanding the possibility that records falling within a particular category identified in the list may be denied pursuant to §87(2) of the Law. Lastly, the limitation in the regulations concerning the reference only to those records maintained by the Division on or after January 1, 1978 conflects with the statute, for there is no line of demarcation contained in §87(3)(c) regarding the records to which reference must be made in the list.

It is emphasized that the analagous provision in the Freedom of Information Law as originally enacted in 1974 specifically stated that the subject matter list required pursuant to §88(4) was required to make reference to records "produced, filed or first kept or promulgated after the effective date of this article", which was September 1, 1974. In my opinion, the amendment to the original language regarding the subject matter list evidences an intent on the part of the Legislature to remove the line of demarcation that was present in the original statute. If a similar dividing line concerning the records to which reference must be made in terms of time was intended in the amended statute, I believe the Legislature would have provided specificity similar to that given in the original statute.

For each of the reasons decribed above, I believe that §8008.2(h) of the regulations promulgated by the Division of Parole fails to comply with the direction provided in §87(3)(c) 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/kk

cc: Division of Parole

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1182

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

June 29, 1979

Mrs. Harry E. King Jr.
[redacted]

Dear Mrs. King:

I have received your letter of June 20 concerning the hours during which records may be requested and made available by the Town of Big Flats.

It is noted that I read the article that appeared in the Corning Leader that was appended to your letter. I did receive communications sent to me by the Town Supervisor, Karl Balland. Since they were merely copies of correspondence sent to others, I did not feel that it was necessary to respond.

Nevertheless, in conjunction with your letter, you have stated that Mr. Balland requires that an appointment must be made to review records during regular business hours. In my opinion, the requirement that an individual make an appointment during regular business hours is unnecessary and, as you intimated, is contrary to the direction provided in the regulations promulgated by the Committee.

The regulations govern the procedural aspects of the Freedom of Information Law and each agency in the state, including a town, must adopt regulations no more restrictive than those promulgated by the Committee.

Most relevant under the circumstances is §1401.4 of the regulations entitled "Hours for public inspection." The cited provision states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.

> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Paragraph (a) of the quoted provision makes clear that agencies that have regular business hours are required to accept requests and produce records during those hours. Paragraph (b) indicates that the only instances in which an appointments procedure should be adopted concern those situations in which an agency has no regular business hours. Consequently, in my view, if the Town of Big Flats maintains regular business hours, an appointment to inspect and copy records should not be necessary.

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: Supervisor Balland

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1183

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

June 29, 1979

Mr. Thomas Howard
Dannemora Fire Department
Box 446
Dannemora, New York 12929

Dear Mr. Howard:

I have received your letter of June 21 concerning the disclosure of information contained in a form known as the "Ambulance Service Record," a copy of which you have attached.

In my opinion, much of the information that might be contained within the Ambulance Service Record may be withheld.

Although the Freedom of Information Law is based upon a presumption of access, §87(2) of the Law lists eight grounds for denial. Most relevant under the circumstances is §87(2)(b), which states that an agency may deny access to records or portions thereof which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision (2) of section 89 of this article." Section 89(2)(b) lists five illustrations of unwarranted invasions of personal privacy, of which two might with justification be cited to withhold information from the Ambulance Service Record.

Specifically, 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..."

Since much of the form would be reflective of a medical history, and since an ambulance might be considered a "medical facility," I believe that the medical information contained within the form 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:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1184

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

June 29, 1979

Mr. W. R. Casey
[redacted]

Dear Mr. Casey:

I have received your letter of June 18 concerning your "difficulty in obtaining information and records from the Sayville School Board and administrators to substantiate their public claims and questionable budget practices."

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law states that all records in possession of an agency, including a school district, must be made available except to the extent that records or portions thereof fall within one or more categories of deniable information enumerated in the ensuing paragraphs (a) through (h).

Among the categories of deniable information, most relevant to your inquiry is §87(2)(g), which 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 language contains what in effect is a double negative. Although government may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records.

In the case of the budget documents to which you made reference, if they have been generated within the school district, it appears that they would constitute "intra-agency" materials. However, it also appears that the information in which you are most interested consists of "statistical or factual tabulations or data" that must be made available. Further, case law has held that budget worksheets and similar documentation consisting of statistical or factual data used in the preparation of a budget are accessible [see e.g. Dunlea v. Goldmark, 380 NYS 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NYS 2d 754, (1977)].

Enclosed for your consideration are copies of the Freedom of Information Law, an explanatory pamphlet on the subject and regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Sayville School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1185

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

June 29, 1979

Mr. Joseph M. Belth
Editor
The Insurance Forum
P.O. Box 245
Ellettsville, Indiana 47429

Dear Mr. Belth:

I apologize for the delay in responding to your letter. Your inquiry concerns an apparent failure of the Insurance Department to render a determination on appeal within the time limits specified in the Freedom of Information Law.

As you are aware, §89(4) of the Law requires the head of an agency or whomever is designated as appeals officer to render a determination on appeal "within seven business days of the receipt of such appeal..." and "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to records sought."

In my opinion, if no determination is made within seven business days of the receipt of an appeal, the appeal may be considered constructively denied. From that point, I believe that the remedies available under Article 78 of the Civil Practice Law and Rules may be pursued.

In addition, it is emphasized that a recent decision rendered by the Court of Appeals held that an agency cannot merely assert grounds for denial to withhold records; contrarily, the agency must prove to a court that records withheld would indeed result in the harmful effects of disclosure described in the categories of deniable information appearing in §87(2)(a) through (h) of the Law. [Church of Scientology v. State, 46 NY 2d 906 (1979)].

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: Superintendent Albert B. Lewis

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1186

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

July 2, 1979

Gregory P. Photiadis, Esq.
Duke, Holzman, Yaeger & Radlin
2410 Main Place Tower
Buffalo, New York 14202

Dear Mr. Photiadis:

I have received your letter of June 18 and the correspondence appended to it. Your inquiry concerns unsuccessful efforts to obtain records under the Freedom of Information Law from the Niagara County Sewer District.

According to your letter addressed to the Clerk of the Niagara County Sewer District dated May 17, you have requested five categories of records developed during a particular time period, including minutes of administrative board meetings, resolutions proposed or passed by the advisory board, correspondence between the District and the firm of Krehbiel-Guay-Rugg-Hall relating to a particular contract, records in possession of the District concerning particular easements related to Contract No. 12A, and correspondence between the District and the County Legislature regarding Contract No. 12A.

In my opinion, many of the records in which you are interested are clearly available, and the remainder of the records that you are seeking are likely available in great measure.

The first area of inquiry concerns minutes of meetings. Minutes are accessible under the Freedom of Information Law and have long been available under other provisions of law for decades. For example, §51 of the General Municipal Law has long granted access to:

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

In addition, §101 of the Public Officers Law, the Open Meetings Law, requires that public bodies compile and provide access to minutes of meetings.

Similarly, the resolutions proposed or passed by the advisory board to which you made reference would also be available as minutes or determinations made by an agency. It is noted that the definition of "agency" appearing in §86(3) of the Law makes reference to any "municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity..." that performs a governmental function for the state or any one or more municipalities. Since an advisory board is an agency, its resolutions would in my view constitute determinations made by the agency that are accessible pursuant to §87(2)(g)(iii) of the Freedom of Information Law. Further, minutes of the Board would likely make reference to resolutions that were proposed but perhaps not passed. If such minutes exist, they are available.

The third category of records sought concerns correspondence between the Sewer District and a named firm regarding Contract No. 12A from January, 1974 through June, 1978 regarding a particular easement related to the contract. Without greater knowledge of the contents of the records sought, it would be difficult to conjecture as to rights of access. Nevertheless, it is emphasized at this juncture that the 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 available, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in paragraphs (a) through (h) of the cited provision.

It appears that only one of the grounds for denial in §87(2) might have relevance to the records in question. Specifically, §87(2)(d) enables an agency to withhold 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..."

If indeed the records or portions of the records in question contain trade secrets and if disclosure would cause substantial injury to the competitive position of the subject of the records, they may be withheld on that basis. However, if there is no possibility that the harmful effects of disclosure described in §87(2)(d) would arise, the records could not in my view be withheld on that basis.

With respect to the fourth and fifth categories of records sought, it appears that the only ground for denial that might have relevance is §87(2)(g), which 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 language contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency communications, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Therefore, although the correspondence might be characterized as

"inter-agency or intra-agency" materials, much of the information contained in such materials, particularly statistical or factual data, should be made available.

Further, based upon the materials that you sent, it appears that the Sewer District has failed to comply with the procedural aspects of the Freedom of Information Law, the regulations promulgated by the Committee that govern the procedural aspects of the Law and have the force and effect of law, and the rules promulgated by the Niagara County Legislature.

With respect to procedure, §89(3) of the Law and §1401.5 of the regulations provide that an agency must respond to a request within five business days of its receipt. The response can take one of three forms. First, an agency may grant access to the records. Second, an agency may deny access to the records. And third, an agency may acknowledge receipt of a request within five business days and take ten additional business days to grant or deny access. If no response is given within five business days, the request is considered a denial that may be appealed. When a response is given in the nature of a denial, the reasons for the denial must be stated in writing and the applicant must be apprised of his or her right to appeal and be given the name and address of the person or body to whom an appeal should be directed. On receipt of an appeal, the appeals person or body must render a determination "fully in writing" within seven business days of receipt of the appeal. In addition, the appeals person or body is required under §89(4)(a) of the Freedom of Information Law to transmit copies of appeals and the determinations that ensue to the Committee on Public Access to 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/kk

cc: Glen S. Hackett, Esq.
Donald P. Lane
Russell Parker
John Simon, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1187

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

July 3, 1979

Ms. Aline G. Cote
City Clerk
Office of the City Clerk
City Hall
Plattsburgh, New York 12901

Dear Ms. Cote:

I have received your letter of June 28 and thank you for your interest in compliance with the Freedom of Information Law. Your inquiry concerns rights of access to vacation and sick leave reports regarding public employees. You have indicated that the City Attorney contends that disclosure would result in an unwarranted invasion of personal privacy since names appear on the report.

In my opinion, the reports are likely available.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a city, are accessible, except to the extent that records or portions of records fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h). Under the circumstances, I do not believe that any of the grounds for denial may appropriately be raised.

While §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy," case law interpreting the privacy provisions of the Law in my view can be cited as a basis for disclosure. The courts have consistently determined that public employees require less protection in terms of privacy than the public generally. In brief, the courts

have held that records that are relevant to the performance of the official duties of public employees are accessible, for disclosre would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g. Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees which have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Although the reports in question identify public employees, the direction provided by case law could in my view be cited as a basis for disclosure, since the tabulations concerning vacation and sick leave are relevant to the performance of the official duties of the individuals named in the reports. Consequently, the records would in my opinion be available.

Lastly, if the applicant is interested only in the numerical figures, it may be possible to delete the names to protect privacy while providing access to the numerical information contained on the reports in order that statistical data can 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
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1188

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

July 3, 1979

Mr. James J. Arnold
#76 D 0190
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Arnold:

I have recently received your letter of June 18 concerning a failure to respond to a request on the part of the Clinton County Sheriff. You have asked for information regarding the means by which you may appeal to the Sheriff.

First, 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 have the force and effect of Law, and an explanatory pamphlet on the subject.

Second, in terms of time limits for response to requests, I direct your attention to §89(3) of the Freedom of Information Law and §1401.5 of the regulations. When read in conjunction with one another, the cited provisions require that an agency must respond to a request within five business days of its receipt of a request. The response can take one of three forms. An agency may grant access, deny access, or acknowledge receipt of a request within five business days and then take ten additional business days to grant or deny access. If no response is received within five business days, the request is considered a denial that may be appealed. When a denial is given in writing, the reasons must be provided and the applicant must be apprised of the name and address of the person or body to whom an appeal should be directed.

Section 89(4) of the Freedom of Information Law states that the head or governing body of an agency or whomever is designated to determine appeals shall respond to appeals within seven business days of receipt of an appeal.

Each agency, including Clinton County, is required to adopt regulations consistent with and no more restrictive than those adopted by this Committee. Therefore, it is suggested that you attempt to learn the identity of the appeals officer for Clinton County.

Lastly, the Freedom of Information Law also requires that the person or body designated to determine appeals transmit copies of appeals and the determinations that ensue to 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/kk

Encs.

cc: Clinton County Sheriff

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AD-1189

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

July 5, 1979

Ms. Karen L. Indorf
[redacted]

Dear Ms. Indorf:

As you are aware, I have received your letter of June 24 and the attached regulations adopted under the Freedom of Information Law by the East Islip Union Free School District. I will comment regarding the regulations and several of the points raised during our conversation.

It is noted at the outset that the District's regulations appear to be an amalgam of provisions from both the original Freedom of Information Law effective September 1, 1974 and the amended Freedom of Information Law, effective January 1, 1978. For example, the reference to the Freedom of Information Law as Chapters 578-580 of the Laws of 1974 is outdated and therefore inaccurate, for those Chapters were repealed and replaced by a new Freedom of Information Law in 1978 (Chapter 933 of the Laws of 1977). Similarly, the lists of records to be made available or excluded from public inspection are based upon the original statute and in my view should be deleted, for they are misleading.

I would also like to emphasize that the thrust of the amendments represents a significant departure from that of the original statute. In brief, the Freedom of Information Law as originally enacted provided access to specified categories of records, to the exclusion of all others. Therefore, if an applicant could not conform a request to one of the categories, access could be denied. The amendments, however, reverse the logic of the original statute by stating that all records are available, except those records or portions of records that fall within one or more enumerated categories of deniable information [see attached, Freedom of Information Law, §87(2)(a) through (h)]. In addition,

while the original Law required that an applicant request "identifiable" records, the amendments merely require that an applicant must request records "reasonably described" [see §89(3)]. As such, with respect to the request that you orally described to me, you need not request individual or numbered checks; contrarily you could appropriately request to inspect all checks for a given time period or related to a particular service provided, for instance.

There are also several points that should be made with respect to the contents of the "rules and regulations" listed numerically beginning on page 2 of the attachment.

Section 1 concerning "lists" makes reference to the original Freedom of Information Law, which as noted earlier has been replaced by an amended statute. While the former §88(4) required a school district to create a subject matter list only with respect to records first filed, kept or promulgated after September 1, 1974, §87(3)(c) of the amendments requires that the list include reference to all records, whether or not they are available, and regardless of the date the records were first kept or filed.

Section 2 concerns the designation of a "fiscal officer". In this regard, it is important to point out that the fiscal officer was required to be designated under the original statute for the purpose of providing access to a payroll record to the news media. The amendments, however, make no reference to a fiscal officer and it is clear that payroll records required to be compiled by §87(3)(b) are available to any person.

Section 5 entitled "procedures" states in subdivision (b) that requests shall be submitted on a form prescribed by the District and that the form must be completed at least five days "prior to the date upon which the individual wishes to obtain a copy of the record." Several subdivisions in Section 5 contain similar language. However, since the Law requires only that an applicant reasonably describe records in writing, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for denial of access and

that any written request that reasonably describes records sought should suffice. Further, the provision in the District regulations requiring that requests be submitted at least five days prior to the date upon which the applicant seeks to obtain records in my opinion conflicts with the direction provided by §89(3) of the Freedom of Information Law and §1401.5(d) of the Committee's regulations. In both of the cited provisions, an agency is required to respond to a request within five business days of its receipt. Further, §1401.4 of the Committee's regulations states that agencies shall "produce records during all hours they are regularly open for business." Consequently, in view of the foregoing, the five business day period is not in my opinion intended to be an outer limit for response; if records are readily available there is no reason for an applicant to wait five days to obtain copies of records.

I have enclosed copies of both the Committee's regulations and model regulations which have been prepared for agencies to assist them in complying with the procedural aspects of the Freedom of Information Law. Copies of both will be sent to the District as well.

With respect to rights of access to budgetary materials, including the books of account to which you made reference during our conversation, I believe that they are available for inspection and copying. It is noted in this regard that §87(2)(g)(i) of the Law specifically provides that an agency must grant access to "statistical or factual tabulations or data" found within intra-agency materials. In addition, §2116 of the Education Law provides broad rights to records in possession of school districts.

Lastly, you described a situation in which members of the Board of Education in the performance of their duties attend conferences or conventions, for example. You stated further that some of the members have obtained advances for the cost of the trips for themselves as well as their spouses. Although you indicated that members of the Board reimburse the District for any expenses incurred by their spouses, you asked whether the advances to spouses would be legal. Having

contacted a representative of the Office of Counsel at the State Education Department on your behalf, I was informed that §77(b) of the General Municipal Law appears to permit advances only for persons "duly authorized" to attend. Based upon the language of §77(b) of the General Municipal Law, it appears that a public corporation may advance monies only to persons requiring such advances to perform their official duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: East Islip Union Free School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1190

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

July 5, 1979

Mr. Walter Koupash
[redacted]

Dear Mr. Koupash:

I have received your letter of June 30 concerning unanswered requests for records addressed to the Clerk of the Bolton Central School District dated June 21 and June 26.

As stated in my letter of June 21, §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee require that an agency respond to a request within five business days of its receipt. If no response is given within five business days, the request is considered a denial that may be appealed to the governing body of the School District, the School Board, or whomever has been designated by the School Board to respond to appeals.

Based upon the information given in your letter, it would appear that your request of June 21 has been constructively denied and therefore may be appealed. Similarly, if more than five business days have transpired since the receipt of your letter of June 26, that request may also be appealed.

If your appeals are denied in writing or no response is given to them as required by §89(4)(a) of the Freedom of Information Law, you may challenge the denials by means of initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Although an Article 78 proceeding generally requires that a member of the public prove that the action of an agency was unreasonable or "arbitrary and capricious." §89(4)(b) of the Freedom of Information Law requires that an agency prove that the records withheld fall within one or more grounds for denial appearing in §87(2) of the statute.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Lois Hiser, Clerk of the Board
Patricia Ann Lamb, Business Manager
Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1191

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

July 6, 1979

Mr. Peter M. Biggs
Office of Public Information
City of Rochester
City Hall
30 Church Street
Rochester, New York 14614

Dear Mr. Biggs:

Thank you for your letter of June 27 and your interest in complying with the Freedom of Information Law.

Your questions concern the contents of the subject matter list and how specific the list should be.

It is noted at the outset that your citation of the subject matter list, §88(4), is derived from the Freedom of Information Law as originally enacted in 1974. Amendments to the Law became effective on January 1, 1978 and the provision relating to the subject matter list now is §87(3)(c) (see attached). The cited provision 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."

The only distinction between the former and the current provision, other than a clarification of language, concerns the requirement that the list make reference not only to records first kept, or filed since the effective date of the original Freedom of Information Law, September 1, 1974, but to all records in possession of an agency, notwithstanding the date of their creation or maintenance by an agency.

As you are aware, the subject matter list must be "reasonably detailed"; it need not make reference to every record in possession of an agency. While I regret that I cannot offer you a definition of "reasonably detailed", §1401.6(b) of the regulations promulgated by the Committee (see attached) states that "the subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

I have enclosed a copy of the Committee's subject matter list in the hope that it might be somewhat useful to you. Although the nature and volume of records in possession of the Committee is insignificant in comparison to those in possession of a large city, perhaps it can provide some direction. In addition, it is suggested that you review the disposition schedules for records developed by the State Education Department. Based upon my review of many retention and disposal schedules, I believe that they are more detailed than the subject matter list would require.

I regret that I do not have other subject matter lists to provide for your review. As a general rule, agencies are not required to transmit their lists to the Committee and, consequently, this office rarely receives or reviews subject matter lists.

Once again, I thank you for your interest in compliance and apologize for the paucity of useful information that I can give you.

If you feel that I can be of further assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-352
FOIL-AO-1192

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

July 9, 1979

Mrs. Betty Connolly
[redacted]

Dear Mrs. Connolly:

I have received your letter of June 26 as well as the materials appended to it. Your letter and the materials appear to indicate a fundamental lack of understanding of the Open Meetings Law by the School Board of the Oceanside Union Free School District.

Since I cannot in good faith verify or agree that all of your allegations are accurate except by means of the documentation that you sent, the following will consist of a recitation of legal interpretations reflective of my opinion concerning the points that you raised regarding both the Open Meetings Law and the Freedom of Information Law.

It is emphasized at the outset that the state's highest court held that the definition of "meeting", while vague in terms of its specific language [see Open Meetings Law, §97(1)], should be construed expansively in accordance with the legislative declaration appearing in §95 of the Law. In brief, it was held that any convening of a quorum of a public body for the purpose of discussing its business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 547 (1978)]. Therefore, if, for example, the Board met to discuss various items at gatherings other than its regular or special meetings, those gatherings should have been convened as open meetings. Consequently, if meetings were held to discuss the contents of the proposition to which you made reference, those gatherings were meetings that should have been convened open to the public.

Section 99 of the Law requires that all meetings must be preceded by notice to the public and news media. When a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to the meeting. 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. As such, it is clear that notice must be given before all meetings, including those that might be classified as "special" or "emergency". In addition, the Legislature recently passed amendments to the Open Meetings Law that are now awaiting the Governor's signature. One aspect of the amendments would require that a public body designate one or more public locations where notice will be posted prior to all meetings. I have enclosed a copy of the amendments and the Memorandum in Support of the legislation for your consideration.

Next, exhibits F and I found in the materials you sent constitute agendas of special meetings held "for the purpose of calling for an executive session to discuss legal matters". In my view, the agendas represent a lack of understanding of the Open Meetings Law and two possible violations of the Law. First, a public body cannot in my opinion schedule an executive session in advance due to the definition of "executive session" [§97(3)] and the procedural requirements that must be followed by a public body prior to entry into executive session [§100(1)]. "Executive session" is defined as a portion of an open meeting during which the public may be excluded. Thus it is clear that an executive session is not separate and distinct from an open meeting but rather is a portion thereof. Further, §100(1) 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

The quoted provision requires that several affirmative steps be taken prior to entry into executive session. A motion must be made during an open meeting that is passed by a majority vote of the total membership of the public body, which identifies generally the subjects intended to be discussed behind closed doors. Moreover, the ensuing paragraphs (a) through (h) specify and limit the subjects that may appropriately be considered in executive session. In view of the definition and the requirements described above, I do not believe that a public body can schedule an executive session in advance, for it can never be known in advance whether a majority of the total membership of a public body will indeed vote to enter into executive session or whether the entire meeting will be devoted to matters that may properly be discussed in executive session.

The contents of your letter, the minutes and the agendas attached to your letter indicate that several executive sessions were held for the purpose of discussing "legal matters." In my opinion, a motion to enter into an executive session to discuss "legal matters" without more is insufficient. The most relevant exception for executive session is in §100(1)(d), which provides that a public body may enter into executive session to discuss "proposed, pending or current litigation." Based upon the documentation that you sent, there is no indication that pending litigation was discussed or that litigation would be in the offing. Moreover, I agree with the statement in your letter to the effect that virtually all matters discussed by a school board or by the board of any other public corporation might be considered a "legal matter". In a similar vein, many have contended that "possible litigation" may be discussed behind closed doors. I have contended to the contrary that any matter could be subject of "possible litigation" and that the language of §100(1)(d) must be construed narrowly. In sum, it appears that the executive sessions held for discussion of "legal matters" did not fall within any of the grounds for executive session enumerated in the Law and that they should have been held in full view of the public.

You also mentioned that executive sessions have been held to discuss "personnel matters." In this regard, I do not believe that a motion to discuss "personnel" without greater specificity is proper. The applicable exception for executive session regarding personnel is §100(1)(f) which 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, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

The Committee has consistently advised that the provision quoted above is intended largely to protect privacy and not to shield matters of policy under the guise of privacy. The legislation before the Governor if signed into law will tend to narrow the exception by stating that a public body could enter into executive session to discuss specific matters regrding "particular" persons or corporations as opposed to "any" person or corporation.

Your letter makes reference to the approval of minutes of executive session. In this regard, §101(2) of the Open Meetings Law requires that:

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

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

Secion 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 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 act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

With respect to the Freedom of Information Law, you have made several allegations regarding the procedural implementation of the Law and the subject matter list.

First, you stated that requests to inspect records are "never honored" before seven days have elapsed. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee, which have the force and effect of Law, prescribe the time limits for response to a request (see attached). The cited provisions require that an agency must respond to a request within five business days of receipt of a request. It is emphasized that the five business day provision is in my view intended to be an outer limit for response, not a period during which members of the public must await a response. Further, a response to a request can take one of three forms. An agency may grant access to the records sought, deny access, or acknowledge receipt of the request within five business days. When a request is acknowledged, the agency has ten additional business days to grant or deny access. If no response is given in five business days, the request is considered a denial that may be appealed to the governing body of the District or whomever has been designated to determine appeals. In the event of a written denial of access, the reasons for the denial must be stated and the applicant must be apprised of his or her right to appeal and be given the name and address of the person to whom the appeal should be sent. If a record is denied constructively or by means of a written denial, the applicant has 30 days to appeal. The appeals person or body then has seven business days from the receipt of an appeal to grant access to the records or to fully explain in writing the reasons for further denial. In addition, copies of appeals and the ensuing determinations on appeals must be transmitted to the Committee pursuant to §89(4)(a) of the Freedom of Information Law.

With regard to your request for the subject matter list, I can only advise that a similar list was required to be compiled under the original Freedom of Information Law enacted in 1974 and that such a list should be in existence and available on an ongoing basis. Further, I do not believe that the compilation of a subject matter list creates an onerous burden on a school district, for the State Education Department provides retention and disposal schedules for records upon which a subject matter list may be based. Having reviewed several of the retention and disposal schedules, I believe that they are more detailed than a subject matter list must be.

In terms of a legal remedy, since §87(3)(c) of the Freedom of Information Law requires each agency to maintain a subject matter list, you could presumably initiate an Article 78 proceeding in the nature of mandamus to seek to compel the District to perform a duty that it is required to perform, i.e. to create a subject matter list.

Copies of this response as well as the Freedom of Information Law, the Open Meetings Law, regulations promulgated under the Freedom of Information Law by the Committee and model regulations designed to assist agencies in complying with the Freedom of Information Law will be sent to you and the School 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
Executive Director

RJF/kk

Encs.

cc: Honorable Warren Anderson
Honorable Mario M. Cuomo
Honorable Armand D'Amato
Honorable Stanley Fink
Honorable Norman Levy
New York State Office of General Services
Oceanside Union Free School District
Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1193

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

July 16, 1979

Mr. Paul Seibert
[redacted]

Dear Mr. Seibert:

I have received your letter of July 2 concerning requests for records in possession of the New York City Housing Authority. You have asked once again whether rights of access granted by the Freedom of Information Law are applicable to records that were created by or in possession of the Housing Authority prior to September 1, 1974, the effective date of the Freedom of Information Law as originally enacted.

As I have contended in a previous letter, the Committee by means of a resolution advised in November of 1974 that the Freedom of Information Law, in view of its remedial nature, should be considered retrospective in its application.

The amendments to the Freedom of Information Law, effective January 1, 1978, in my opinion bolster this contention. Please note that the amended statute, a copy of which is attached, defines "record" to include any information "in any physical form whatsoever" in possession of an agency [§86(4)]. This is not to say that all records in possession of an agency are accessible, but rather that all records in possession of an agency are subject to rights of access granted by the Law. Moreover, §87(2), the focal point of the Law, states that all records in possession of an agency are accessible, except those records or portions thereof that fall within one or more among eight enumerated categories of deniable information appearing in paragaphs (a) through (h) of §87(2).

A further indication of a legislative intent to make the Law retrospective, concerns the provision regarding the compilation of a "subject matter list". The subject matter

list is an index of records that may be used by the public to identify the category of records in which an individual may be interested. While §88(4) of the original Freedom of Information Law required that the subject matter list make reference to only those records first filed, kept or promulgated after the effective date of that statute, the new Freedom of Information Law requires that the list make reference by subject matter to "all records in possession of the agency, whether or not available under this article" [§87(3)(c)].

In view of the foregoing, I reiterate my contention that the Freedom of Information Law is retrospective and applies to records that may have come into the possession of an agency prior to the effective date of the statute as originally enacted in 1974.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1194

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

July 16, 1979

Barbara Regino
Supervisor
Town of Goshen
P.O. Box 217
Goshen, NY 10924

Dear Supervisor Regino:

Thank you for your letter of July 6 and your interest in complying with the Freedom of Information Law.

You have asked whether "water and sewer billing cards and bills for services to a special district are subject to the Freedom of Information law..." and whether such records should be available to persons other than the residents to whom the bills are given.

In my opinion, the records that you described are available to the public generally.

Although the billing cards and the bills for services identify specific individuals, statutory and case law have directed by implication that the disclosure of some records that identify individuals would result in permissible as opposed to an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. For example, assessment rolls containing a great deal of personal information regarding the owners of real property have long been held to be accessible to the public. Similarly, §51 of the General Municipal Law has for decades provided access to:

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

Since the provision quoted above makes specific reference to books of entry or account as well as "bills, vouchers, checks" and similar documents, it would appear that the Legislature felt that disclosure of some items identifiable to individuals should be available, notwithstanding the fact that they identify specific taxpayers.

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-1195

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

July 16, 1979

Mr. Arthur J. Brewster
[redacted]

Dear Mr. Brewster:

I have received your letter of July 3 concerning a denial of access to records by the Little Falls Central School District.

Your letter indicates that you submitted an appeal to the head of the agency on June 21 and had not received a reply by July 3. The records that you are seeking are "paid legal vouchers from 1/1/79 to the present."

In my opinion, the vouchers are accessible.

First, it is important to note that §89(4)(a) of the Freedom of Information Law requires that an appeal be determined fully in writing within seven business days of its receipt by the person or body to whom appeals are directed. As such, based upon the information provided in your letter, the statutory time limit for response to an appeal was exceeded.

Second, as I have advised in the past, while there may be a privileged relationship between a school board, its employees and its attorney, case law has held that records reflective of payments to counsel fall outside the attorney-client privilege [e.g. People v. Cook, 372 NYS 2d 210 (1975)]. Further, I believe that the paid vouchers would constitute factual data that would be available under §87(2)(g)(i) of the Freedom of Information Law.

Third, although you may be involved in litigation with the School District, your status as a litigant does not in my opinion diminish your rights of access under the Freedom of Information Law. In an analogous situation, it was held that records that are accessible under the

Freedom of Information Law must be made equally available to any person, notwithstanding the status or interest of the applicant (see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165). Moreover, in Burke, supra, the Appellate Division specifically directed that the status of an applicant as a litigant did not detract from his rights of 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
Executive Director

RJF:jm

cc: William D. Bradt -
Acting Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1196

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

July 17, 1979

Mr. Joseph Fournier
Box B 77-A-3575
Dannemora, New York 12929

Dear Mr. Fournier:

I have received your letter of July 3 regarding compliance with §89(4)(a) of the Freedom of Information Law by the City of White Plains and its Corporation Counsel.

You have indicated that you transmitted an appeal to the Corporation Counsel on June 16, and in a response dated June 28, you were advised that the appeals officer, Mr. Bergins, would be absent from his office until July 9, 1979. Consequently, you were informed that your appeal would not be determined until his return.

Section 89(4)(a) of the Freedom of Information Law requires that appeals be determined within seven business days of their receipt. Since more than seven business days will have transpired before a determination on appeal is made, I believe that the City has engaged in a technical violation of the Freedom of Information Law.

It is noted that §89(4)(a) is flexible, for it states that a person denied access to records may appeal to:

> "the head, chief executive or governing body of the entity, or the person therefore designated by such head, chief executive, or governing body, who shall within seven business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial or provide access to the records sought."

In the event that a designated appeals officer cannot respond within seven business days, the head or governing body of the agency may in my opinion designate a different person to act in the capacity of the appeals officer. Further, in the event that §89(4)(a) is not followed by means of a response within seven business days of receipt of an appeal, I believe that such failure would constitute a constructive denial of access that could be followed by 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/kk

cc: Mr. Bergins
Rose Marchionni

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1197

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

July 17, 1979

Mr. Thurmon Brooks
79-A-1291
D-7-34
Box 51
Comstock, New York 12821

Dear Mr. Brooks:

I have received your letter of July 9. As requested, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee that govern the procedural aspects of the Law and an explanatory pamphlet entitled "The New Freedom of Information Law and How to Use It".

With regard to your specific questions, you wrote that you were interested in gaining access to affidavits given to a district attorney, grand jury minutes and a list of witnesses that may have testified before a grand jury.

In my opinion, information submitted to a grand jury, whether by means of affidavit or testimony, may generally be denied. Section 190.25(4) of the Criminal Procedure Law states that:

> "[G]rand jury proceedings are secret, and no grand juror, other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury

> may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony."

In view of the provision quoted above, it appears that it would be necessary to obtain a court order in order to gain access to the information 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
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1198

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

July 17, 1979

Mrs. Mildred A. Hackett
[redacted]

Dear Mrs. Hackett:

I have received your letter of July 12 concerning a situation that you described to me two days earlier.

According to our conversation and your letter, you requested to inspect minutes of the monthly meetings of the Town Board of the Town of Volney after having visited the home of the Town Clerk, the location where town records are kept. You were informed there by the Deputy Town Clerk that the minutes could not be inspected. Your letter indicates further that your inspection of the minutes would not result in any burden to either the Town Clerk or her Deputy, since the minutes book "was on the porch on a card table and the Deputy was in the kitchen with the door open just off the porch."

In my opinion, the refusal by the Deputy Town Clerk to permit you to inspect the minutes book constituted a violation of the Freedom of Information Law and the regulations promulgated by the Committee on Public Access to Records. The regulations govern the procedural aspects of the Law and have the force and effect of law. In addition, each agency in the state, including a town, is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee.

With respect to the ability to inspect the records at the time of your visit, §1401.4 of the regulations promulgated by the Committee states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Since the minute book in which you were interested was readily available, I cannot envision any legal ground for a refusal to permit you to inspect it. Even if it could be argued that the Clerk does not keep regular business hours, you indicated that you called her in advance for the purpose of making an appointment to inspect records. As such, it appears that there was no basis for the denial.

Lastly, you suggested that the address and telephone number of the Committee should be transmitted to every municipality in the state. Memoranda and copies of statutes such as the Freedom of Information Law, the Open Meetings Law and the regulations have been sent to every unit of government in the state. In each instance in which such a mailing occurred, the address and the telephone number of the Committee were included in order to provide municipal officials with the opportunity to contact the Committee for the purpose of requesting assistance. All I can suggest is that you should feel free to encourage other citizens to make use of the services offered 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/kk

cc: Volney Town Board
Alice Battles, Town Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-354
FOIL-AO-1199

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

July 17, 1979

Mr. Rex R. Snider
[redacted]

Dear Mr. Snider:

I have received your letter of July 12 and thank you for your interest in compliance with the Freedom of Information Law and the Open Meetings Law.

Enclosed for your consideration are copies of both laws, regulations governing the procedural aspects of the Freedom of Information Law, a pamphlet entitled "The New Freedom of Information Law and How to Use It" and a bill to amend the Open Meetings Law that was signed yesterday by Governor Carey.

With respect to your comments, it appears that the Village of Corfu may have engaged in violations of the Open Meetings Law in several areas.

First, you wrote that during regular meetings, the Village Board of Trustees in some instances schedules special sessions, "in some instances executive sessions", to be held at a later date. You also indicated that notice is generally not given regarding the special sessions apart from announcements given at regular meetings.

In this regard, §99 of the Open Meetings Law requires that notice be given prior to all meetings, whether regularly scheduled or otherwise. When a meeting is scheduled at least a week in advance, notice must be given to the public and the news media at least seventy-two hours prior to the meeting. If a meeting, such as a special meeting, is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to the meeting. It is noted that the amendments to the Open Meetings Law signed by the Governor will require that every public body designate one or more conspicuous locations to post notice of all meetings when the amendments become effective on October 1.

Next, I would like to emphasize that the definition of "meeting", although vague as initially written, has been construed expansively by the courts, which have essentially held that any gathering of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Law [see Orange County Publication v. Council of the City of Newburgh, 60 AD 2d 409 aff'd NY 2d 947 (1978)]. The courts specified that the Open Meetings Law is applicable whether or not there is an intent to take action and regardless of the manner in which a gathering is characterized.

The phrase "executive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. As such, it is clear that an executive session is not separate and distinct from a meeting but rather is a portion thereof. Further, §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, §100(1) 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

The only subjects that may be discussed in executive session are those listed in paragraphs (a) through (h) of §100(1).

You indicated that executive sessions were held to discuss "the proposed budget, the proposed sewer law, proposes sewer rates, employee raises and benefits, and creation of jobs." Although some of the subject matter that you identified may have been properly discussed during executive session, it appears that several areas of discussion, including those relative to the proposed budget, sewer rates and the creation of jobs should have been discussed during open meetings.

Moreover, as you intimated, while a public body may generally vote during a properly convened executive session, any vote to appropriate public monies must be taken in public during an open meeting.

With respect to the Freedom of Information Law, §87 (1)(b)(iii) of the Law states that an agency may charge up to twenty-five cents per photocopy. As such, I believe that the fee of twenty-five cents established by the Village is proper. However, it is noted that the public may inspect accessible records at no charge.

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/kk

Encs.

cc: Village Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1200

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

July 18, 1979

Mr. Frank Schubauer
President
Evans Neighbors Association
[redacted]

Dear Mr. Schubauer:

Thank you for your letter of July 7 as well as the materials appended to it. Your inquiry concerns rights of access to "the detailed agenda" used by the Board of Education of the Lake Shore Central School District at its meetings. According to letters written by the Superintendent of Schools and the School Board attorney, the agenda is, in the words of the attorney, "specifically exempted from disclosure" under the Freedom of Information Law.

I disagree with the opinions expressed by the Superintendent and the School Board attorney. While I could not conjecture as to the extent to which the agenda may be accessible, its contents in my opinion are clearly not "exempt" from disclosure.

It is emphasized at the outset that the Open Meetings Law deals solely with the activity of public bodies with respect to meetings. The Freedom of Information Law deals solely with records. Further, there may be instances in which a discussion may properly be held in executive session under the Open Meetings Law, but in which records regarding the discussion may be available under the Freedom of Information Law.

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, including a school district, are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in paragraphs (a) through (h) of the cited provision. In addition, the

term "record" is defined by §86(4) of the Law to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Consequently, the agenda in which you are interested is clearly a "record" subject to rights of access granted by the Freedom of Information Law. It is also important to note that the introductory language of §87(2) states that an agency may deny access to "records or portions thereof..." that fall within the categories of deniable information. As such, it is clear that the Legislature recognized that there may be situations in which records are accessible or deniable in part.

Under the circumstances, I believe that the District is obliged to review the agenda in its entirety to determine which portions, if any, fall within the grounds for denial listed in the Freedom of Information Law.

The Board attorney wrote that in his opinion the agenda is "specifically exempted from disclosure" under the Freedom of Information Law. In this regard, although §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", there is no state or federal statute that specifically exempts agendas of school boards from disclosure. To fall within that exemption, there must be direction from either the State Legislature or Congress to the effect that disclosure of specific records is prohibited. No such direction exists in this case.

The second ground for denial states that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy" [§87(2)(b)]. To the extent that disclosure of the agenda would result in an unwarranted invasion of personal privacy, it may be denied. Nevertheless, there may be situations in which the deletion of names, for example, or other identifying details could be accomplished without compromising the privacy of any individual whose name might appear. In such a case, I believe that the District would be required to delete identifying details, while providing access to the remainder. Further, although subjective judgments must often be made in order to determine whether a person's privacy might be compromised in an unwarranted fashion by means of disclosure,

the courts have held that records concerning public employees that are relevant to the performance of their official duties are accessible, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g. Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 664 (Court of Claims, 1978)].

The third ground for denial states that an agency may withhold records or portions thereof "which if disclosed would impair present or imminent contract awards or collective bargaining negotiations" [§87(2)(c)]. The key word in the quoted language is "impair", and the provision enables an agency to withhold records or portions of records when disclosure would hamper the ability of government to engage in a contractual relationship. Therefore, if the agenda contains information regarding the District's collective bargaining strategy and disclosure would place the District in an unfair bargaining position, those portions of the agenda could in my view be withheld. On the other hand, if the District is engaged in public bidding regarding a particular contract, disclosure would not likely impair the ability of the District to consummate a contractual relationship. Therefore, such records would be available.

The fourth ground for denial concerns trade secrets and information that is maintained for the regulation of commercial enterprise which if disclosed "would cause substantial injury to the competitive position of the subject enterprise" [§87(2)(d)]. In my view, this exception to rights of access would rarely arise, because the School District would not likely obtain trade secrets and because the District is not engaged in the regulation of commercial enterprise.

The fifth exception concerns records compiled for law enforcement purposes [§87(2)(e)]. Again, since the School District is not a law enforcement agency, I do not believe that this ground for denial would arise with any regularity.

The next ground for denial states that an agency may withhold information "which if disclosed would endanger the life and safey of any person" [§87(2)(f)]. For obvious reasons, it is extremely unusual that this exception is appropriately cited.

The seventh exception to rights of access 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..." [§87(2)(g)].

The quoted provision contains what in effect is a double negative. Although an agency may withhold intra-agency materials, such as the agenda, it must disclose statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. According to the Assembly sponsor to the amendments of the Freedom of Information Law, the exception is intended to enable an agency to withhold statements of opinion or advice, but that the statistical or factual data upon which an agency relies for carrying out its duties should be made available (letter from Assemblyman Mark Siegel to Robert J. Freeman, July 21, 1977). Therefore, in my opinion, to the extent that the agenda contains statistical or factual data, instructions to staff that affect the public, statements of policy or determinations, it is accessible unless another ground for denial can properly be cited.

Lastly, an agency may withhold records or portions thereof that "are examination questions or answers which are requested prior to the final adminstration of such questions" [§87(2)(h)]. Stated differently, if an examination question will be given in the future, the question and the answer may be withheld.

The foregoing represent the only grounds for denial that may be cited to withhold records under the Freedom of Information Law.

To reiterate, although there may be portions of the agenda that fall within one or more among eight grounds for denial, the remainder must 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
Executive Director

RJF:jm

cc: Lake Shore Central School Board
William G. Houston, Superintendent of Schools
Phillip Brothman, School Board Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1201

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

July 18, 1979

Mr. Dan Lipsman
[redacted]

Dear Mr. Lipsman:

I have received your most recent letter concerning a request to inspect records in possession of the Board of Higher Education, a denial of access to the records and the time limits for response to requests.

Since I am not familar with the nature of the records sought or the dates upon which the requests may have been made, all that I can do at this juncture is give you general advice regarding the procedural requirements of the Freedom of Information Law. I have enclosed copies of both the Law and the regulations, which govern the procedural aspects of the Law and have the force and effect of law. Further, each agency in the state, including the Board of Higher Education, is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee.

Section 89(3) of the Law and §1401.5 of the regulations require that an agency respond to a request within five business days of its receipt. The response can consist of a grant of access, a denial of access, or a written acknowledgement is given, the agency has ten additional business days from the date of the acknowledgement to grant or deny access. If no response is received within five business days of the receipt of the request or by the tenth day after the date of acknowledgement, the request is considered constructively denied and may be appealed [see regulations, §1401.7(c)]. Generally, however, a denial must be given in writing, provide the reasons and apprise the applicant of the name and address of the person or body to whom an appeal may be directed. Whether a denial is in writing or constructive, the applicant has 30 days in which to appeal. Upon receipt of an appeal, the appeals person or body has seven business

days to grant access to the records sought or to deny access in writing including a full, written explanation of the reasons for further denial. In addition, both the Law and the regulations require that appeals and the determinations that ensue be transmitted to the Committee.

If an applicant is denied access on appeal, he or she may initiate judicial proceedings under Article 78 of the Civil Practice Law and Rules. It is noted in this regard that the agency has the burden of proving that records withheld fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of the Law. It is also emphasized that the Court of Appeals, the state's highest court, has held that an agency cannot merely assert grounds for denial of access and prevail; on the contrary, an agency must prove that the harmful effects of disclosure described in §87(2) would indeed arise (Church of Scientology v. State, 46 NY 2d 906).

Lastly, as you are aware, to challenge a denial in thr court, it must be demonstrated that an applicant has exhausted his or her administrative remedies and that the procedures outlined above have been followed. Therefore, if, for example, you did not appeal within 30 days of an initial denial, or if more than four months have passed since a final denial, you would be barred from initiating a judicial proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

cc: Lester Freundlich

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1202

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

July 20, 1979

Mr. Kevin D. Crozier
Records Access Officer
City of Mount Vernon
Department of Law
City Hall
Roosevelt Square
Mount Vernon, NY 10550

Dear Mr. Crozier:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns the disclosure of home addresses of officers and employees of the City of Mount Vernon. You have indicated that the City of Mount Vernon has a residency law for all officers and employees which could serve as the basis for challenging an earlier decision in which the City denied access to the home addresses.

To the best of my knowledge, there have been no decisions rendered to date construing the relationship between the requirements of the Freedom of Information Law and local residency laws. In my opinion, however, while the City may disclose the home addresses of its employees, the home addresses need not be disclosed.

As I explained during our telephone conversation, it is important to view the issue of disclosure of home addresses through the legislative history of the Freedom of Information Law. In §88(1)(g) of the original statute enacted in 1974, each agency was required to compile a payroll record consisting of the name, address, title and salary of all officers and employees of the agency. No direction was provided regarding which address should be given, home or business. Due to complaints made by public employees who stated that they had been solicited, telephoned or harrassed in some way in their homes, the Freedom of Information Law was amended to provide specific direction regarding the address that must be included within the payroll record. Currently §87(3)(b) of the Law re-

quires that each agency maintain a payroll record consisting of the "name, public office address, title and salary" of all officers or employees. In view of the direction given by the Legislature in the amended Freedom of Information Law, it would appear that the new language evidences an intent to enable agencies to withhold the home addresses of public employees on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Further, while §87(3) of the Freedom of Information Law requires agencies to compile and maintain three categories of records, that provision in my view represents an exception to the general rule that the Law grants access to existing records. Section 89(3) of the Law states that an agency need not create a record in response to a request, except in the case of those records required to be compiled under §87(3). Consequently, if the City has no list of its employees that includes home addresses, there is no requirement that such a list be compiled.

Similarly, with regard to the suggestion expressed in your letter that each department head reveal the names of non-residents employed in his or her department, while there is no provision that precludes department heads from creating records, there is no requirement in the Freedom of Information Law that such steps must be taken.

In sum, I believe that §87(3)(b) is reflective of an intent to enable an agency to withhold the home addresses of public employees on the ground that disclosure would result in an unwarranted invasion of personal privacy. In addition, if there is no record reflective of the names and addresses of public employees, such records need not be created.

Nevertheless, I am obliged to inform you of a decision concerning payroll information that was decided prior to the enactment of the Freedom of Information Law. In Winston v. Mangan, it was held that:

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

> The employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed. See, 15 Op.St.Compt. 377 (1959). In such instances, the strength of the competing consideration of employee privacy must be balanced against the marginal benefit in the public's knowledge of this specific information, such as protection against 'cronyism' or violations of local residence laws, and some cause should be shown to warrant their disclosure" [72 Misc. 2d 280, 338 NYS 2d 654, 662].

Viewing Winston in conjunction with the Freedom of Information Law, there are several points that should be made. First, it is clear that the court was concerned with the privacy of public employees relative to disclosure of their home addresses. Second, a basic principle of the Freedom of Information Law is that the status or interest of an applicant is largely irrelevant to rights of access; if a record is accessible under the Law, it should be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165]. Whether a court today would accept the idea that "private need" be demonstrated is conjectural.

Irrespective of a technical interpretation of the Freedom of Information Law under which the home addresses need not be provided, it is conceivable that a court might grant access. By construing the statement of legislative intent broadly (§84), perhaps the only means of insuring compliance with a local residency law would involve a review and therefore disclosure of home addresses. Nevertheless, due to the lack of case law regarding the issue, it would be inappropriate to conjecture as to the rationale that might be employed by a court.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1203

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

July 23, 1979

David Greenberg, Esq.
Greenberg & Wanderman
35 North Madison Avenue
Spring Valley, New York 10977

Dear Mr. Greenberg:

I apologize for the delay in responding to your most recent letter. As you stated, there appears to be no disagreement regarding the general interpretation of the Family Education Rights and Privacy Act (the Buckley Amendment) or the New York Freedom of Information Law.

With respect to the alphabetical score sheet relative to the results of P.E.P. tests given to a particular third grade class, I tend to agree that deletion of students' names from the sheet would not likely serve to preclude identification of the students. Although you sent only portions of the sheet, assuming that the class is relatively small, it appears that students could be identified notwithstanding the deletion of their names from the sheet.

You wrote that, in your opinion, if the District xeroxed the lines applicable to each student separately "while blocking out all other information, it would still present a very simple task for someone to properly align the scores for the purpose of associating particular scores to particular pupils." Depending upon how the individual lines are copied, it might in some instances be possible to identify the students but in others difficult or impossible. If 25 lines are copied separately and provided to an applicant in an order that is not alphabetical, it is questionable whether students could be identified.

Although I agree with your contention that an agency need not create or construct a record, I could not conjecture at this juncture whether making multiple copies of different information within a single record would constitute the construction or creation of a record. That is a question which in my view must be decided by a court.

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

Sincerely,

Robert T. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1204

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

July 23, 1979

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

Dear Mr. Sheehan:

I apologize for the delay in responding to your letter of June 22.

Your inquiry concerns two sets of requests for accident reports. One group of accident reports concerning events occurring in March, 1965 and September, 1978, was approved. Consequently, you have questioned your ability to review the similar reports for June, 1965 and January, 1979, which you believe should also be approved.

Although §66-a of the Public Officers Law has long granted access to accident reports, questions arise regarding the scope of rights of access under §66-a when read in conjunction with the Freedom of Information Law.

First, it is clear that the fact that records may have been granted in the past does not automatically confer a right to gain access to analogous records in the future [see e.g., Person - Wolinski Associates v. Nyquist, 377 NYS 2d 897 (1975)].

Second, as you are aware, §89(3) of the Freedom of Information Law requires that records be "reasonably described". While it is possible that a court might find that a request for all accident reports regarding events occurring during a particular month might constitute a request for records reasonably described, it is also possible that a court might consider such a request to be overly broad.

And third, as you know, you and I have had a great deal of correspondence pertaining to your requests made under the Freedom of Information Law during the past several years. In some instances, the records sought have been voluminous. In others, the City of Binghamton may have spent a great deal of time locating records on your behalf. In this regard, case law has held that "mere inconvenience" is not a sufficient ground for denial of access [see Sorley v. Lister, 215 NYS 2d 218 (1961)]. However, where "mere inconvenience" ends and something more begins is unclear. The courts have not yet devised a line of demarcation between a request that would result in mere inconvenience and a request that would impair the ability of government to function effectively and carry out its duties appropriately. Under the circumstances, if you are denied access to requests for dozens of accident reports regarding events that transpired years ago, perhaps the issue of inconvenience to government might have to be decided judicially.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1205

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

July 23, 1979

Robert H. Skigen, Esq.
Baum, Skigen & Lefkowitz
278 East Main Street
P.O. Box 648
Smithtown, New York 11787

Dear Mr. Skigen:

I have received your letter of July 5, which raises questions under the Freedom of Information Law.

Your first question concerns rights of access to records in possession of a police department that show "the type of radar employed, its history of maintenance and repair and the training given to the officers who operate the unit."

In my opinion, to the extent that records exist that are reflective of the information that you are seeking, they are available.

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 available, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in paragraphs (a) through (h) of the cited provision. Under the circumstances, I do not believe that any of the grounds for denial could appropriately be raised.

The first ground for denial that might be cited 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;
>
> 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, it is questionable whether any of the records sought were compiled for law enforcement purposes. If the records were not compiled for law enforcement purposes, §87(2)(e) could not be cited as a ground for denial. Even if the provision in question could be cited on the ground that the records sought were indeed compiled for law enforcement purposes, it is in my view doubtful that any of the grounds for denial appearing in §87(2)(e) could be cited to withhold records. Presumably disclosure would not interfere with an ongoing investigation, deprive any person of a right to a fair trial or impartial adjudication or identify a confidential source relative to a criminal investigation. While some of the records might be reflective of investigative techniques and procedures, it appears that they concern routine techniques and procedures. In this regard, it is important to note that a recent decision rendered by the Court of Appeals dealt with possible distinctions between "routine" and "non-routine" investigative techniques. In Fink v. Lefkowitz (___ NY 2d ___, NYLJ, July 17, 1979, p. 1), the Court of Appeals wrote that:

> "[I]ndicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel...The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe."

The Court further stated that under the circumstances of the case at bar, disclosure of the records sought "would have a dramatic impact on law enforcement investigations by alerting prospective defendants..." to the nature of

inquiries in which special prosecutors might engage. In my opinion, none of the harmful effects of disclosure relative to the records deemed deniable in Fink would arise by means of disclosure of the records in which you are interested. Certainly the use of radar is common, and in fact, signs on the highways often indicate that radar is being used in a particular area, thereby encouraging compliance with speed limits.

Disclosure of records indicative of the type of radar used, the history of maintenance and repair, and the training given to officers regarding the routine use of radar would not in my opinion result in any of the harmful effects of disclosure described in §87(2)(e) of the Freedom of Information Law.

A second possible ground for denial is §87(2)(g), which 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..."

It is emphasized that the provision quoted above contains what in effect is a double negative. While 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 final agency policy or determinations found within such records. Much, if not all, of the information sought in conjunction with the request in my opinion falls within the scope of rights of access granted by §87(2)(g). Records reflective of the types of radar employed and the history of maintenance and repair would constitute factual data. Records reflective of the training given to officers who operate the radar unit would in my opinion constitute instructions to staff that affect the public or would be reflective of the policy of an agency with respect to the use of a particular radar unit.

The second area of inquiry concerns the practices of the Adjudication Bureau of the Department of Motor Vehicles. According to your letter, copies of traffic tickets are not themselves available; contrarily, the public is given a printout of the information contained on the original ticket. Further, the printout used is in code and you have been told that the code is not available to the public.

If the Adjudication Bureau does not have possession of the original ticket, it has no obligation to produce it. Nevertheless, the agency that does have possession of a ticket as originally issued would in my opinion be obliged to permit inspection or photocopying of the ticket.

With regard to the code used by the Adjudication Bureau, it appears that it would constitute factual data that is accessible under the Freedom of Information Law. However, since I am unaware of the specific contents of the code, it is possible that portions of it might be withheld, depending upon the effects of disclosure. In this regard, it is important to note that the introductory language of §87(2) states that an "agency may withhold records or portions thereof..." that fall within one or more of the eight enumerated categories of deniable information. As such, the Legislature recognized that there may be situations in which a record may be both accessible and deniable in part. To the extent that any records, including the code, contain deniable information, those portions could be deleted. The remainder, however, should be made available. As such, the Adjudication Bureau is obliged to review the code to determine which portions, if any, may justifiably 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Suffolk County Police Department
Adjudication Bureau, Dept. of Motor Vehicles

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1206

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

July 24, 1979

Mr. Charles F. Cook
[redacted]

Dear Mr. Cook:

I have received your letter and the materials attached to it dated June 15, which recently arrived at this office. The information appended to your letter concerns the interpretation of the Freedom of Information Law and the Town Law.

I will attempt to deal with the questions cited by means of the notations that you made on the documents.

First, much of your correspondence concerns the budget process employed by the Town Board of the Town of Evans. Specifically, it appears that you are interested in obtaining a line by line breakdown of the Town's budget.

Budget procedures and finances of towns generally are governed by Article 8 of the Town Law, §§100 through 125. Having reviewed the provisions concerning the budget process, I do not believe that a town is required to prepare a line item budget that identifies every employee and each specific area of expenditure. Subdivision (1) of §107 of the Town Law concerning contents of a preliminary budget, which, when approved, becomes the official budget, states that:

> "[T]he preliminary budget shall be in the format prescribed by the state comptroller. The preliminary budget shall show by funds (a) proposed appropriations and estimated revenues in accordance with the classification of accounts prescribed by the state comptroller pursuant to article three of the general municipal law, (b) estimated fund balances, (c) the amount of taxes to be levied, (d) salaries of elected officers, and (e) such other information pertinent to the above as shall be prescribed by the state comptroller."

Although some specific figures must be included within the preliminary budget, I do not believe that a line by line breakdown must be prepared, unless the State Comptroller has so directed or the Town by means of resolution has required that such a breakdown be prepared.

Further, it is important to note that the Freedom of Information Law grants access to existing records. Consequently, an agency need not create a record in response to a request, except in the circumstances prescribed by §87(3) of the Law.

Among the records required to be compiled that may be of relevance to your inquiry is the payroll record. Section 87(3)(b) of the Law requires each agency to maintain and make available a payroll record identifying the name, public office address, title and salary of every officer or employee of an agency, including a town.

As a general rule, records reflective of the budget process and finances of local government are available. For example, §51 of the General Municipal Law has for decades grantes 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, to the extent that records exist relative to the finances or budget process of a town, they are in my opinion accessible.

Another area of inquiry concerns the procedural requirements of the Freedom of Information Law. In this regard, I have enclosed copies of both the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law. Each agency in this state is required to adopt procedures no more restrictive than those proposed by the Committee's regulations.

In brief, the head or governing body of an agency is required to designate a records access officer to whom requests should be directed (regulations, §1401.2). The records access officer is required to respond to a request within five business days of its receipt. Within that time, a request may be granted, denied in writing, or receipt of a request may be acknowledged [Freedom of Information Law, §89(3) and regulations, §1401.5]. When an acknowledgment is given in writing, the agency has ten additional business days to grant or deny access. If no response is given within five business days, the request is considered constructively denied and may be appealed [regulations, §1401.7(c)]. When a request is denied in writing, the reasons must be specified and the applicant must be apprised of his or her right to appeal and be given the name and address of the person to whom an appeal should be directed. The applicant then has thirty days to appeal. When an appeal is made to the head or governing body of an agency, or whomever is designated to determine appeals, that person or body has seven business days to grant access to records or fully explain the reasons for further denial in writing. In addition, copies of appeals and the determinations that follow must be sent to this Committee.

You also mentioned fees assessed for copying by the Town. Section 87(1)(b)(iii) of the Law states that an agency may charge no more than twenty-five cents per photocopy. If the town charges a higher fee, it would in my view be violating the Freedom of Information Law.

You have indicated that you requested job descriptions of the positions held by a named individual. To the extent that records containing job descriptions exist, they are in my opinion available, for they constitute factual data and are reflective of the policy of the town with respect to the duties carried out by a particular employee [see Freedom of Information Law, §87(2)(g)(i) and (iii)].

In sum, it appears that virtually all of the information in which you are interested is accessible to the extent that it exists. To reiterate, §89(3) of the Freedom of Information Law provides that an agency generally need not create records in response to 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/kk

Encs.

cc: Town Board, Town of Evans

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1207

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

July 24, 1979

Howard N. Meyer, Esq.
270 Madison Avenue
New York, New York 10016

Dear Mr. Meyer:

I have received both of your letters of July 20.

The first letter makes reference to a document characterized by the Teachers' Retirement System as an "opinion" of the Committee. You have asked whether the opinion can be so characterized, or whether it is reflective of my personal view.

As a general matter, the Committee has provided me as Executive Director with the authority to write advisory opinions on its behalf. Since the effective date of the Freedom of Information Law, September 1, 1974, I have written approximately 1,200 advisory opinions on behalf of the Committee, few of which have been specifically reviewed by the Committee. Due to the volume of opinions that must be given, the Committee provides guidance regarding policy which I attempt to faithfully execute through the rendering of advisory opinions. Consequently, although the opinion to which the Teachers' Retirement System made reference was not written by the membership of the Committee, I believe that it has been ratified by implication by the Committee.

In terms of the specific issue of disclosure of addresses of public employees, it is noted that the Committee recommended in 1977 that the confusion surrounding the contents of the payroll record would be diminished by means of making specific reference to the public office address. Although there was no specific report to the Legislature issued in 1977 regarding the Freedom of Information Law (there was no statutory requirement until 1978 that the Committee do so), the amendments to the Freedom of Information Law, effective January 1, 1978 are based largely upon recommendations made by the Committee.

Further, I have enclosed a copy of the Committee's first annual report to the Governor and the Legislature on the Freedom of Information Law, which was drafted and edited word for word by the Committee members, and which on pages 8 and 9 discusses payroll information. As indicated on the top of page 9, the Committee believes that:

> "[T]he amendments to the Law sought to protect against unwarranted invasions of personal privacy by requiring that reference be made only to the public office address of a public employee."

The additional information sought by means of legislation described in the ensuing paragraphs was not passed during the latest session of the Legislature.

Again, although the opinion in question was written by me, I believe that it is reflective of the direction given to me by the Committee.

With respect to your second letter, please be advised that I have not received a copy of the brief prepared by the Teachers' Retirement System. As you requested, I have enclosed each of the opinions that you cited.

I have no comment regarding the opening remarks of your "brief-in-progress".

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/kk

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1208

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

July 24, 1979

Mr. Robert Gagne
[redacted]

Dear Mr. Gagne:

Thank you for your most recent letter and the materials appended to it, some of which in my view are quite interesting.

You mentioned at the beginning of your letter that §501 of the State Administrative Procedure Act (SAPA) in its initial version required that each agency make available the forms that it uses. Since that section of SAPA has been repealed, you suggested that the repeal was based upon the recommendation of materials that I drafted. For the purpose of clarification, there was a memorandum drafted by the former Executive Director, Louis Tomson, directed to Gilbert Harwood, then Counsel to the Department of State, which suggested that "rules, forms and instructions" are available under both SAPA and the Freedom of Information Law and that "placing these records in a single publication is unnecessary." Although the suggestion was made, I did not make it.

Your first question is whether a subject matter list required to be compiled pursuant to §87(3)(c) of the Freedom of Information Law must "inventory" the forms used by an agency. In my opinion, since the cited provision of the Freedom of Information Law requires that reference be made to records "by subject matter" and "in reasonable detail", a subject matter list need not make reference to each form that it uses. There may be several forms that could fall within a particular subject heading.

Second, you have asked whether the subject matter list must inventory the "orders or directives" that it issues which affect the public. My response to this question must be the same as that given to the first, i.e. that a

single heading in a subject matter list may cover a number of orders or directives issued with respect to a single subject.

In conjunction with the second question, you have provided a list of categories of records which you believe must be included in an agency's subject matter list. While I believe that it is likely that most of the headings that you listed would appear in a subject matter list, some of the subjects may not be applicable to particular agencies and certainly an agency may provided greater detail. The list, however, appears to be reflective of records generally held by agencies.

The third question is whether it would be "unreasonable, arbitrary and capricious" for an agency in New York City to require that requests be directed to Albany and insist that an individual travel to Albany to view records that are maintained as originals or copies in New York City. In my opinion, it would indeed be "unreasonable, arbitrary and capricious" to require that an applicant travel to Albany if the original records or copies of the records sought are maintained in a local office. As a general matter, the Committee has consistently advised that an individual who is willing to pay the appropriate fees for copying and postage should be able to receive copies of records by mail. In addition, assuming that the same records are kept in Albany and New York City, I believe that the intent of the Law requires that records be made available at a location that is convenient to the applicant whenever that is possible. Further, the contents of records determine rights of access; their location is irrelevant. From my perspective, rights of access cannot justifiably be diminished by requiring an individual to travel great distances to inspect records, which may in many instances result in constructive denials of access.

The fourth question concerns a circumstance in which two agencies have the same records. You described a situation in which one agency is willing to release a particular record but a second agency that maintains the record denies access. I agree with your position as you stated it, that if a record is available, it is available regardless of the agency that maintains it. As a matter of fact, when the Committee was revising its regulations prior to the effective date to the amendments to the Freedom of Information Law, a request was made by an agency to provide in the regulations that an agency be given the capacity to require that an applicant direct his or her request to the

original custodian of records, rather than a secondary custodian of records. The Committee rejected the proposal on several grounds. First, the term "record" is broadly defined by §86(4) to include "any information...in any physical form whatsoever..." in possession of an agency. Second, §87(2) provides that all records in possession of an agency are available, except when the exceptions to rights of access may appropriately be cited. Third, it was argued that if an agency has possession of records, even though it may be a secondary custodian, presumably it maintains possession of the records for a reason. Consequently, rights of access to records in possession of a number of agencies are equal and an agency should not require an applicant to submit a request to the originating agency.

Your fifth question concerns a similar situation. For example, if a particular agency maintains possession of a record but argues that a record was produced by a different agency, you inquired whether you should be required to go to the originating agency to make the request. The response here is the same as that stated previously. You should not be required to direct requests to the originating or any other agency, particularly if the fees differ.

Lastly, you indicated that you reviewed a computer printout, portions of which interested you. When you requested copies, the agency denied access. Again, I agree with your contention that a denial of the ability to copy makes no sense if you were previously granted the ability to inspect the records. Further, as you are aware, §89(3) of the Law specifically requires agencies to make copies of accessible records on request. In addition, it has been held by the courts for almost six decades that the right to inspect is concomitant with the right to copy [see e.g., re Becker, 200 AD 178, 192 NYS 754 (1922)]. As such, it is logical to interpret the Freedom of Information Law in a manner that requires an agency to produce copies of records that are available for inspection.

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/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-359
FOIL-AO-1209

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

July 26, 1979

Mr. Mike Meaney
The Daily Item
Port Chester, NY 10573

Dear Mr. Meaney:

I have received your letter of July 19 in which you have raised numerous questions regarding the powers of school boards in relation to the Open Meetings Law.

It is noted at the outset that the Open Meetings Law was recently amended. The revised statute, which will go into effect on October 1, will in my opinion solve or clarify several of the problems that have consistently arisen under the original statute. I will make reference to the provisions of the amended Law throughout the remainder of this opinion.

The first area of inquiry concerns "union grievances". You have asked when a school board may hold a closed session on a grievance. Section 97(3) of the Law defines "executive session" as a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law specifies the procedure for entry into executive session and limits the subject matter that may be discussed in executive session.

Two of the grounds for executive session may have relevance under the circumstances that you described. Section 100(1)(e) states that a public body may enter into executive session to discuss "collective bargaining negotiations pursuant to article fourteen of the civil service law", which is commonly known as the Taylor Law. In my opinion, the quoted provision makes reference to the contractual negotiations in which public employee unions and government are involved. I do not believe that it includes grievances. However, §100(1)(f) of the amended Law will enable a public body to enter into executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

In view of the foregoing, a public body will have the capacity to discuss the employment history of a particular individual behind closed doors, for example, as well as matters leading to the discipline, suspension, removal etc. of a particular individual. If a grievance is general in its terms in that it deals with such subjects as the ability to hold union meetings on school grounds or similar issues, I believe that none of the grounds for executive session could appropriately be cited.

In the same subject area, you have asked whether it is legal for a school board "to make a contract agreement to hear all grievances in executive session." In my opinion, a collective bargaining agreement or contract cannot legally include such a provision. As I mentioned earlier, §100(1) prescribes a procedure for entry into executive session. Specifically, 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Thus it is clear that an executive session can be held only after having convened an open meeting. Further, the only subjects that may be discussed in executive session are those described in the ensuing paragraphs (a) through (h). In my view, a contractual provision cannot supersede a statute or restrict rights granted by a statute. Consequently, a collective bargaining agreement cannot in my opinion require that all grievances be heard in executive session.

You have also asked how school boards must report their decisions on a grievance and whether the minutes must include the nature of the grievance. It is important to point out that public bodies may generally act during a properly convened executive session. However, §105(2) of the Open Meetings Law states that less restrictive provisions of law than the Open Meetings Law are not superseded by the Open Meetings Law. In the case of a school board, §1708(3) of the Education Law has been judicially interpreted to require that action be taken during open meetings in all instances except a tenure proceeding held pursuant to §3020-a of the Education Law. Consequently, although a school board may in some instances deliberate with respect to a grievance behind closed doors, determinations reached with respect to the grievance must be made during open meetings. Further §101(1) of the Law directs that minutes include reference to all "motions, proposals, resolutions and any other matter formally voted upon". As such, it would appear that minutes must include reference to the nature of the grievance, and that if a grievance is submitted, a determination not to act or to drop charges should also be included in minutes.

The second area of inquiry concerns personnel matters. You have asked initially how specific decisions made by a board in closed sessions must be. Again, I would like to reiterate that decisions cannot be made by a school board behind closed doors except in the case of a tenure proceeding. Further, with respect to the example that you provided, I do not believe that a board can simply report that the "Smith matter" was approved. Minutes must in my opinion indicate the nature of action taken.

I would also like to point out that the direction provided by the Freedom of Information Law may be of significance. Although that statute provides that an agency may withhold records which if disclosed would result in an "unwarranted invasion of personal privacy" [§87(2)(b)], the courts have generally held that public employees require lesser protection of privacy than the public generally. In brief, the Committee has advised and the courts have upheld the notion that records that have a bearing upon the manner in which a public employee performs his or her official duties is accessible, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy. Therefore, if a public employee is reprimanded, the reprimand is available under

the Freedom of Information Law, even if a particular public employee might be identified [see e.g. Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 664 (Court of Claims, 1978)].

As I indicated earlier, §100(1)(f) of the Open Meetings Law will enable a public body to enter into executive session to discuss some "personnel" matters. However, the so-called "personnel" exception for executive session has been substantially narrowed by the amendments. The amendment to §100(1)(f) is based upon the proposal made by the Committee in its third annual report to the Legislature on the Open Meetings Law. In the report the Committee wrote that:

> "[M]any public bodies have entered into executive session to discuss matters which tangentially affect public employees. It is the Committee's contention that paragraph (f) is not intended to shield discussion regarding policy under the guise of privacy. Clear distinctions may be made between situations in which 'personnel' are discussed directly and indirectly. For example, when a municipal board considers the dismissal of public employees for budgetary reasons, the discussion should be public, for issues regarding policy, not the privacy of public employees, would be at issue. Conversely, when the same board considers the dismissal of a particular employee because that person has not performed his or her duties adequately, the discussion could properly be discussed in executive session, for it would deal with the privacy of a named individual."

The legislative solution offered by the Committee, that "any person or corporation" be modified to allude to a "particular person or corporation" has been incorporated into the amendments. Therefore, discussions of personnel under the amendments must pertain to a particular person, rather than policy matters that have an indirect or tangential bearing upon "personnel".

The next area of inquiry concerns the Freedom of Information Law. The first question is whether teacher evaluations are available under the Law. In my opinion, the evaluations are likely deniable. Relevant to the question is §87(2)(g), which 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..."

While statistical or factual data, instructions to staff that affect the public or agency policy or determinations found within intra-agency materials are available, evaluations would likely constitute expressions of opinion or advice that would be deniable.

The same provision, however, would grant access to the next group of records that you described, "administrative decisions disciplining an employee". Since an administrative decision to discipline a public employee is reflective of a final agency determination, it is accessible. Further, as noted previously, reprimands of public employees have been held to be available by the courts (see Farrell, supra).

With respect to civil service test results and the identities of those who may have taken civil service examinations, the civil service "eligible lists" are accessible. The eligible list includes the names and standings of persons who passed a particular civil service exam. However, a list of all who may have taken an exam is deniable, for it could be used it identify those who have failed an examination by means of comparing it with the eligible list. Under the privacy provisions of the Freedom of Information Law as well as rules promulgated by the State Civil Service Department, disclosure of the identities of those who have failed the examination would result in an unwarranted invasion of personal privacy and therefore may be denied. Again, however, an eligible list identifying passing candidates is accessible.

Your next question concerns the Open Meetings Law. You have asked whether there are instances during the budget-making process in which the board may enter into executive session, such as a discussion of changes in staffing levels that might lead to the elimination of particular positions. As noted earlier, §100(1)(f) of the Open Meetings Law, the so-called "personnel" exception for executive session, is in the Committee's view intended to protect personal privacy, not to shield matters of policy under the guise of privacy. As a general matter, I believe that most discussions concerning the budget must be held during an open meeting. Further, even if the discussion concerns the elimination of positions, such a discussion would deal with policy. Nevertheless, if the discussion concerns the employment history of a particular individual and whether or not that individual should be retained, such a matter would in my view be appropriate for executive session.

Lastly, you have asked whether "standing committees of two or three school board members" are covered by the Open Meetings Law. There is only one appellate court decision on the subject, Daily Gazette Co., Inc. v. North Colonie Board of Education (412 NYS 2d 494, ___ AD 2d ___). In that case, it was held that committees and subcommittees which have no power to take final action, but rather only the authority to advise, are not public bodies subject to the Open Meetings Law. In its report to the Legislature, the Committee recommended that the definition of "public body" [§97(2)] be amended in order that committees and subcommittees clearly be included in the definition. The amendments to the Law redefine "public body" to make specifice reference to committees, subcommittees or similar bodies of a public body such as a school board. Consequently, when the amendments to the Law take effect, the committees that you described will clearly be subject to the Open Meetings Law in all respects.

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-1210

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

July 30, 1979

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

Dear Mr. Browne:

I have received your letter of July 24 in which you requested an advisory opinion regarding "access to certain documents and records in the custody of the New York City Controller Harrison Goldin."

Specifically, you are interested in gaining access to logs of Mr. Goldin's incoming and outgoing telephone calls. Your letter indicates that the logs are routinely compiled by Mr. Goldin's staff, kept personally by Mr. Goldin, that all calls to which reference is made on the logs are made to or from telephones in Mr. Goldin's office and that all bills are paid by the City.

In my opinion, the logs in which you are interested are available in great measure.

The Freedom of Information 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, which includes the City of New York and the units that comprise the City government, are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in paragraphs (a) through (h) of §87(2).

Further, §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..."

Since the telephone logs are "held" and "produced" by an agency, they constitute records subject to rights of access granted by the Freedom of Information Law.

Two of the exceptions to rights of access have a bearing upon your request.

Section 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."

The quoted provision contains what in effect is a double negative. Although an agency may deny access to inter-agency or intra-agency materials, it must grant access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records. While the telephone logs may be considered "intra-agency" materials, according to your letter, they consist solely of "factual tabulations or data" which must be made available under §87(2)(g)(i). As such, §87(2)(g) cannot in my view by appropriately cited as a ground for denial.

The remaining exception that may be applicable is §87(2)(b), which provides that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". In addition, §89(2)(b) lists five illustrative examples of unwarranted invasions of personal privacy.

Although the interpretation of the privacy provisions of the Freedom of Information Law often involve the making of subjective judgments on a case by case basis, the decisional law rendered to date under the Freedom of Information Law indicates that the telephone logs are accessible in part if not <u>in toto</u>.

In construing the privacy provision, this 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 result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g. Farrell v. Village Board of Trustees, 372, NYS 2d 905; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977)]. Conversely, records that have no relevance to the performance of the official duties of public employees may be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Under the circumstances, I believe that the maintenance of the telephone logs indicates that the logs are relevant to the performance of the official duties of the controller, and that they could not be characterized as "personal". In this regard, in one case in which a public official argued that particular records were "personal property" and outside the scope of the Freedom of Information Law, the court held to the contrary. In Warder v. Board of Regents (410 NYS 2d 742), the issue concerned access to notes taken by the Secretary to the Board of Regents at meetings of the Board. The Secretary claimed that the notes constituted "personal memoranda" outside the Freedom of Information Law. After making an in camera inspection, the court found that the notes fell within the definition of "record" and constituted factual data that should be made available. While it might be argued that the telephone logs in question are "personal", they are in my view records that are clearly subject to rights of access.

Two of the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) also speak in terms of "relevance". Specifically, the cited provision states that:

> "[A]n 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 agency."

Although some of the notations contained in the logs might be of a personal nature or might have been "reported in confidence", it is likely that the contents of the logs are "relevant to the work of the agency" that maintains them, the Comptroller's office, or else they would not be kept.

Even in a situation in which disclosure of portions of a log might arguably result in an unwarranted invasion of personal privacy, the Freedom of Information Law provides that the remainder should be available. It is emphasized that the introductory language of §87(2) states that an agency may deny access to "records or portions thereof" that fall within one or more grounds for denial. As such, the Legislature recognized that there may be situations in which some aspects of a record might be deniable, while the remainder should be made available. Therefore, when certain portions of a record would if disclosed result in an unwarranted invasion of personal privacy, the remainder should be made available after having made the appropriate deletions. In the case of the phone logs, the Comptroller is in my opinion required to review them in their entirety to determine which portions, if any, would result in an unwarranted invasion of personal privacy if disclosed.

Lastly, it is noted that the Freedom of Information Law places the burden of proof in a judicial proceeding upon the government. Section 89(4)(b) of the Law requires that an agency prove that records withheld fall within one or more of the grounds for denial appearing in §87(2). Further, the Court of Appeals recently held that an agency cannot merely assert grounds for denial and prevail; on the contrary, the agency must demonstrate that the harmful effects of disclosure described in the exceptions to rights of access would arise [see Church of Scientology v. State, 46 NY 2d 906 (1979)].

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/kk

cc: Hon. Harrison Goldin
Allen G. Schwartz

bcc: Richard Emery

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1211

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

July 31, 1979

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

Dear Mr. Sheehan:

I have received your letter of July 17 regarding a delay in providing access to records due to vacations taken by officials of the City of Binghamton.

Generally, I do not believe that the type of delay that you described in your letter would be appropriate, for §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee govern the time limits for response. However, it appears that there is little that can be done about such a delay, for the request has been approved. In the alternative I imagine that the City could legally have acknowledged receipt of your letter on the fifth business day after its receipt, and responded by means of a denial ten business days after the acknowledgement. At that point, you could have filed an appeal within thirty days that would have to be answered within seven business days of its receipt. All of that could have been done legally and would likely have resulted in a greater delay than the one that you described. Consequently, while the response may technically be reflective of non-compliance, the alternative could have been an ever greater delay.

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/kk

bcc: John Park, Corporation Counsel
City of Binghamton

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-362
FOIL-AO-1213

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

July 31, 1979

Mr. Robert Gagné
[redacted]

Dear Mr. Gagné:

As you are aware, I have received your most recent letter concerning the disclosure of records and proceedings before a city school district board of education, the New York State Education Department and the various divisions of human rights.

Your first question deals with rights of access to a calendar of upcoming or passed hearings before the agencies specified above regarding, for example, the revocation of licenses, breaches of ministerial duties, unprofessional conduct, and discrimination. In this regard, it is important to note that rights of access to records pertaining to members of the public may be different from rights of access to records concerning public employees. In the case of a revocation hearing, since a license essentially lets the world know that a particular individual is qualified to engage in a particular vocation, I believe that a calendar identifying the subject of a revocation hearing would be available. Similarly, since the courts have held that records relevant to the performance of the official duties of public employees are accessible on the ground that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy, a calendar relative to hearings concerning public employees would also be available. However, as I mentioned to you during our telephone conversation, records concerning discrimination may likely be denied. Specifically, §297(8) of the Executive Law concerning the Human Rights Division states that:

> "[N]o officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section."

The intent of the quoted provision appears to involve the protection of privacy. As such, I believe that a calendar relative to human rights proceedings may justifiably be withheld.

Your second question concerns rights of access to pleadings of upcoming or passed hearings. Rights of access depend to an extent on the forum in which the proceeding takes place and the contents of the records. For instance, if a proceeding is conducted in a court of law, virtually all records related to the proceeding are accessible under §255 of the Judiciary Law. In other non-judicial types of proceedings, persons other than the subject of the hearing may be identified by means of witness statements, for example. In such instances, I believe that records or portions thereof may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Further, some proceedings are given specific consideration by statute. The Public Health Law contains provisions regarding the creation of a State Board for Professional Medical Conduct. In §230 of the Public Health Law, reference is made in subdivision (11) to a prohibition against discovery. The relationship between that prohibition and the Freedom of Information Law is to date unclear and is being litigated (see attached, Freedom of Information Law Advisory Opinion No. 1176).

Your third question is whether under the Open Meetings Law you or any person has the right to attend hearings held by the agencies specified earlier that concern charges against a teacher, trade school operator or an employer, for example. First, if the proceeding is conducted by a single hearing officer, the Open Meetings Law would not be applicable, for the Law covers only public bodies consisting of two or more members. Second, if the proceedings are "quasi-judicial" in nature, they would be exempt from the provisions of the Open Meetings Law pursuant to §103(1). Third, in a case in which the Open Meetings Law would be applicable, the subject matter could justifiably be discussed during an executive session. Section 100(1)(f) of the Open Meetings Law, which as amended will become effective on October 1, states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

As such, the topics you discribed may generally be discussed behind closed doors.

However, as I mentioned during our conversation, while a matter may be exempted from the Open Meetings Law, or a discussion may be held in executive session, there is no requirement that the discussions be held behind closed doors. Like the Freedom of Information Law, the Open Meetings Law is permissive; a public body may discuss certain matters behind closed doors, but it need not.

Lastly, your final question concerns fees for copies. I agree with your contention that if a court clerk maintains possession of records that are subject to copying at fifty cents or one dollar per page, the same records should be made available from an agency subject to the Freedom of Information Law, presumably at a lower rate. Further, it would be illogical to assert that records accessible from a court are deniable from an agency.

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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1213

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

July 31, 1979

Mr. Edward M. Barr
560 Columbia Street
Lot 23
Cohoes, NY 12047

Dear Mr. Barr:

I have received your letter regarding a denial of access by the Cohoes Police Department to a complaint that you initiated.

According to your letter, you personally filed a complaint regarding a vehicle that was parked illegally. After filing the complaint, you requested a copy, which was refused.

In my opinion, the complaint should have been made available.

The Freedom of Information Law (see attached) is based upon a presumption of access. Section 87(2) of the Law states that all records in possession of an agency, such as the City of Cohoes, are available, except those records or portions of records that fall within one or more among eight categories of deniable information.

Although it has generally been advised that the identity of a complainant may be withheld, the basis for such advice is §87(2)(b), which states that an agency may withhold records or portions thereof with if disclosed would result in an "unwarranted invasion of personal privacy" [§87(2)(b)]. However, in this instance, such a denial could not be raised appropriately, for you could hardly invade your own privacy.

Further, §87(2)(e) provides that an agency may deny access to records "compiled for law enforcement purposes" under circumstances specified in the Law. Nevertheless, since you were the complainant, and since the complaint does not pertain to criminal activity, the cited provision could not in my view be cited justifiably as a ground for denial.

In sum, I do not believe that any of the grounds for denial appearing in the Freedom of Information Law could appropriately be given by the Police Department as a means of withholding a complaint that you submitted.

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

Enc.

cc: Cohoes Police Department

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-363
FOIL-AO-1214

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

August 1, 1979

Henry J. Logan, Esq.
Town Attorney
Town of Mt. Pleasant
One Town Hall Plaza
Valhalla, NY 10595

Dear Mr. Logan:

Thank you for your letter of July 20 and your interest in complying with the Freedom of Information and the Open Meetings Laws.

According to your letter, the clerks of the Town Planning and Zoning Boards, as well as the Town Clerk, take written notes at the meetings of their respective boards. Further, you have indicated that a tape recorder is also used to assist in preparing the minutes. In conjunction with the foregoing, you have raised several questions.

First, you have asked whether the written notes of the clerks are public documents. In a situation in which the secretary to the Board of Regents took written notes that were used to formulate the minutes, but which were separate and distinct from the minutes, it was held that the notes were accessible [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. In the Warder case the court made an in camera inspection and determined that the contents of the notes were reflective of factual data that was available under §87(2)(g)(i) of the Freedom of Information Law. Due to the similarities between Warder and the question that you raised, I believe that the notes in question are accessible.

Second, you have asked whether the notes are subject to public review before the minutes are compiled. In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which 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..." Since

the notes are records subject to rights of access, they should be made available in accordance with the procedural requirements of the Freedom of Information Law. For example, as you are aware, §89(3) of the Law requires that an agency respond to a request by means of a grant of access, a denial of access or a written acknowledgment within five business days of its receipt of a request. Consequently, it is conceivable that the notes might be made available prior to the compilation of the minutes. In this regard, it is emphasized that the provision concerning minutes in §101 of the Open Meetings Law has been amended. I have enclosed copies of the bill to amend the Open Meetings Law and the composite version of the Law as it will appear when the amendments become effective on October 1. Section 101(3) of the amendments will require that minutes of open meetings be compiled and made available within two weeks of a meeting. It is understood that public bodies might not meet to approve minutes within two weeks of a meeting. As such, it is suggested that unapproved minutes be marked as "unapproved," "draft," or "non-final", for example. By so doing, the public has the ability to know generally what transpired at a meeting, but at the same time is given notice that the minutes are subject to change. In addition, the members of the public body are given a measure of protection.

Your third question concerns the length of time that notes or tape recordings must be kept. In this regard, the Education Department pursuant to §65-b of the Public Officers Law concerning the destruction of records of municipalities, has developed a series of retention and disposition schedules which determine the length of time that records must be kept prior to their disposal. If the notes or tape recordings, for example, have been designated in the schedules to be kept for a specific period of time, they cannot be destroyed prior to that time. Further, as a general rule, a municipality cannot destroy records without the consent of the Commissioner of Education. I believe that you may apply to the Commissioner of Education to destroy particular types of records on an ongoing basis to avoid the need for renewing requests to destroy.

Fourth, you have asked whether public bodies must compile minutes of their work sessions. While the Open Meetings Law does not define "minutes", §101 of the Law describes the minimum requirements concerning the contents of minutes. Specifically, §101(1) of the Law states that:

> "[M]inutes 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, if, for example, proposals or resolutions, none of which might be acted upon at the work session, are introduced, minutes must be compiled that make reference to such proposals or resolutions.

As you requested, I have enclosed a copy of the Freedom of Information Law, which as amended became effective on January 1, 1978.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1215

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

August 1, 1979

Mr. Joseph DuBovy
Coalition for Youth Advocacy
1006 Constant Avenue
Peekskill, New York 10566

Dear Mr. DuBovy:

I have received your letter of July 17 as well as a copy of your request directed to the BOCES in Yorktown Heights.

I agree with your contention that a denial must precede an appeal. In brief, each agency is required to designate a "records access officer" who is required to respond to requests made under the Freedom of Information Law within five business days of their receipt. The response can consist of a grant of access, a denial of access, or an acknowledgment of receipt of a request in a case in which a determination to grant or deny access cannot be made within five business days. If a request is acknowledged, the agency has ten additional business days to grant or deny access. In the event that access is denied, the denial must be given in writing, stating the reasons therefor, apprising the applicant of his or her right to appeal and providing the name of the person or body to whom an appeal should be directed. If a request is neither denied nor acknowledged in writing within five business days of its receipt, the request is considered constructively denied. An applicant has thirty days in which to appeal a denial of access. The appeals officer or body has seven business days from the receipt of an appeal to grant access to the records or fully explain the reason for a further denial in writing. In addition, §89(4)(b) of the Freedom of Information Law requires that copies of appeals and the determinations that follow be sent to this Committee.

In terms of your request, it is important to make two points. First, an agency is generally not required to create a record in response to a request. Therefore, if, for example, there is not listing of the names of facilities and the supervising professionals who conducted psychological evaluations, the agency is not required to create such a record on your behalf.

Second, the Family Educational Rights and Privacy Act (20 USC §1232g, commonly known as the "Buckley Amendment") precludes an educational agency or institution from disclosing any records that identify a particular student or students to any person except the parents of the student. I realize that you specified in your request that you are not interested in any identifying information. Nevertheless, in some instances it might be possible to identify particular students by means of disclosure of related documents.

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law.

To expedite your request, a copy of this response will be sent to the BOCES.

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

Encs.

cc: BOCES

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1216

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

August 1, 1979

Mr. W. R. Casey
[redacted]

Dear Mr. Casey:

I have received your letter of July 18 regarding access to budget worksheets in possession of the Sayville School District.

There is little that I can add to my earlier letter with respect to substantive rights of access. Since you indicated that a collective bargaining agreement was reached and the School District budget has been put in final form, the budget worksheets are in my opinion available. As advised in my earlier letter, the Court of Appeals, the state's highest court, has held that budget worksheets and similar documents consisting of statistical or factual data used in the preparation of a budget are accessible [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NYS 2d 754, (1977)].

With regard to the steps that you may now take, it is emphasized that the Committee has adopted procedural regulations with which each agency in the state, including a school district, must comply. I have enclosed a copy of the regulations for your consideration. Please note that each agency must designate both a records access officer, who provides an initial response to a request by means of granting or denying access, and an appeals officer who is designated by the governing body of an agency and responds to appeals that follow denials of access. Further, §89(4)(b) of the Freedom of Information Law requires that all appeals and the determinations that ensue be sent to this Committee.

I would like to bring to your attention one aspect of the appeals process that may be important. Specifically, §1401.7(d) of the regulations requires that an appeal be made within thirty days of a denial of access. Based upon the length of time between your letters, it is possible that more than thirty days have elapsed since your request was denied. If that is the case, it is suggested that you attempt to gain access to the procedures adopted by the Board under the Freedom of Information Law and restate your request as if it is a new request. By so doing, if you are denied, you will not be precluded from appealing the denial due to the passage of more than thirty days.

Lastly, if you are denied access on appeal you may initiate judicial proceedings pursuant to Article 78 of the Civil Practice Law and Rules. Further, the Freedom of Information Law, §89(4)(b), states that the agency has the burden of proving that records withheld fall within one or more among the eight grounds for denial appearing 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:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1217

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

August 2, 1979

William M. Murphy, Esq.
[redacted]

Dear Mr. Murphy:

I have received your letter of July 20 in which you requested an advisory opinion.

It is emphasized at the outset that the ensuing paragraphs will deal solely with the allegation by the Pocantico Hills School District and its attorney that time sheets of District employees are confidential. The opinion will in no way pertain to the conduct of individuals involved in the controversy.

According to the correspondence attached to your letter, the attorney for the District has stated that time records and time sheets relative to employees of the District may be withheld based upon an "unwritten policy of the District to preserve and maintain the confidentiality of the records reflecting the hours worked of all employees."

In my opinion, the "unwritten policy" of confidentiality adopted by the District is contrary to the Freedom of Information Law. Further, I believe that the time sheets in question are accessible under the Freedom of Information Law.

It is important to emphasize that the term "confidential" is in my view greatly overused. In New York law, "confidential" can have but two meanings. First, a record is confidential when a statute specifically prohibits disclosure. Such records would be deniable under §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that "are specifically exempted from disclosure by state or federal statute."

Second, according to case law, there has developed what is known as the "governmental privilege." In brief, the governmental privilege may appropriately be asserted when an agency can demonstrate to a court that disclosure of records 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 view of the foregoing, I reiterate my contention that records may be considered "confidential" only when an act of the State Legislature or Congress specifically prohibits disclosure, or when a court determines that disclosure would result in detriment to the public interest. Neither of those circumstances could in my opinion be cited with respect to the time sheets.

Further, as you intimated, the policy of New York with respect to access to records is contained in the Freedom of Information Law. As such, an agency, such as a school district, cannot in my view unilaterally establish policy that is contrary to or more restrictive than a statute passed by the State Legislature. If agencies could generally engage in such policy-making activities, statutes would have minimal effect, if any.

The Freedom of Information Law is based upon a presumption of access. The Law states that all records in possession of a government are available, except to the extent that records or portions thereof fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of §87 (2). Although two grounds for denial might be cited as a basis for withholding in the context of this dispute, neither could in my view constitute a valid ground for denial.

The first ground for denial that might be cited is §87(2)(g), which 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 a public body may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. With respect to the records in question, I believe that time sheets clearly constitute intra-agency materials. Nevertheless, having reviewed a copy of the time sheet appended to your letter, it is equally clear that time sheets consist solely of "statistical or factual tabulations or data" that would be accessible. Consequently, §87(2)(g) cannot in my opinion be cited appropriately as a ground for denial.

The remaining ground for denial that might be cited is §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy." Although the interpretation of the privacy provisions of the Freedom of Information Law must of necessity in some cases involve the making of subjective judgments, the case law interpreting those provisions indicates that the records in question are accessible. First, the case law has in several instances essentially held that public employees enjoy lesser rights of privacy than members of the public generally. Second, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are accessible, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372, NYS 2d 905; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978)]. Contrarily, when records or portions of records relating to public employees have no bearing on the manner in which they perform their official duties, such information may be withheld, for disclosure would in such cases result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

In my opinion, the contents of the time sheet that you attached are in every respect relevant to the performance of the official duties of both the public employee who is the subject of the record and the District. Further, much of the information is accessible in a different form from other sources. For example, as you intimated, each agency is required to compile and make available a payroll record that includes the name, public office address, title and

salary of every officer or employee of an agency [§87(3)(b)]. In addition, §2116 of the Education Law has for decades granted access to virtually all records in possession of a school district. If, for example, the time sheet contained extraneous information not relevant to the performance of the official duties of a public employee, such information could be deleted from the record. For instance, if the time sheet contained a social security number, or if a payroll record included the number of deductions claimed by a particular employee, such information in my view could justifiably be deleted from a record, for disclosure would indeed result in an unwarranted invasion of personal privacy. Nevertheless, in the case of the time sheet that you attached, none of the information could in my opinion be withheld with justification on the ground that disclosure would result in an unwarranted invasion of personal privacy. As such, I believe that the time sheet in question is accessible under the Freedom of Information Law to any person.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard L. Montesi, School Superintendent
Merril A. Mironer, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1218

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

COMMITTEE MEMBERS
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BASIL A. PATERSON
IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 2, 1979

Mr. James J. Arnold
#76-D-0190
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Arnold:

I have received your letter dated July 9, which was received by this office on July 25.

Your letter concerns a response to a request that you directed to the Clinton County Sheriff, which stated that it is the policy of the Sheriff's office that copies of records will not be mailed. The Sheriff wrote further that records may be inspected during regular business hours.

As you explained in your letter to me, your incarceration effectively precludes you from physically visiting the Sheriff's office to avail yourself of rights granted by the Freedom of Information Law. Similar situations have arisen in the past concerning persons who are hospitalized or who live great distances from the locations where records are kept. In my opinion, it is unreasonable to require an individual to physically present himself or herself where records are kept in order to inspect or copy records.

The Freedom of Information Law grants access to any person to records of government throughout New York State. From my perspective, if, for example, Albany is the only location where certain records are kept, it would be unreasonable and therefore a constructive denial of access to require a citizen living in Suffolk County, or Buffalo, or Plattsburgh, for instance, to travel to Albany in order to gain access to records. Moreover, there is no requirement in the Law that requests for records be personally submitted. On the contrary, §89(3) of the Law merely requires that a request be made in writing that reasonably describes the records sought. The same section also states that an agency must provide copies of accessible records upon payment of or offer to pay the requisite fees for reproduction.

In this instance, I believe that the Sheriff is required to provide copies of accessible records to you upon payment of the appropriate fees for copying as well as the cost of mailing. Therefore, it is suggested that you renew your request to the Sheriff and enclose the appropriate amount to cover the fees for copying and postage. In addition, a copy of this letter will be sent to the Sheriff.

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/kk

cc: Russell J. Trombly
Clinton County Sheriff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1219

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

August 3, 1979

Ms. Nan Frankel
Youth Advocacy Project
210 Old Country Road
Mineola, New York 11501

Dear Ms. Frankel:

I have received your letter of July 17 in which you raised questions regarding a proposal concerning the destruction of records now before the Roslyn School District.

Your letter cites a provision contained in regulations promulgated by the United States Department of Health, Education and Welfare pursuant to public law 94-142, which states that:

> "[T]he information must be destroyed at the request of the parents. However, a permanent record of a student's name, address and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation."

However, you indicated that the District's proposal includes an additional statement to the effect that "[T]he most recent Psychological Report shall be retained for six years following graduation." According to your letter, a District spokesman stated that the six year retention period is based upon a records retention and disposition schedule sent to school districts by the State Education Department.

Your question is whether the additional requirement that records be retained pursuant to the retention schedule conflicts with the direction provided by the HEW regulations.

As I informed you earlier, I have contacted the Bureau of Education for the Handicapped, which is part of the Department of HEW, on your behalf. In brief, I was informed that states wishing to receive funds under the handicapped education program from the Department are required to comply with the regulations promulgated by the Department. Further, since New York is a participant in the program and receives funds, it is obliged to comply with the appropriate regulations. Consequently, to the extent that the policy of New York conflicts with HEW regulations, it would appear that the policy of New York would be void to that extent.

However, I was advised to inform you that your next step should involve contacting the Bureau of Education for the Handicapped. In order to request an inquiry, you should write to Gerald Boyd, Bureau of Education for the Handicapped, Donohoe Building, 400 Maryland Avenue, S.W., Washington, DC, 20202.

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: Roslyn School Board
Carol Weiss
Charlotte Roth

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1220

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

August 6, 1979

Ms. Ruth C. Boice
Patent Trader
Box 240
Mount Kisco, New York 10549

Dear Ms. Boice:

I have received your letter of July 25 concerning a denial of access to records by the Westchester County Department of Health.

Specifically, based upon information provided in your letter and our conversation of August 2, the records in which you are interested were compiled in the mid 1950's to determine the levels of radiation to which the employees of the Canadian Radium and Uranium Corporation were exposed. The records were apparently compiled by the State Department of Labor at the time in the ordinary course of business in order to ascertain whether the Corporation was violating health standards.

Your appeal directed to the Commissioner of the Department of Health, a copy of which was attached to your letter, indicates that access has been denied on the basis that the records in question have been marked confidential and constitute memoranda between other departments.

In my opinion, records reflective of the test results are in great measure available.

It is noted at the outset that the word "confidential" is in my view overused. Under New York law, records may be considered confidential in but two instances. First, a record is confidential when a statute enacted by the State Legislature or by Congress specifically prohibits disclosure.

Such records would be deniable under the Freedom of Information Law pursuant to §87(2)(a), which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute." The second situation in which records may be deemed confidential is based upon the "governmental privilege", which is derived from case law. In brief, the governmental privilege is applicable when government can demonstrate to a court that disclosure would, on balance, result in detriment to the public interest. Under the circumstances, I do not believe that either of the grounds for confidentiality could appropriately be asserted.

There are, however, two grounds for denial that might be raised. One is in my view applicable, but only to an extent.

Section 87(2)(g) of the Freedom of Information Law 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..."

The quoted provision contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. In my view, the test results are reflective of both "statistical or factual tabulations or data" and determinations made by an agency. As such, I believe that they are available. Consequently, although the records in question might be characterized as "inter-agency", the portions of the records in which you are interested are in my view available and §87(2)(g) would not be applicable as a ground for denial.

The second ground for denial that might be raised is §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy." Assuming that the records containing the test results identify the individuals to whom the test results relate, disclosure of the identities of the individuals would in my opinion result in an unwarranted invasion of personal privacy. Nevertheless, it is emphasized that the introductory language of §87(2) permits an agency to withhold "records or portions thereof" that fall within one or more among eight grounds for denial that ensue. In this instance, the portions of the records that identify the individuals tested could be deleted based upon the privacy provisions. However, the remainder, i.e. the factual findings constituting the test results, 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
Executive Director

RJF/kk

cc: Dr. Anita S. Curran

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1221

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

August 7, 1979

Mr. Donald S. Adamowski
Montgomery County
Department of Public Works
Park Street
Fonda, New York 12068

Dear Mr. Adamowski:

I have received your letter of July 26 and thank you for your interest in complying with the Freedom of Information Law. Your question concerns rights of access to "billing and invoice data relating to municipal landfill operations."

In my view, such data is clearly accessible.

First, the 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 available, except those records or portions thereof that fall within one or more categories of deniable information appearing in paragraphs (a) through (h) of §87(2).

Second, the records in question are in my view accessible pursuant to §87(2)(g)(i) of the Law. The cited provision provides that an agency may deny access to interagency or intra-agency materials, except to the extent that such materials contain statistical or factual data, instructions to staff that affect the public or final agency policy or determinations. Since the records in question are reflective of factual data, as well as a determination to employ the services of particular firms, they are in my view accessible.

Third, §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 means of other statutory provisions or case law. In this regard, §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..."

Since the General Municipal Law has long granted access to books, bills, vouchers, checks and similar documents, the rights granted by that statute are preserved by means of §89(5) of the Freedom of Information Law.

As you requested, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, model regulations that may assist you in complying, 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

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1222

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

August 8, 1979

Ms. Jane Kennedy
"Borrowed Roots"
c/o The Courier
P.O. Box 280
Van Buren, AR 72956

Dear Ms. Kennedy:

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

As a general matter, adoption records in New York are confidential. According to §114 of the Domentic Relations Law, a copy of which is attached, records concerning adoption may be opened only after having obtained a court order.

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/kk

Enc.

cc: Solicitor General

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1223

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

August 8, 1979

Ms. Victoria V. Lawson
[redacted]

Dear Ms. Lawson:

I have received the copy of your letter sent to the Attorney General and the Comptroller. Your inquiry concerns the process by which a school district may add to the budget passed by district voters.

With respect to the Freedom of Information Law, you have questioned a statement that you have attributed to School District Officers regarding the disclosure of teacher demands:

> "[T]here is nothing that compels a board to disclose those items, and non-disclosure of the subject (salary offers by the board) of negotiations is specifically permitted by the Public Officers Law."

It is noted at the outset that the issue that you raised has been brought up in the past. In many instances, school district voters act upon a budget prior to the close of collective bargaining negotiations. Since the negotiations inevitably result in an agreement that includes an increase in salaries and benefits, district voters are forced to pay the difference without having the benefit of expressing their views on the agreement by means of acceptance or rejection of the district budget. Having discussed the matter with several individuals who are knowledgeable with respect to the powers of school districts, I believe that a school board has the legal authority to unilaterally increase the expenditures of a district without voter approval after a budget has been passed.

Further, in a similar situation in which an individual requested records reflective of the last proposals exchanged between a district and a teachers union prior to the vote on the budget, it was held that such proposals could be withheld under the Freedom of Information Law [see Colahan v. Board of Education of Bayport-Blueville School District, Supreme Court, Suffolk County, NYLJ, June 16, 1978]. The decision was appealed and argued recently before the Appellate Division, Second Department. No decision has been rendered yet.

In terms of the Freedom of Information Law, the Law generally provides all records in possession of government are available, unless the records fall within one or more categories of deniable information enumerated in §87(2) of the Law. Relevant under the circumstances is §87(2)(c), which states that an agency, such as a school district, may deny access to records or portions thereof which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations". As such, if a school district can demonstrate to a court that disclosure of teacher demands would indeed "impair" the collective bargaining process, such records may be withheld. Contrarily, if no proof of impairment of the ability to engage in a collective bargaining agreement can be offered, the records would be accessible.

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/kk

cc: Greenburgh Central School District No. 7

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1224

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

August 9, 1979

John J. LaDuca, Esq.
LaDuca & McGinn
Suite 100
Executive Office Building
Rochester, New York 14614

Dear Mr. LaDuca:

As I informed you during our conversation of August 8, I have received your letter of July 26 regarding access to wiretap information concerning one of your clients.

To reiterate, the Committee on Public Access to Records is charged with the responsibility of advising with respect to the Freedom of Information Law. It does not have possession of records of state government generally, nor does it have the capacity to compel government to comply with the Freedom of Information Law.

Nevertheless, having reviewed your letter, it is suggested that you review the provisions of §700.55 of the Criminal Procedure Law, which concerns the custody of eavesdropping warrants, applications and recordings and generally restricts access to such information.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1225

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

August 9, 1979

Ms. Lorraine Bergstrom
[redacted]

Dear Ms. Bergstrom:

I have received your letter of July 30 as well as the correspondence appended to it. Based upon the material, it appears that you have been denied access to records pertaining to you by the New York City Police Department.

According to your letter, you have requested that the New York City Police Department produce records in its possession that are filed under your name. In all honesty, it is in my view questionable whether your request meets the requirements of the Freedom of Information Law. Specifically, §89(3) of the Law requires that an applicant submit a request in writing that "reasonably describes" the records sought. In this regard, it may be difficult if not impossible for the Police Department to locate records in response to a request as broad as the one you submitted.

It is suggested that you renew your request and attempt to provide as much specificity as possible regarding the records that may be held by the Police Department. For example, by providing dates, file designations or any additional identifying information, perhaps the Police Department would have a greater capacity to locate records pertaining to you. If, for example, you were questioned, charged, arrested, or involved in any activity in which the Police Department may have contacted you, you should provide as much detail as possible regarding the events surrounding your contact with the Police Department.

I have enclosed for your consideration copies of the Freedom of Information Law, regulations that govern the procedural aspects of the Law with which all agencies must comply and a pamphlet entitled "The New Freedom of Information Law and How to Use It."

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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1226

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

August 13, 1979

Ms. Diane Landry
[redacted]

Dear Ms. Landry:

In the past few weeks, I have received several carbon copies of letters that you have written to employees of the Legislature. I have contacted Joseph Martorana, among others, on your behalf to determine exactly what the problems or areas of disagreement might be. In all honesty, notwithstanding those conversations, there appears to be a general lack of understanding of the nature of the information in which you are interested. Consequently, there are several points that I would like to make.

First, Joseph Martorana is employed by the Assembly as its records access officer. Having reviewed your correspondence, I have the impression that you might believe that Mr. Martorana is the access officer for both houses of the Legislature. Contrarily, however, Mr. Martorana's duties concern only the Assembly. Further, under §88(1) of the Freedom of Information Law, it is clear that the leader of each house of the Legislature is required to adopt procedural regulations regarding access to records "for their respective houses". As such, the Assembly and the Senate both are required to designate access officers, and Mr. Martorana has responsibility with respect to records in possession of the Assembly.

Second, despite the title of the Freedom of Information Law, it is a statute that grants access to certain existing records. While the Law permits public review of a great deal of information, it does not permit the equivalent of the cross-examination of public officials. Moreover,

§89(3) of the Law specifically provides that government is not required to compile or create a record in response to a request. Unless I am mistaken, it appears that some of the information in which you are interested may not exist in the form of a "record".

Third, as stated earlier, there is confusion on the part of those to whom your requests have been made as to the nature of the information that you are seeking. Mr. Martorana and I have worked together for years, and I know that he is more that willing to comply with the Freedom of Information Law. Nevertheless, he has told me that he is unable to discern exactly the nature of information in which you are interested. Perhaps additional clarification on your part would expedite the response to your requests.

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/kk

bcc: Joseph Cornell
Mark Glaser
Joseph Martorano
Francine Misasi

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1227

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

August 13, 1979

Mr. Kevin C. McGraw &
Ms. Patricia Clark
Legislative Associates
Assembly Program Staff
Room 519
Capitol
Albany, New York

Dear Mr. McGraw and Ms. Clark:

I have received your letter of August 8 in which you requested a review of the regulations promulgated recently by the Department of Health. Specifically, the regulations concern the SPARCS system (10 NY CRR 405.30) and whether they comply with the Freedom of Information Law and the regulations promulgated by the Committee.

Before reviewing the specific aspects of the regulations, it is important to make several points.

First, as you are aware, I have had numerous communications with the individuals responsible for devising the regulations under the SPARCS system. I believe that those individuals are generally aware of the nature of the comments that will ensue, for they have been discussed in the past.

Second, it is important to recognize at the outset that the regulations under review are somewhat unique, for they seek to create a two-tiered system concerning access to SPARCS data. One tier concerns access to information that does not identify any patient. The second tier concerns access to information that would ordinarily be considered deniable under the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Public Officers Law, §§87(2)(b) and 89(2)(b)]. Further, the purpose of the system involves the sharing and dissemination of a great deal of deniable data

to individuals and groups that have a need for the information and with which government must cooperate in order to accomplish the goals envisioned by the SPARCS system. Thus, a category of information that would be deniable under the Freedom of Information Law is considered by the regulations for the purpose of providing access to particular individuals or groups.

Third, notwithstanding the unique treatment of deniable information, the Freedom of Information Law is in my view nonetheless applicable. 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... computer tapes or discs" [§86(4)]. In view of the foregoing, the information contained within the SPARCS system falls within the definition of "record" in the Freedom of Information Law. Further, the SPARCS Bureau is found within the Office of Health Systems Management, which is part of the State Health Department. Since the custodian of the SPARCS data is an "agency" as defined by §87(3) of the Freedom of Information Law, the records, the SPARCS Bureau, and the officers charged with the duty of maintaining the SPARCS system are in my opinion subject to the Freedom of Information Law in all respects.

Fourth, §89(2)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate rules and regulations concerning the procedural implementation of the Law. The Committee has done so, and such regulations are found in 21 NYCRR §1401. In addition to the Committee's rule-making authority, §87(1)(b) of the Freedom of Information Law requires agencies to promulgate regulations consistent with the Law and "such general rules and regulations consistent with the Law and "such general rules and regulations as may be promulgated by the committee on public access to records..." Consequently, the SPARCS regulations concern "records" promulgated by an "agency," that must be consistent with and no more restrictive than the regulations promulgated by the Committee.

At this juncture, it is emphasized that despite the potential gains to the State that may be derived from the system, I feel compelled to comment in a technical manner regarding the specific aspects of the regulations.

Section 405.30(a)(2) defines "deniable individual stay data" to include a number of particular aspects of an individual's hospital stay which, according to the regulations, would constitute an unwarranted invasion of personal privacy if disclosed. Although it is in my view questionable whether each datum would indeed constitute an unwarranted invasion of personal privacy if disclosed (e.g. admit date, discharge date and accident date), I believe that the provisions taken as a whole relative to the combination of such data likely justifies the identification of such data as deniable.

In addition, it is important to note that the Freedom of Information Law is permissive. While §87(2)(a) through (h) of the Freedom of Information Law permits an agency to withhold records or portions of records, there is nothing in the Law that requires an agency to withhold such information. Consequently, despite the direction in the Freedom of Information Law regarding the protection of privacy, there is no provision of which I am aware that would require the Health Department to withhold the information contained in the SPARCS system or consider it "confidential" by means of regulation.

Further, §405.30(b)(2) of the SPARCS regulation describes "the purposes for which data from SPARCS may be used..." The ensuing provisions indicate six areas of possible use of the SPARCS data. In this regard, one of the cornerstones of the Freedom of Information Law is the principle that accessible information should be made equally available to any person, without regard to status or interest. As such, the purpose for which a request is made is largely irrelevant under the Freedom of Information Law [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165).

If the regulations had instead described the purposes for which deniable data might be used, rather than how data generally from SPARCS could be used, I believe that a more appropriate line of demarcation could have been created. In addition, some groups, including the New York Civil Liberties Union, pressed for specific guidelines regarding the purpose for which SPARCS data could be used. Again, however, the language in question pertains to SPARCS data generally and is in my view overly restrictive with respect to the Freedom of Information Law. For example, if a newspaper wanted to

perform its own study and sought only statistical data that could not identify any individual, the purpose of such a request would not meet the guidelines described in the regulations, but would in my view be accessible [see Freedom of Information Law, §87(2)(g)(i)]. If, however, the dividing line suggested above had been drawn to distinguish between solely statistical data and deniable data, the purposes of SPARCS and rights of access would in my opinion have been clearer.

Much of the remainder of the SPARCS regulations concern the means by which information may be obtained. Prior to a review of those provisions, it is important to lay the groundwork for the ensuing comments by describing the procedural requirements of the Freedom of Information Law and the Committee's regulations relative to response to requests.

Section 1401.2 of the Committee's regulations requires that each agency designate one or more records access officers responsible for responding to requests. I know that the Health Department long ago designated a records access officer; however, it appears that the responsibility for providing access to information in possession of the SPARCS Bureau does not fall on the designated records access officer of the Health Department. It further appears that the regulations have not designated a records access officer "by name or by specific job title" as required by the Committee's regulations.

Section 89(3) of the Law and §1401.5 of the regulations state that an agency must respond to a "written request for a record reasonably described" within five business days of its receipt. Within that period, the agency has three potential responses. It can grant access, deny access, or acknowledge receipt of the request in writing and provide an estimate of the date that a determination to grant or deny access will be made. If the receipt of a request is acknowledged, the agency then has ten additional business days from the date of the acknowledgment to grant or deny access to the records. If a request is neither granted, denied nor acknowledged within five business days of its receipt, the request is considered constructively denied pursuant to §1401.7(c) of the Committee's regulations and the applicant may appeal. In the event of a written denial, the denial must be in writing providing the reasons therefor, apprising the applicant of his or her right to appeal, and informing the applicant of the name and address of the person or body to whom an appeal should be directed.

Section 89(4) of the Freedom of Information Law provides that a person denied access may within thirty days of the denial appeal to the "head, chief executive or the governing body of the entity, or the person therefor designated by such head, chief executive, or governing body." The person or body designated to determine appeals is required by §89(4)(a) of the Law to "...fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought" within seven business days of receipt of an appeal. If a person is denied access to records on appeal, he or she may seek judicial review of the denial by initiating an Article 78 proceeding.

Although the SPARCS regulations contain procedures for reviewing requests and determining access to data in the SPARCS system, they are in my view inconsistent with the procedure envisioned by the Freedom of Information Law.

With respect to the foregoing, §405.30(c) describes the functions of the SPARCS Bureau, which includes the receipt and review of all requests for data. Subdivision (1)(iv) of the cited provision concerning requests for accessible data (as opposed to deniable data) shall, according to the SPARCS regulations, "be processed within a reasonable time." Although "a reasonable time" may fall within the time limitations prescribed by the Freedom of Information Law, it lacks the required specificity of the Law and the Committee's regulations.

Subdivision (1)(v) of the same provision concerns the review of requests for deniable data and makes reference to the purposes for which the data may be used. In this instance, since the provision concerns requests for deniable data, I believe that an inquiry into the purpose for which data might be used is likely proper for the reasons described earlier.

The next step found in subdivision (1)(vi) pertains to the process by which the SPARCS Bureau makes recommendations for the approval of requests for deniable data. Thus it is clear that the SPARCS Bureau does not make a determination regarding an initial request, but rather recommends.

The SPARCS Bureau transmits its recommendation regarding a request for deniable data to the Data Protection Review Board (DPRB). In §405.30(d)(2)(iii), the DPRB is given the authority to review requests for deniable data. In §405.30(d)(3) the DPRB is designated to meet to review requests "which

have been submitted to DPRB members more than twenty-one days prior to the date of its meeting" [§405.30(d)(3)(iv)]. In addition, the cited provision states that "the DPRB may vote to defer the request for data for one month." In view of the time in which it takes the SPARCS Bureau to review a request, make its recommendation to the DPRB, which in turn reviews the request, it is obvious that the time limits prescribed by the Freedom of Information Law and the Committee's regulations cannot in all likelihood be followed. The length of time during which the SPARCS Bureau reviews requests for either accessible or deniable data is unclear. Further, the DPRB has substantially more time to make its determination than the Freedom of Information Law or the Committee's regulations permit.

Further, §405.30(d)(v) provides that the DPRB shall forward to the Commissioner of the Department of Health its determination "for his ratification or disapproval." As such, although the DPRB represents a second step in the process of reviewing requests, it could not be considered either a records access officer that makes initial determinations to grant or deny access or an appeals body in this context, for its determinations are subject to review by the Commissioner.

Section 405.30(f) states that the Commissioner "shall make his decision whether to ratify or disapprove the determination of the DPRB within ten business days after receipt from the DPRB the request for data." If the Commissioner could be considered an appeals officer, the ten business day period would exceed the seven business day limitation contained in §89(4)(b) of the Freedom of Information Law.

Additionally, §405.30(g) provides that if the Commissioner disapproves of the DPRB determination, "he shall return the request for data to the DPRB which shall reconsider the request at its next meeting." The DPRB may at its next meeting essentially overrule the Commissioner's decision by a vote of two-thirds of its members.

In view of the foregoing, rather than two steps required by the Freedom of Information Law (an initial determination to grant or deny access by a records access officer, followed by review by an appeals officer or body in the case of a denial). the SPARCS procedure contains four steps, including reviews first by the SPARCS Bureau, second by the DPRB, third by the Commissioner and, potentially fourth by the DPRB again. As such, it appears that the Commissioner officially makes the

initial determination to grant or deny access, and the DPRB has the authority as an appeal body to review the Commissioner's determination. However, to reiterate, the time limitations for response to requests required by the Freedom of Information Law would not be followed under the procedure. It appears that the multi-leveled review process culminating in determination by the Commissioner, if he approves of the DPRB recommendation, or by the DPRB if the Commissioner disagrees with its determination, could take months.

There are other comments that I would like to make that are ancillary but nonetheless related to the Freedom of Information Law.

For example, §405.30(i) entitled "[A]cess to and purging of data" provides examples of entities that may receive SPARCS data. The list of example of recipients of SPARCS data is unnecessary. As noted earlier, if, for example, solely statistical data is requested that in no way identifies a patient, presumably any person could gain access to such information.

Subidivisions (3) and (4) of §405.30(i) concern the disposition of individual stay data and source material. In this regard, it is noted that I have discussed the matter with an attorney for the Office of Health Systems Management who is aware of the legal basis regarding the disposal or destruction of records. However, it is important to note that records may be destroyed only pursuant to the provisions of §186 of the State Finance Law. Therefore, for SPARCS to comply with its own regulations, it must first reach an agreement under §186 of the State Finance Law with the Office of General Services regarding the destruction of its records.

Section 405.30(j) requires that requests "may be submitted on a standard form to be supplied by the SPARCS Bureau." The cited provision further states that the request make reference to "the specific nature of data requested." In this instance, it appears that the SPARCS regulations seek to facilitate the making of requests for SPARCS data. However, it should be noted that the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for denial of access. Rather, any request made in writing that reasonably describes the records sought as required by §89(3) of the Freedom of Information Law should suffice. In the same vein, although the designation of the "specific nature" of the data requested may facilitate the process of making and responding to requests, such specificity is not required by the Freedom of Information Law.

Lastly, reference is made in several portions of the regulations to conditions placed upon recipients of the information concerning the destruction, use or further dissemination of the SPARCS data. Although the provisions may provide a degree of moral direction, it is difficult to envision the means by which such provisions could be enforced.

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: Joanne Quan
Mark Hartman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1228

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

August 15, 1979

Ms. Sharon Thorn
[redacted]

Dear Ms. Thorn:

I have received your letter of August 8 regarding the difficulties you have encountered in your attempts to gain access to records in possession of the Town Assessor of the Town of Saugerties. Having reviewed the correspondence appended to your letter, I have several comments.

It is emphasized at the outset that the records in which you are interested had been held to be available by the courts long before the enactment of the Freedom of Information Law. For example, as early as 1951, it was held that cards and records contained in a "Kardex System" as well as applications made by taxpayers for revision of real property assessments are available for public inspection and copying (Sears, Roebuck and Co. v. Hoyt, 107 NYS 2d 756). Similarly, in Sanchez v. Papontas, the Appellate Division found that pencil-marked data cards in possession of a municipality and used by its assessors to reappraise real property are available to the public, even though the cards were prepared by a third party, a private company [303 NYS 2d 711 (1969)]. Since §89(5) of the Freedom of Information Law preserves rights of access granted by other laws or by means of judicial determination, the records in which you are interested are now and have long been accessible.

The correspondence between you and the Town Assessor indicates that the assessor intends to charge fifty-cents per photocopy. In one letter, the records are described as 8 1/2 by 11 inches; in another, the records are described

as 9 1/2 by 11 1/2 inches. In this regard, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge no more than twenty-five cents per photocopy unless a different fee is otherwise prescribed by law. The only basis upon which the Town Assessor could rely for charging a fee of fifty-cents would be the existence of a local law permitting such a fee that was enacted prior to the Freedom of Information Law, which became effective on September 1, 1974. If there is no such legal authorization, the fee for photocopies is restricted to twenty-five cents per page. It is also noted that the Law refers to photocopies not in excess of 9 by 14 inches. Since some records have been described as 9 1/2 by 11 1/2 inches, there are two alternatives that could be cited to arrive at a fee. First, you might request a photocopy of a page minus one-half inch, resulting in a twenty-five cent fee. In the alternative, the Law provides that an agency may assess a fee based upon the actual cost of reproduction of records in excess of 9 by 14 inches or that are not subject to photocopying, such as microfilm or tape recordings.

Lastly, in view of our discussion as well as the correspondence attached to your letter, I would like to review in general fashion the procedural requirements imposed upon agencies, such as the Town, by the Freedom of Information Law. In this regard, I have enclosed copies of the Freedom of Information Law, regulations promulgated by the Committee, which have the force and effect of law and with which each agency in the state must comply, and model regulations designed to assist government in complying with the procedural aspects of the Law. Copies of each of those documents will be sent to the public officials that you identified in your letter.

First, §1401.2 of the regulations requires that the governing body designate one or more records access officers who have the duty of responding initially to requests made under the Freedom of Information Law. In most instances, Town Boards have designated the town clerk as records access officer, for the town clerk is the legal custodian of all town records pursuant to §30 of the Town Law. Further, although the Town Assessor may have been designated as a records access officer, if he has not been designated as such, I do not believe that he would have the responsibility of responding to your requests. In any case, §89(3) of the Law and 1401.5 of the regulations require that a records access

officer respond to a request within five business days of its receipt. The response can consist of a grant of access, a denial of access, or an acknowledgement that a request has been received. An agency may acknowledge receipt of a request if, for example, records cannot be located within five business days. When an acknowledgement is given, the agency has ten additional business days to grant or deny access. If no response is given within five business days, the request is considered constructively denied and may be appealed. In general, however, a denial must be made in writing, state the reasons for the denial, apprise the applicant of his or her right to appeal and provide the name and address of the person or body to whom an appeal should be directed (see regulations, §1401.7). An appeal may be made within thirty days of a denial and should be directed to the head or governing body of an agency or whomever has been designated by such head or governing body to determine appeals [see Freedom of Information Law, §89(4)(a); regulations, §1401.7]. The appeals person or body then has seven business days from the receipt of an appeal to grant access to the records sought or fully explain the reasons for further denial in writing.

In addition, it is noted that a final denial may be challenged by means of an Article 78 proceeding. Section 89(4)(b) of the Law specifies, however, that the agency has the burden of proving that records withheld fall within one or more categories of deniable information listed in the Law. In this instance, as noted earlier, rights of access to the records in question have long been established and in my view there should be no dispute regarding your ability to inspect and copy 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/kk

Encs.

cc: Hon. Frank Greco
Daniel N. Lamb, Jr.
Paul Pavlovich

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1229

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

August 17, 1979

Mr. Jeffrey Berdy
[redacted]

Dear Mr. Berdy:

I have received your most recent letter regarding an alleged failure of the New York City Board of Education to respond to your requests for records. In view of the foregoing, you have asked that I "direct" the Board of Education to comply with your requests.

Please be advised that the Committee has no power to compel compliance with the Law or "direct" agencies to grant or deny access to records. The Committee is given only the authority to give advice with respect to the Freedom of Information Law. Under the circumstances, assuming that you have exhausted your administrative remedies, you may challenge any denials of access, whether written or constructive, by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

It is emphasized that §89(4)(b) of the Freedom of Information Law requires that an agency demonstrate to a court that records withheld in fact fall within one or more categories of deniable records enumerated in §87(2)(a) through (h) of the Law. Further, the state's highest court, the Court of Appeals, recently held that an agency cannot merely assert grounds for denial to prevail. On the contrary, the agency must prove that the harmful effects of disclosure described in the Law would in fact arise by means of disclosure [see Church of Scientology v. State, 46 NY 2d 906 (1979)].

Lastly, I would like to reemphasize a point made in my response to you of April 17. Although the Freedom of Information Law provides access to information, the information must appear in the form of a record or records to fall within the framework of the Law. Further, §89(3) of the Law provides that an agency need not create a record in response to a request. As indicated in April, it is unclear whether the information in which you are interested exists in the form of a record or records. In sum, while the Law provides significant rights of access to government records, it is not a device with which the public can cross-examine public officials.

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1230

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

August 20, 1979

Mr. John A. Leith
Senior Public Records Analyst
The University of the State of
New York
The State Education Department
Albany, New York 12230

Dear John:

Thanks for sending the proposed retention schedules regarding records compiled in connection with the Freedom of Information Law. I have comments with respect to four among the six records described.

First, the subject matter list would be retained for six years after it is updated or becomes obsolete. Assuming that a subject matter list is accurate, it could in my view have inestimable value in terms of historical research. For example, in 1974, when the Freedom of Information Law was enacted, the Department of State had many fewer functions that it has now. A review of successive subject matter lists would provide a history of the evolution of a particular office or department, and its functions and duties. Perhaps not all subject matter lists should be retained ad infinitum. However, it might be useful to maintain at least one such list over a period of each year or two years, for instance.

Second, the payroll record would be required to be kept for three years after it is superseded. Again, it may be important in terms of financial history of an agency to maintain the payroll information for longer than a three year period. It is noted, however, that if the Department of Audit and Control keeps the equivalent of the payroll record for a longer period of time, the three year retention would likely be more than sufficient.

The fourth item concerning denials of access would be required to be maintained for a period of one year after a final determination is made. In this regard, it is possible that a review of such records within a particular agency might provide a history of the agency's experience with the Freedom of Information Law and the changes in the Freedom of Information Law and its interpretation over the course of years. Nevertheless, I could understand why the custodians of records, the agencies, might disagree, for the majority of such records would likely have minimal value.

And lastly, the sixth item concerns the maintenance for one year of a register or list of applicants seeking access to records. From my perspective, such a list need not be kept. First, the Committee and the courts have determined that the Freedom of Information Law grants equal rights of access to any person, without regard to status or interest. As such, the name of an applicant is largely irrelevant. Further, based upon the same reasoning, it is possible that such a list might be denied on the ground that disclosure would result in an unwarranted invasion of personal privacy.

I hope that I have been of some assistance. If you would like to discuss any aspects of my comments, please feel free to call.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1231

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

August 20, 1979

Robert H. Skigen, Esq.
Baum, Skigen & Lefkowitz
278 East Main Street
P.O. Box 648
Smithtown, New York 11787

Dear Mr. Skigen:

I have received your most recent letter regarding the relationship between the Freedom of Information Law and §160.50 of the Criminal Procedure Law.

According to your letter, you have been denied access to requests for information regarding traffic violations by the Assistant Clerk of the District Court in Suffolk County. Further, the denial appears to be based upon §160.50 of the Criminal Procedure Law and a memorandum on the subject written by Robert T. Pisani, Court Clerk III to Edward M. Barry, Chief Clerk of the District Court.

Since §160.50 is a relatively new provision of law, there is not a great deal of judicial interpretation of the statute. Nevertheless, I believe that it is intended to apply only to records that relate to criminal actions or proceedings that are terminated in favor of the subjects or such actions or proceedings. Thus, a distinction must in my opinion be made between records concerning non-criminal actions, such as traffic violations, and those criminal actions or proceedings to which §160.50 applies. Consequently, while certain records in possession of a court clerk, including records pertaining to the termination of criminal action or proceedings in favor of such a person, may be sealed and outside the scope of public access, records concerning violations, rather than criminal actions, fall outside of the sealing requirements of §160.50.

Enclosed for your consideration is a copy of a decision rendered recently by the Nassau County District Court regarding a similar issue. Implicit in the decision is that a court might not have discretion to return fingerprints or photographs or seal records if the records fall outside the scope of §160.50.

Lastly, you also wrote that the District Court does not have a "Freedom of Information Officer". Please be advised in this regard that neither courts nor court records are subject to the Freedom of Information Law [see Freedom of Information Law, definitions of "judiciary" and "agency", §§86(1) and 86(3) respectively]. Despite the absence of coverage by the Freedom of Information Law, it is emphasized that records in possession of court clerks are generally accessible under §255 of the Judiciary Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: Robert T. Pisani
Nicholas DePasquale

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1232

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

August 21, 1979

Mr. Dennis A. Kaufman
Staff Attorney
Prisoners' Legal Services
of New York
84 Holland Avenue
Albany, New York 12208

Dear Mr. Kaufman:

I have received your letter of August 15 concerning a denial of access to records by the Department of Correctional Services and the implementation of the Freedom of Information Law by the Department.

First, according to your letter and the correspondence appended to it, a request for a "three-page fire safety and evacuation plan for F-Block at Great Meadow Correctional Facility" was denied on appeal on the ground that disclosure "would endanger the life and safety of both inmates and staff." As such, the plans were denied under §87(2)(f) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof which if disclosed would "endanger the life and safety of any person."

Without having reviewed the records that have been denied, it would not be appropriate to conjecture as to the propriety of the assertion made by the Department. Since the plans have been denied on appeal, your only recourse would appear to lie in the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

In many instances, the courts have made in camera inspections of records to determine which portions, if any, fall within the grounds for denial appearing in the

Freedom of Information Law. Under the circumstances, should judicial review be sought, perhaps a court would inspect the records in question to determine whether each segment of the three pages denied or any portion thereof would in fact result in endangerment to the life and safety of inmates and staff.

It is also emphasized that the Freedom of Information Law requires that an agency prove that the harmful effects of disclosure described in the grounds for denial would indeed arise by means of disclosure. Further, the Court of Appeals has held that an agency cannot merely assert grounds for denial; on the contrary, it must prove the applicability of grounds for denial [see Church of Scientology v. State, 46 NY 2d 906 (1979)].

The remaining point in your letter concerns the procedural implementation of the Freedom of Information Law by the Department. In this regard, the following consists of a review of the procedural requirements of the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law and with which each agency must comply.

Section 89(3) of the Law and §1401.5 of the regulations states that an agency must respond to a "written request for a record reasonably described" within five business days of its receipt. Within that period, the agency has three potential responses. It can grant access, deny access, or acknowledge receipt of the request in writing and provide an estimate of the date that a determination to grant or deny access will be made. If the receipt of a request is acknowledged, the agency then has ten additional business days from the date of the acknowledgment to grant or deny access to the records. If a request is neither granted, denied nor acknowledged within five business days of its receipt, the request is considered constructively denied pursuant to §1401.7(c) of the Committee's regulations and the applicant may appeal. In the event of a written denial, the denial must be in writing providing the reasons therefor, apprising the applicant of his or her right to appeal, and informing the applicant of the name and address of the person or body to whom an appeal should be directed.

Section 89(4) of the Freedom of Information Law provides that a person denied access may within thirty days of the denial appeal to the "head, chief executive or the governing body of the entity, or the person therefor designated by such head, chief executive, or governing body." The person or body

designated to determine appeals is required by §89(4)(a) of the Law to "...fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought" within seven business days of receipt of an appeal. If a person is denied access to records on appeal, he or she may seek judicial review of the denial by initiating an Article 78 proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Fish, Counsel
Robert C. Gaffigan, Assistant Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1233

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

August 22, 1979

Mr. Ned Shreve
Director of Public Relations
Department of Audit & Control
Alfred E. Smith State Office Building
Albany, NY 12247

Dear Mr. Shreve:

Betsy Buechner of the Governor's Office of Employee Relations has sought an advisory opinion and requested that it be transmitted to you.

The issue raised by Ms. Buechner involves rights of access to "the names of those persons receiving 'extraordinary compensation' for their work during the recent strike by Council 82." Ms. Buechner added that those who worked during the strike "were subjected to threatening phone calls, harassment and damage to their homes and other personal property during the strike."

In general, records of the identities of public employees who, in the performance their duties, have received the appropriate compensation for so doing would be made available as a matter of course for several reasons. For example, §87(3)(b) of the Freedom of Information Law specifically requires an agency to compile a payroll record that indicates the name, public office address, title and salary of all officers or employees of an agency. Similarly, this Committee has advised and the courts have upheld the notion that records which identify public employees that are relevant to the performance of their official duties are accessible, for disclosure in such instances would result in a permissible as opposed to an "unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)].

Nevertheless, in view of the circumstances, which are well documented and which resulted in harassment on the part of strikers directed at those who refused to strike, it is in my opinion possible that the names may properly be denied.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are available, except those records or portions thereof that fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law. Relevant to this inquiry is §87(2)(f), which states that an agency may withhold records or portions thereof which "if disclosed would endanger the life or safety of any person." While it would be inappropriate to conjecture with regard to the effects that might arise should the names be disclosed, it is not in my opinion inconceivable that a court would, based upon the factual background, withhold the identities of the employees in question on the basis of §87(2)(f).

In addition, a concept known as the "governmental privilege" has been established in common law. In brief, the privilege may be properly asserted when an agency can demonstrate to a court that disclosure of particular records would, on balance, result in detriment to the public interest [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 113 (1974)]. Again, due to the unique circumstances presented, an argument might be made that disclosure of the names would indeed result in detriment to the public interest.

Lastly, I would like to point out that §89(3) of the Freedom of Information Law states that an agency need not create a record in response to a request. Therefore, if there is no record containing a list of the names of those who received extraordinary compensation, it need not be created. In the alternative, if such a record does exist, portions of the record may be deleted if disclosure would result in endangering the life or safety of particular individuals identified.

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: Betsy Buechner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1234

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

August 23, 1979

Mr. Cosimo V. Di Bari
[redacted]

Dear Mr. Di Bari:

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

Since the Committee has only the authority to advise, it is incapable of performing an "investigation" regarding the possibility that your rights may have been violated. Nevertheless, the correspondence attached to your letter in my view indicates several deficiencies regarding Saratoga County's interpretation and implementation of the Freedom of Information Law.

First, in a letter addressed to you by Mr. Plummer, the County's Records Access Officer, Mr. Plummer denied access and requested that you specify the records in which you are interested. In this regard, the Freedom of Information Law does not require an applicant to "specify" the records sought. While, the original Freedom of Information Law enacted in 1974 required an applicant to seek "identifiable" records, the amended Law, effective January 1, 1978, merely requires that an applicant request records "reasonably described" [see attached, Freedom of Information Law, §89(3)]. Moreover, the regulations promulgated by this Committee, which have the force and effect of law, as well as Resolution No. 66 adopted by the County Board of Supervisors, provide that a records access officer "is responsible for assuring that agency personnel...assist the requester in identifying requested records, if necessary..." [see atttached, Committee regulations, §1401.2(b)(2) and Resolution No. 66, §1(b)(2)]. As such, a records access officer is required to provide assistance in instances in which the nature of records sought might be unclear.

Second, as you stated in your letter, the response failed to advise you of your right to appeal. The Committee's regulations as well as those adopted by the County require that an applicant be informed of the reasons for a denial in writing and advised of his or her right to appeal. In addition, the name, address and phone number of the person or body designated to determine appeals must be provided.

Third, having reviewed the letter sent to you by Mr. Plummer, the grounds for denial that were offered are in my opinion insufficient. Mr. Plummer characterized your request as "too broad in nature" and wrote that "certain records are privilege (sic) information". To classify records as "privileged" without more constitutes a failure to comply with the Freedom of Information Law. The Law is based upon a presumption of access. Specifically, §87(2) provides that all records in possession of an agency are accessible, except those records or portions thereof that fall within one or more grounds for denial enumerated in the Law. Those are the only grounds upon which a denial can be based. Furthermore, the use of the word "privileged" is often in my opinion misplaced or misunderstood. Records may be considered privileged in but two instances. The first concerns a situation in which a statute passed by either the State Legislature or Congress specifically prohibits disclosure. Such records may be withheld under §87 (2) (a) of the Freedom of Information Law. The second situation in which records may be considered "privileged" would involve a finding by a court that disclosure of records would result in detriment to the public interest [Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. In view of the foregoing, the basis for the denial is inappropriate.

Much of the remainder of your correspondence concerns the so-called "subject matter list". Please be advised that Resolution No. 66, which was adopted on February 28, 1978, merely reflects a requirement that has been in effect since September 1, 1974. The original Freedom of Information Law, effective September 1, 1974, required that each agency maintain a list in reasonable detail by subject matter of all records produced, filed or first kept as of the effective date of the Law. As such, a subject matter list has been required to be kept since 1974. The amendments to the Law broaden the scope of the content of the subject matter list by requiring that the list make reference to all records by category in possession of an agency, regardless of the date of their initial possession by government.

It is suggested that if your request has not been satisfied by the time you receive this response, you renew your request and attempt to provide greater detail regarding the records in which you are interested. If you continue to have problems, please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Solicitor General
Kermit G. Plummer, Jr.
Thomas Nolan
Board of Supervisors

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 370
FOIL-AO-1235

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

August 24, 1979

Mr. Robert F. Tomeny
Editor
The Scotchman Star-News
P.O. Box 393
North Syracuse, NY 13212

Dear Mr. Tomeny:

Thank you for your letter of August 20 and your interest in compliance with the Open Meetings Law.

First, you have asked under what circumstances a public body such as a board of education can call and conduct an executive session. In this regard, enclosed are copies of the Open Meetings Law as originally enacted and the Law as amended as it will appear on October 1. In both instances, the procedure for entry into executive session and the subject matter that may appropriately be discussed in executive session are found in §100(1)(a) through (h) of the Law. The eight subjects enumerated in the cited provision represent the only circumstances in which a public body may enter into executive session.

Second, you have asked whether official action may be taken during an executive session and, if so, under what circumstances. Although the Open Meetings Law generally permits public bodies to vote during a properly convened executive session, §100(1) of the Law requires that any vote taken to appropriate public monies be conducted during an open meeting. In addition, I believe that the Education Law precludes school boards from voting in executive session, except in conjunction with §3020-a of the Education Law concerning tenure.

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 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 2d 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 (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 act only during an open meeting.

It is also noted that §87(3) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

The third question concerns minutes of executive sessions and your experience that minutes of executive sessions had neither been required nor made available to the public in your area. Section 101 of the Open Meetings Law describes in subdivision (1) the minimum requirements regarding the contents of minutes of open meetings. Subdivision (2) currently states that minutes of executive sessions must be taken with respect to any action that is taken by formal vote during an executive session. However, the provision also currently states that the minutes of executive session "shall" not include any matter that is not required to be made available under the Freedom of Information Law. The amendments to the Law make one change in this respect. Since the Freedom of Information Law provides that an agency may, but need not, deny access to certain records, similarly, minutes of executive session under the amended Law may, but need not, include information that is deniable under the Freedom of Information Law. Further, as noted earlier, school boards in most cases need not compile minutes of executive session, for they have no authority to take action during executive session. However, other public bodies which have the authority to take action behind closed doors must record such action in the form of minutes of an executive session in accordance with §101(2).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1236

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

August 24, 1979

Mr. Howard M. Sinnott, II
Deputy Town Attorney
Town of North Hempstead
Town Hall
Manhasset, New York 11030

Dear Mr. Sinnott:

Thank you for sending your determination regarding a request made under the Freedom of Information Law by Vincent Teta. The request by Mr. Teta concerned complaints made by third parties addressed to the Building Department pertaining to specific premises.

I disagree in part with the determination.

As a general matter, the Committee has advised that complaints made by third parties are accessible, except to the extent that disclosure would result in an unwarranted invasion of personal privacy under §§87(2)(b) or 89(2)(b) of the Freedom of Information Law. Consequently, the substance of a complaint should be made available, but identifying details relative to a complainant may be deleted when disclosure would result in an unwarranted invasion of the complainant's privacy.

It is also noted that decisions rendered under both the original and the amended Freedom of Information Law have held that the "law enforcement purposes" exception [formerly §88(7)(d), now §87(2)(e)] may be appropriately raised only by a criminal law enforcement agency [see Young v. Town of Huntington, 388 NYS 2d 978 (1976) and Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)]. Further, the Young decision, supra, specifically held that records compiled by a town building department fell outside the "law enforcement purposes" exception to rights of access.

Even in a situation in which records might have fallen within §87(2)(e), it was determined that complaints are available after having deleted identifying details regarding the complainants [see Church of Scientology v. State, 61 AD 2d 942 (1978); aff'd 46 NY 2d 906 (1978)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1237

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

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 24, 1979

Mr. Larry Campbell
#79-C-29
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

Dear Mr. Campbell:

I have received your letter of August 19 regarding access to your pre-sentence report.

While I agree with your contention that the Department of Correctional Services is subject to the Freedom of Information Law under §86(3) and that a presentence report is a "record" within the scope of §86(4) of the Law, I do not believe that the Department of Correctional Services has the authority to release the report to you.

As you are aware, subdivision (1) of §390.50 generally requires that presentence reports be kept confidential, "except where specifically required or permitted by statute or upon specific authorization of the court." As such, the reports are deniable under §87(2)(a) of the Freedom of Information Law, which provides that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute." Further, subdivision (2) of the cited provision reiterates that "the presentence report or memorandum shall be made available by the court..." for examination by a defendant, for example.

In view of the specific direction that a presentence report can be made available only by a court, the Department of Correctional Services or a probation department, for instance, would in my opinion be precluded from disclosing a presentence report without judicial permission to do so.

It is suggested that you apply directly to the court in which you were convicted for the purpose of gaining access to your presentence report. I would also like to suggest that you attempt to contact the nearest office of Prisoners' Legal Services, which may be helpful to you.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1238

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

September 6, 1979

Mr. Joseph A. Zysman
[redacted]

Dear Mr. Zysman:

I have received your letter of August 27 concerning access to a hearing record or transcript, to the extent that such a record exists, regarding a hearing held by the New York City Office of Rent Control.

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

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

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

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

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

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1239

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

September 17, 1979

Saram Amerling, Esq.
Bar Building
36 West 44th Street
New York, New York 10036

Dear Mr. Amerling:

As you are aware, the Department of Law has transmitted your letter addressed to Attorney General Abrams to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

Your letter indicates that you have requested various information from the Police Commissioner of the City of Newburgh, including the vehicle identification number, the license plate number, the liability insurance carrier, and the residence address of a particular taxi operator. In response to your request, the Police Commissioner, Thomas J. Wohlrab, responded that it is not the policy of the Newburgh Police Department to divulge addresses of individuals for purposes other than law enforcement.

I disagree with the ground for denial offered by the Police Commissioner.

Nevertheless, it is important to note at the outset that the Freedom of Information Law grants access to certain existing records, and §89(3) of the Law specifically provides that an agency need not create a record in response to a request. Therefore, if no records in possession of the Police Department exist that include the information sought, the Department is not obliged to create such a record on your behalf.

As a general matter, however, the 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 those records or portions thereof that fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

Having reviewed the grounds for denial in conjunction with the information requested, it appears that one ground may be applicable in part. Specifically, §87(2)(b) of the Law provides that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy". In addition, §89(2)(b) lists five illustrative examples of unwarranted invasions of personal privacy.

In my view, disclosure of some of the details in which you are interested should be made. The granting of a license in effect enables the public to know that a particular individual is qualified to engage in a vocation regulated by government. Since government grants licenses or permits to drive a taxi, I do not believe that disclosure of the identity or license number of a person so licensed would result in an unwarranted invasion of personal privacy. The Department in which the Committee is housed, the Department of State, licenses thousands of individuals in various vocations. While the Department does not provide access to mailing lists of names and addresses of licensees, it does permit disclosure of information in its possession relative to particular licensees on request. In my view, a similar type of disclosure should be made in this instance.

The only item that you requested which in my opinion would result in an unwarranted invasion of personal privacy if disclosed is the identity of the operator's insurance carrier. Since all licensed drivers in New York must be covered by insurance, insurance coverage is not a requirement imposed only upon taxi cab operators. As such, if the Police Department maintains the information, it may in my opinion be likely denied with justification.

Should you continue to have difficulty to gaining access to the information, it is suggested that you contact the Office of Public Information of the New York State Department of Motor Vehicles at (518) 474-0877. Perhaps that office could provide you with the information 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
Executive Director

RJF/kk

cc: Department of Law
Thomas J. Wohlrab, Police Commissioner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1240

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

September 17, 1979

Mr. Daniel Jean Lipsman
[redacted]

Dear Mr. Lipsman:

I apologize for the delay in response to your most recent letter.

While I sympathize with your points of view, I do not know whether there is any legal recourse available to you.

First, you have written that documents denied have not been identified, thereby making it all but impossible for you to "assess the legitimacy of the claim involved." In this regard, the Freedom of Information Law merely requires that an agency provide reasons in writing for denial; there is no requirement that an agency identify records with particularity that may have been denied following a general request for documents within a file.

Second, you have raised questions regarding the presence of records pertaining to you in possession of the Board of Higher Education, as well as the possibility of expungement of information pertaining to you in the records. Please be advised that there is no provision of New York law which enables an individual to review records pertaining to him or her and thereafter seek the expungement of details which may be erroneous, misleading or archaic, for example. If, however, the records are subject to the Family Educational Rights and Privacy Act, commonly known as the Buckley Amendment, they may be subject to review. In addition, that Act enables the subjects of records to seek amendment to records pertaining to them. Nevertheless, I do not know whether the records in question fall within the scope of the Buckley Amendment. Further, government in New York cannot destroy or

otherwise dispose of records, unless the act of destroying or disposing of records is done in accordance with provisions of a statute or regulations.

Lastly, you made reference to letters of recommendation. In this regard, again, I direct your attention to the Buckley Amendment. To the best of my knowledge, an eligible student may inspect letters of recommendation, unless his or her right to inspect such records has been waived. Therefore, if there was no waiver with respect to the letters of recommendation, they are likely accessible to you under the Buckley Amendment. However, to gain a more definitive response, it is suggested that you contact the "FERPA" office, which is located at the Department of Health, Education and Welfare, Room 526F, Hubert H. Humphrey Building, Washington, D.C., 20201.

I regret that I cannot be of greater assistance. If you have any further questions, 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-1241

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

September 17, 1979

Ms. Francine R. Lasken
[redacted]

Dear Ms. Lasken:

I have received your letter of August 24 and apologize for the delay in response.

Your inquiry concerns rights of access under the New York Freedom of Information Law regarding "a secret disciplinary file" concerning your mother maintained by her supervisor, and a written decision concerning your mother.

It is noted initially that the Freedom of Information Law is applicable to the records in question, since the New York City Human Resources Administration is an agency subject to the Law, and since §86(4) of the Law defines "record" broadly to include any information "in any physical form whatsoever" in possession of an agency. In addition, the Law is based upon a presumption of access and states that all records are available, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached).

Under the circumstances, it appears that only one of the grounds for denial might be applicable. Specifically, §87(2)(g) of the Freedom of Information Law 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 noted that the quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records. With regard to the records in question, it appears that they constitute "intra-agency" materials. Nevertheless, to the extent that they contain statistical or factual data, instructions to staff that affect the public or statements of agency policy or determinations, they are accessible.

Therefore, if, for example, the contents of the "secret file" contain "factual data", that data should be made available. Further, the decision of the location head is in my view reflective of a final determination which also should be made available.

Lastly, §89(3) of the Law requires that an agency produce copies of accessible records on request. As such, your mother has not only the right to inspect available records, but also the right to make copies of the records or to have copies made upon payment of the appropriate fee, which cannot exceed 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:jm

cc: Human Resources Administration

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-371
FOIL-AO-1242

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

September 17, 1979

James T. O'Reilly, Esq.
[redacted]

Dear Jim:

Please accept my apologies for the late response. I recently returned from vacation.

Your question concerns the status of panels known as "IRB's" (Institutional Review Boards) created pursuant to federal regulations by state hospital administrators. In my opinion, an IRB created by a state hospital administrator is a public body subject to the Open Meetings Law.

Reference was made in your letter to the Committee's proposed redefinition of "public body", which would include advisory bodies, committees and subcommittees that have no power to take final action, but merely recommend to a governing body or an executive, for example. While the specific language suggested was not enacted, the definition of "public body" was amended to include committees, subcommittees and similar groups. The new definition of "public body" includes:

> "any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

Please note that the original definition applied to entities that "transacted" public business; the amendment includes bodies that "conduct" public business. Therefore it is clear that entities consisting of two or more that act collectively are subject to the Law, even though they may have no capacity to take final action.

Further, although the last clause of the amended definition makes reference to committees, subcommittees or other similar bodies "of such public body", the fact that an IRB may be created by a hospital administrator rather than by a governing body does not in my view remove an IRB from the coverage of the Law. In addition to components of governing bodies or other entities created by public bodies covered by the amendments, case law has held that an advisory body created by an executive is also subject to the Open Meetings Law [see MFY Legal Services v. Toia, 402 NYS 2d 510 (1978)].

A similar finding can be reached by means of breaking the definition of "public body" into its elements. An IRB is an entity consisting of more than two members. As such, it is required to act by means of a "quorum" under §41 of the General Construction Law (definition appears in full on page 4 of the report to the Legislature, February 27, 1979). It conducts public business and performs a governmental function for an agency of state government. As such, an IRB acting within or created by state or municipal government is a public body subject to the Open Meetings Law. It is noted that §56.81 of the regulations describes quorum requirements that differ from those appearing in §41 of the General Construction Law. Despite the distinction, it is clear that IRB is required to act by means of a quorum.

The second question is whether minutes of a meeting of an IRB created by a state institution are accessible under the New York Freedom of Information Law. In this regard, as you are aware, §86(4) of the Freedom of Information Law defines "record" broadly to include an information "in any physical form whatsoever" in possession of an agency. Consequently, minutes are clearly subject to rights of access. Whether the minutes would be accessible in toto or in part would depend upon their contents. Section 87(2) of the Law requires that all records be made available, except those records or portions thereof that fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

Therefore, if, for example, names or other identifying details appear in minutes or similar documentation, such information could likely be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy [§87(2)(b)]. It is also possible that information information in possession of an IRB might constitute a trade secret that would be deniable under §87(2)(d). However, as a general presumption, minutes of the meetings should in my view be made available.

I have enclosed for your consideration copies of the Open Meetings Law as amended, a memorandum sent to public bodies throughout the state in which the amendments are explained, and my comments to the Counsel to the Governor regarding the bill.

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

Hope all is well with you. Keep in touch.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1243

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

September 18, 1979

Mr. Manuel Harris
Din#77A-1323
250 Harris Road
Bedford Hills, NY 10507

Dear Mr. Harris:

I have received your letter of August 28 in which you asked whether you have a right to obtain a copy of a report pertaining to you made by the psychologist at the Bedford Hills Correctional Facility.

In my opinion, it is likely that substantial portions of a psychologist's report may justifiably be denied.

Although the Freedom of Information Law is based upon a presumption of access, §87(2) of the Law lists eight exceptions to rights of access that may be asserted by an agency. Relevant under the circumstances 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 police or determinations..."

While the quoted provision provides access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within inter-agency or intra-agency materials, it permits an agency to withhold advice, opinion or impression, for example. Under the circumstances the psychologist's report would likely constitute "intra-agency" material that consists largely of the opinion of the psychologist. To that extent, it may in my opinion be justifiably withheld.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-374
FOIL-AO-1244

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

September 18, 1979

Ms. Doris Wenger
[redacted]

Dear Ms. Wenger:

I have received your letter and the correspondence appended to it relative to denials of access by the Islip Union Free School District #2.

First, one of your applications for public access included a request for a note register. In response, the application form completed by the District indicates that the note register is not maintained by the School District. As a general matter, if an agency does not maintain a record, it is not obliged to obtain the record in order to provide access. Nevertheless, §170.2(g) of the regulations promulgated by the Commissioner of Education (8 NYCRR) requires the Board of Education

> "[T]o provide the treasurer with a note register in which he shall record the dates of the resolutions authorizing notes; the types of notes; the dates on which notes are drawn; the numbers of the notes; the banks from which the money was borrowed; the amounts of the notes; the rates of interest, the dates of maturity; the dates the notes were paid, and, the amounts of principal and interest paid."

In view of the provision quoted above, it would appear that a failure to maintain the note register that you requested would itself constitute a violation of law. Further, it is equally clear that the information contained within a note register would be accessible under the Freedom of Information Law, for each of the items contained within the register would constitute "statistical or factual tabulations or data", which are available under §87(2)(g)(i) of the Freedom of Information Law.

The second item in your letter alleges that the administrators of the District have a verbal contract, and that you have been unable to locate minutes indicating the duties or salaries of the administrators. Assuming that the Board of Education determined the parameters of the duties of the administrators and that motions were made and votes taken concerning administrators' salaries, such information would be required to be included in minutes under §101 of the Open Meetings Law. In the alternative, assuming the information does not appear in the minutes, §87(3)(b) of the Freedom of Information Law requires that each agency compile a payroll record that includes the name, public office address, title and salary of every officer or employee of the agency. In addition, if the payroll record has not been compiled, such failure constitutes a violation of the Freedom of Information Law.

Your third area of inquiry concerns a request for information regarding the District's Capital Indebtedness Account. In response to your inquiry for the information, you were told that records relative to the Account are not maintained by the District. In all honesty, I am unfamiliar with the recordkeeping requirements of a school district. Consequently, I have no knowledge of whether a school district is indeed required to maintain records concerning a capital indebtedness account. Nevertheless, in order to provide an auditor, such as Sheehan & Company, with sufficient information to perform an audit, it would appear that records concerning a capital indebtedness account would of necessity be transmitted by a school district to an auditor. If such records emanate from a school district, it would seem logical to conclude that a district maintain such records. Further, if the District does indeed maintain such records, they would in my view also be available under the section quoted earlier, §87(2)(g)(i).

Lastly, as you are aware, §89(3) of the Freedom of Information Law requires an agency, on request, to "certify that it does not have possession" of a record sought "or that such record cannot be found after diligent search." As such, it is suggested that you seek a certification from the District in which you are interest are not maintained by the District.

In addition, the Freedom of Information Law and the regulations provide specific time limits for a response to a request. In general, an agency is required to respond to a request within five business days of the receipt of requests. Further, the provision of the Law cited in the preceding paragraph requires agencies to make copies of available records on request when a determination to grant access has been made.

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: Islip Union Free School District #2

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1245

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

September 18, 1979

Michael R. Pender, P. E.
Commissioner
County of Nassau
Department of Public Works
Mineola, New York 11501

Dear Mr. Pender:

Thank you for your letter of September 11 and the correspondence appended to it. The subject of the materials is a request made by Mr. Edwin Duryea for records indicating the name and address of the individual who inspected Mr. Duryea's premises. Based upon the information provided, I agree with your response.

First, the Freedom of Information Law grants access to certain existing records. As a general matter, the Law does not require agencies to compile or create records in response to a request [see attached, Freedom of Information Law, §89(3)]. As such, your office has no obligation to create records on behalf of an applicant, such as Mr. Duryea.

Second, if there had been such a report which included the name and address of the individual who made the inspection, the home address of the employee could in my view be deleted on the ground that disclosure of such information would result in "an unwarranted invasion of personal privacy" pursuant to the Freedom of Information Law, §87(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/kk

cc: Mr. Edwin Duryea

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1246

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

September 19, 1979

Mr. Patrick L. McCloskey
The Office of the District Attorney
Nassau County
262 Old Country Road
Mineola, New York 11501

Dear Mr. McCloskey:

Thank you for transmitting copies of an appeal and your determination thereon relative to a request made under the Freedom of Information Law by Arthur A. Field, Esq.

While the denial may have been proper, the determination rendered on appeal is in my opinion insufficient. Section 89(4)(a) of the Freedom of Information Law requires the person or body designated to determine appeals to "fully explain in writing to the person requesting the record the reasons for further denial..." From my perspective, a statement that records are "excluded under Public Officer's Law §87(2)(e)" is not reflective of a rationale "fully explained".

Moreover, should the denial precipitate a judicial challenge, it is important to point out that the Court of Appeals has held that an agency cannot merely refer to grounds for denial as a basis for withholding. On the contrary, the agency must prove that the harmful effects of disclosure described in §87(2) of the Law would indeed arise if the records are made available [see Church of Scientology v. State, 46 NY 2d 906 (1979)].

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1247

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

September 19, 1979

Mr. Peter M. Biggs
City of Rochester
Bureau of Public Information
City Hall
30 Church Street
Rochester, New York 14614

Dear Mr. Biggs:

I have received your letter of September 6 and thank you for your continued interest in compliance with the Freedom of Information Law. Your inquiry concerns access to incident reports prepared by the Rochester Police Department and the means by which the reports can be made available without hampering investigative efforts of the Police Department, compromising personal privacy, or failing to comply with applicable provisions of other statutes.

In my opinion, due to the varying contents of records and the requirements of a number of statutes, it would be difficult to draw up a simple set of guidelines that could be followed in every instance. Nevertheless, I offer you the following comments.

First, if it is desireable to permit officials at the Police Department to make determinations to grant or deny access without seeking the assistance of your office, perhaps procedural steps may be taken to permit the Police Department to grant or deny access on its own. As you are aware, the Committee has promulgated regulations that govern the procedural aspects of the Law with which each agency in the state must comply in adopting its own procedural rules. In this regard, §1401.2 of the regulations provides that the governing body of a public corporation

"shall designate one or more persons as records access officers by name or specific job title or business address, who shall have the duty of coordinating agency response to public request for access to records". In view of the quoted provision, it is clear that the City of Rochester may designate several records access officers, each of whom would optimally have expertise regarding rights of access to the records within his or her department or agency. It may be appropriate to designate a records access officer at the Police Department who could become familiar with statutory provisions and procedural requirements relative to access to police records.

Second, you asked whether I am acquainted with the manner in which other municipalities handle requests for police reports. In all honesty, I do not believe that there is a pattern that police departments generally follow. On the contrary, the practices of police department are often apparently based upon custom and administrative practice rather than specific rules that may have been laid down. However, with respect to particulars, such as records concerning youthful offenders, I believe that some departments maintain two sets of books, one of which pertains to arrests in general, and another to arrest information that may be or become confidential, as in the case of records pertaining to juveniles or youthful offenders.

Third, with regard to records concerning those arrested when no conviction results, it is suggested that you review the provisions of §160.50 of the Criminal Procedure Law. The cited provision is entitled "[O]rder upon termination of criminal action in favor of the accused" and provides guidance concerning the sealing of records pertaining to arrests that do not result in a conviction.

Fourth, perhaps most importantly, the provisions of the Freedom of Information Law offer substantial guidance concerning rights of access. As you are aware, §87(2)(e) of the Law states that an agency may withhold records compiled for law enforcement purposes when disclosure of the records would result in one or more among four harmful effects described in the Law. In my view, it is likely that officials of the Police Department would be more familiar with and able to gauge the possible effects of disclosure than individuals outside of the field of law enforcement. As such, again, it is reiterated that it may be beneficial to designate a records access officer at the Police Department to deal with requests directed to the Department.

Lastly, since I am not familiar with the specific contents of the incident reports, I cannot provide specific guidance. However, I have enclosed a copy of Sheehan v. City of Binghamton, which concerns access to police blotters. While the term "police blotter" is not defined in any provision of law, based upon the custom and usage of the term, the Committee advised and the Court upheld the contention that a blotter is a log or diary in which any event reported by or to a police department is recorded. In addition, it was emphasized in Sheehan that a police blotter merely summarizes an occurrence and contains no investigative information. If the description of the police blotter, which is accessible, is analogous to the police incident reports in question, perhaps a review of the Sheehan decision 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/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-378
FOIL-AO-124r

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

September 19, 1979

Ms. Dolores Chechek
Trustee
Wappingers Board of Education
Miller Hill Road
Hopewell Junction, New York 12533

Dear Ms. Chechek:

As you are aware, I have received your inquiry and materials regarding a request made under the Freedom of Information Law and the status of a "performance plan" regarding the position of superintendent of schools.

First, with respect to your requests for records, the records sought concern purchases of and payments by the District for a number of goods and services provided to the District. In addition, you have requested records reflective of the number of children participating in a CETA summer program, the number of trainees students teachers involved in the program, attendance records and the cost to the District of implementating the program. In my opinion, records concerning the provision of goods and services to the District are available under the Freedom of Information Law. I believe that virtually all such records could be characterized as "statistical or factual tabulstions or data" that are accessible under §87(2)(g)(i) of the Law.

With regard to the CETA program, as I have written in the past, to the extent that statistical or factual data exists that are reflective of the information in which you are interested, I believe it too should be made available.

The second area of inquiry concerns the performance plan for the position of superintendent of schools. As I understand the situation, the question is whether the performance plan should be discussed during an open meeting or whether it may be discussed during an executive session. The matter has been discussed with both you and Dr. Sturgis, and I believe that I have given you the same response. Public or private discussion of the performance plan centers upon §100(1)(f) of the Open Meetings Law, which 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, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation."

The quoted provision permits the holding of an executive session to discuss the employment history of a person, for example, including the manner in which that person has performed his or her official duties. It does not in my view permit the holding of an executive session to discuss the nature and duties inherent in a position. If it is possible to distinguish between a discussion of the nature of a position and the performance of a particular individual who holds that position, I believe that such distinction must be made in terms of the Open Meetings Law and the ability to enter into executive session. Therefore, if the discussion deals with the duties of any person who might hold the position of superintendent, such a discussion would in my opinion be required to be held in public. However, if the discussion deals with the performance of a particular individual as the superintendent, it is likely that such a discussion could justifiably be held in executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Board of Education

bcc: Dr. Sturgis

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1249

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

September 20, 1979

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

Due to my absence on vacation, I was unable to respond to your inquiry promptly. Please accept my apologies for any inconvenience that may have been caused.

You have indicated that you believe that a written denial of access rendered under the Freedom of Information Law must be provided "in plain English rather than in lawyer's lingo."

In my opinion, although it is preferable that any message given on any subject be stated in language easily understood, the Freedom of Information Law does not specifically require that responses to requests be stated in plain language. From my perspective, the only requirement concerning a response to a request is that its content be accurate.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1250

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

September 21, 1979

Mr. Jeffrey A. Kelly
[redacted]

Dear Mr. Kelly:

As you are aware, Jamie Benfield of the Office of Counsel at the Office of Mental Health has transmitted to me correspondence relative to your request for medical records in possession of the Albany Medical Center Hospital.

Having reviewed the correspondence, I believe that several points should be made.

First, it is clear that the Albany Medical Center Hospital (the "Hospital") is not subject to the Freedom of Information Law. The scope and coverage of the Law is determined by the definition "agency" which appears in §86(3) (see attached). In brief, the Law defines "agency" to include "governmental" entities performing a governmental function. Since the Hospital is private, rather than public, it falls outside the scope of the Freedom of Information Law. Further, the fact that the Hospital might receive funding from government or engage in contractual relationships with government does not bring it within the scope of the Law.

Second, the Office of Mental Health is not required to obtain records from an entity outside of government, such as the Albany Medical Center Hospital, in order to respond to a request made under the Freedom of Information Law. Very simply, records in possession of the Hospital are beyond the control of the Office of Mental Health. As such, that agency has no authority to "overrule Albany Medical Center's denial of your request."

In view of the foregoing, I believe that the response given to you by Ms. Benfield was appropriate and legally correct.

Nevertheless, it is possible that you may gain indirect access to medical records. At the present time, there is no law that enables individuals to gain access to medical records pertaining to them. However, §17 of the Public Health Law provides in relevant part that:

> "[U]pon the written request of any competent patient, parent or guardian of an infant, or committee for an incompetent, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital, provided, however, that such records concerning the treatment of an infant patient for venereal disease or the performance of an abortion operation upon such infant patient shall not be released or in any manner be made available to the parent or guardian of such infant."

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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1251

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

September 21, 1979

Mr. John Zwaryczuk
[redacted]

Dear Mr. Zwaryczuk:

As you are aware, I have received your letter of September 5 regarding your request directed to the New York City Department of Correction under the Freedom of Information Law. Specifically, you have requested a copy of a questionnaire used by the Department to obtain information from previous employers, in this instance, the Office of the Special Prosecutor. Further, you have indicated that the questionnaire was completed by Richard Condon, Director of Investigations for the Office of the Special Prosecutor, and transmitted to the Department of Correction.

As I explained to both you and Mr. Condon in telephone conversations, rights of access to the questionnaire are in my view determined by §87(2)(g) of the Freedom of Information Law.

It is noted at this juncture that although a record such as a questionnaire may be characterized by an agency as confidential, that alone does not in my opinion prohibit disclosure or require confidentiality. As a general matter, records may be considered confidential when a statute passed by the State Legislature or Congress specifically prohibits disclosure. Such records would be deniable under the Freedom of Information Law, §87(2)(a), which enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". To the best of my knowledge there is no statute that requires the confidentiality of the records in which

you are interested. The only other instance in which records may be considered confidential is based upon the "governmental privilege", which has been established at common law. The leading case on the matter, Cirale v. 80 Pine Street Corp., [35 NY 2d 113 (1974)], held that a record may be deemed privileged when an agency can demonstrate to a court that disclosure would on balance result in detriment to the public interest.

As noted earlier, I believe that §87(2)(g) of the Freedom of Information Law is the operative provision in terms of rights of access. That section 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 determination."

The quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records.

In the case of the questionnaire, since it could be characterized as "inter-agency", I believe that those portions of the questionnaire consisting of advice, opinion or impression may be deleted, while the "statistical or factual tabulations or data" found within the materials 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

RJF/kk

Robert J. Freeman
Executive Director

cc: Richard Condon
New York City Department of Correction

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1252

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

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 24, 1979

Mr. Joseph Fournier
77 A 3575
Box B
Dannemora, New York 12929

Dear Mr. Fournier:

I have received your letter of September 12. Your inquiry concerns the relationship between the Freedom of Information Law and Article 31 of the Civil Practice Law and Rules pertaining to discovery.

Essentially, you have raised two questions. The first concerns the interest of an applicant. The second involves the relationship between prohibitions from disclosure under Article 31 and whether such prohibitions are preserved under the Freedom of Information Law.

As a general matter, this Committee has consistently advised that if a record is accessible, it should be made equally available to any person, notwithstanding the status or interest of the applicant. As you are aware, this stance was confirmed by the holding in Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165. In Burke, the applicant, who was involved in litigation with the City of Rochester, requested audits and similar records that were related to the litigation. Under the circumstances, the court found that audits were clearly available under the Freedom of Information Law and that the applicant's status as a litigant could not in any way detract from his rights of access under the Freedom of Information Law. Consequently, the court found that accessible records, such as the audits, should be made available to the litigant.

In the other case cited, Fitzpatrick v. County of Nassau, 372 NYS 2d 939 (1975), the request dealt with records that were prepared for litigation. As such, the court upheld the denial based upon the exemption from disclosure regarding material prepared for litigation found in §3101(d) of the Civil Practice Law and Rules. In my opinion, that decision was appropriate. One of the grounds for denial in the Freedom of Information Law appears in §87(2)(a), which provides that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". Since §3101(d) exempts material prepared for litigation from disclosure, I believe that the denial was consistent with both the Civil Practice Law and Rules and the Freedom of Information Law.

In sum, there are two principles which in my opinion may be offered. First, if a record is available to the general public under the Freedom of Information Law, it should be made available to any person, including a litigant. The other principle is that the prohibitions from disclosure found in the Civil Practice Law and Rules in my opinion fall within the scope of §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are exempted from disclosure 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
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1253

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

September 24, 1979

Mr. Marc Stern
[redacted]

Dear Mr. Stern:

I have received your letter of September 15 concerning a request directed to the State Education Department under the Freedom of Information Law.

It is noted that I received a copy of your initial request made on June 5 and contacted the Records Access Officer for the Education Department at that time on your behalf. I was informed then that the Education Department had not yet received your inquiry and that I would be contacted if any problems or questions arose. Since I did not receive any inquiry concerning your request from the Education Department, I assumed that you were given an appropriate response.

Your first question pertains to the amount of time that the Education Department may take to respond to a request. In this regard, §89(3) of the Freedom of Information Law and 1401.5(d) of the regulations promulgated by the Committee set forth the limitations concerning the time limitations for response to requests (see attached). Each agency in the state is required to adopt procedural rules no more restrictive than the regulations promulgated by the Committee. Both the Law and the regulations provide that an agency must respond to a request within five business days of its receipt of a request. The response can taken one of three forms. Access can be granted, denied, or receipt of the request can be acknowledged in writing within five business days. When receipt of a request is acknowledged, the agency has ten additional business days from the date of acknowledgment to determine to grant or

deny access. As such, the maximum amount of time that may be taken by an agency to respond to a request is fifteen business days.

If no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of receipt of a request, the request is considered constructively denied [see regulations, §1401.7(c)].

When a request is denied, the regulations require that the denial be stated in writing, giving the reasons therefor. In addition, the applicant must be informed of his or her right to appeal and be given the name and address of the person to whom an appeal should be directed. In the case of a constructived denial due to a failure to respond, the applicant may appeal to the head of the agency, or whomever has been designated to determine appeals. Further, §89(4)(a) of the Freedom of Information Law requires that copies of both the appeal and the determination that ensues be transmitted to the Committee when it is made. A determination on appeal must be rendered within seven business days of its receipt by the appeals person or body.

In terms of the substance of your request, the records sought are in my view available at least in part, if not in toto. First, it is important to note that the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) provides that all records in possession of an agency are available, except to the extent that records or portions thereof fall within one or more among eight categories of deniable information enumerated in the Law.

Second, it is clear that the records in which you are interested pertain to events that transpired several years ago. As such, disclosure in no way would interfere with an ongoing proceeding.

Third, it has consistently been advised that charges made against a public employee that are based upon a finding of a probable cause are accessible. Although §87(2)(b) of the Law provides that an agency may withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy", the courts have generally held that public employees enjoy a lesser degree of privacy than the public at large. Further, this Committee has advised and the courts have upheld the notion that records that are

relevant to the performance of the official duties of public employees are accessible, for disclosure in such circumstances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g. Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees that have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 27, 1977).

Similarly, I believe that the transcript of the hearing that you are seeking, to the extent that it exists, is available in great measure. It is important to note, however, that an agency is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, if there is no transcript of the hearing, or if stenographers notes have not been transcribed, the agency maintaining the records would have no obligation to create a transcript of your behalf.

If a transcript does exist, rights of access must be determined by reviewing the transcript in its entirety. Again, in this instance, it would appear that the only ground for denial would be based on the privacy provisions. It is possible that the transcript might contain the names of students, for example or others. If disclosure of the identity of those individuals would result in an unwarranted invasion of personal privacy, the identifying details may be deleted.

Lastly, with respect to "any report by the White Plains Board of Education which led to the October 14, 1974 resolution", I believe that rights of access would be determined by the privacy provisions as well as §87(2)(g) of the Law. Section 87(2)(g) states that an agency, such as a school district, 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 provision quoted above contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Since any report in existence could be characterized as "inter-agency or intra-agency", the agency in possession of the report is required to review its contents to determine which portions if any may justifiably be withheld in accordance with §87(2)(g), as well as the privacy provisions discussed earlier.

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/kk

Encs.

cc: Gene Snay
Vito Longo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1254

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

September 25, 1979

Hon. Carol Berman
Member of the Senate
Legislative Office Building
Room 306
Albany, New York 12247

Dear Senator Berman:

As you are aware, your letter addressed to Attorney General Abrams has been transmitted to this office, which is responsible for advising with respect to the Freedom of Information Law.

Your inquiry concerns a request for information in possession of the Port Authority and indicates that requests directed to the Port Authority have been repeatedly rejected.

In my opinion, members of the public do not enjoy rights of access to records in possession of a "bi-state" agency, such as the Port Authority. As a general matter, I do not believe that the laws of a state that enters into an inter-state relationship can be applicable to another. Therefore, I regret that I must advise that the Freedom of Information Law is not in my view applicable to the Port Authority.

Moreover, both statutory law and judicial determinations tend to uphold that contention. Specifically, §§7108 and 7071 of the Unconsolidated Laws respectively prescribe that the Port Authority is immune from suit, unless legal action is initiated by the Attorney General of either state, New York or New Jersey, and that only the Comptrollers of New York and New Jersey have the right to gain free access to records in possession of the Port

Authority. The latter provision permits the Comptrollers of New York and New Jersey to perform audits of the Port Authority, which are accessible under the Freedom of Information Law from the New York State Comptroller. In addition, judicial determinations have held that individual litigants cannot initiate suits against the Port Authority [see e.g. Lewis v. Lefkowitz, 223 NYS 2d 221 (1961)].

In sum, I believe that the Port Authority is outside the scope of rights of access established by statute in both New York or New Jersey, for neither state has the capacity to extend the scope of its legislation beyond its borders. Further, the cited sections of the Unconsolidated Laws specifically preclude the initiation of suits against the Port Authority, unless such suits are initiated by the Attorneys General of New York and New Jersey.

Lastly, your letter to the Attorney General indicates that you expect to meet with him regarding the means by which citizens may deal with the Port Authority. The subject has been a matter of concern to this office since the Freedom of Information Law became effective in 1974. If your meeting with the Attorney General leads to a conclusion different from my own, I would appreciate hearing from you.

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/kk

bcc: Richard Rifkin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1255

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 27, 1979

Mr. Larry Campbell
79-C-29
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

Dear Mr. Campbell:

I am in receipt of your letter of August 28 regarding my earlier response to your letter of August 24. Having been away on vacation until recently, I regret that I have been unable to answer your second letter sooner.

Once again, your question concerns rights of access to the presentence report of the court in which you were tried. After an intensive study of the applicable New York statutes, §390.50(1) and (2) of the Criminal Procedure Law and the Freedom of Information Law, I must reemphasize that you are not in my opinion entitled as of right to inspect the presentence report or memoranda.

My opinion is based upon the language of Criminal Procedure Law, §390.50(1), which states in part that "[A]ny presentence report or memorandum submitted to the courts pursuant to this article...in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court" (emphasis added). Further, my research indicates that there is no statute which specifically requires or permits access to records in question.

The Freedom of Information Law does not provide additional legal leverage, for §87(2)(a) of the Law states that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute".

The fact that §86(4) of the Freedom of Information Law, which defines "record" broadly to include "any information...in any physical form whatsoever..." in possession of an agency is irrelevant, for that provision merely indicates that all records are subject to rights of access; whether records are indeed available is determined by a review of the grounds for denial enumerated in §87(2) of the Law.

Your inquiry if not the first relative to the problem of access to presentence reports or memoranda. The commission staff of the New York Consolidated Laws Service has commented that "the question of whether the defendant or his counsel should be permitted to see and refute information contained in the presentence report has been the subject of heated controversy." The issue was considered in People v. Peace, [18 NY 2d 230, 273 NYS 2d 64 219 N.E. 2d 419 (1966)], in which the Court of Appeals, New York's highest court, upheld the confidentiality of such reports. It was noted in Peace that the "[R]ight of defendant in a criminal trial to receive, on request, a copy of the probation report prepared for use of sentencing court is a matter for the discretion of the trial court upon all the facts and circumstances of the particular case."

In People v. Gagliardi, [57 Misc. 2d 929, 293 NYS 2d 961 (1968)], the court stated that a "[D]efendant in a criminal case does not have the absolute right upon request to receive copy of the probation report prepared for the sentencing judge". Finally, in another decision, it was stated that "[T]here was no abuse of discretion in denying defendant's request to examine presentence reports, which defendant had no absolute right to examine" [see People v. Cleary, 33 AD 2d 814, 305 NYS 2d 384 (1969)].

As I suggested in my earlier letter, it is recommended that you seek to obtain authorization for release of the records in the court in which you were tried.

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1256

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

September 28, 1979

Dale M. Thuillez, Esq.
Hesson, Ford, Sherwood & Whalen
90 State Street
Albany, New York 12207

Dear Mr. Thuillez:

I have received your letter regarding the rights of candidates "who took the July, 1979, Licensure Examination for Registered Professional Nurse" under the Freedom of Information Law to inspect and copy their individual grades on the examination.

It is noted at the outset that the question raised is related to an unusual situation in which the State Education Department has voided the examination due to disclosure of the examination prior to the date upon which it was given.

Nevertheless, in my opinion, an individual may obtain records or portions thereof that indicate his or her grades relative to the examination in question.

It is noted that §86(4) of the Freedom of Information Law defines "record" broadly to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, based upon the definition, any records in possession of the State Education Department concerning the examination, including grades, are subject to rights of access.

Further, 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 enumerated categories of deniable information appearing in paragraphs (a) through (h) of the cited provision.

It is also important to emphasize that an agency may deny access to "records or portions thereof" that fall within one or more of the grounds for denial. As such, an agency is obliged to review a record requested to determine which portions, if any, may justifiably be withheld.

Under the circumstances, I believe that three of the grounds for denial have a bearing upon rights of access, none of which, however, would in my view be applicable.

First, tangentially related to the request is §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." The quoted provision is obviously intended to enable an agency to withhold questions and answers that may be used in future examinations. However, it is clear that a request for grades does not include a review of examination questions or answers.

Second, assuming that the records have been compiled by the State Education Department, they could likely be considered "intra-agency" materials. In this regard, §87(2)(g) of the Law 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 noted that the provision quoted above contains what in effect is a double negative. Although an agency may withhold 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. With respect to the information sought, I believe that names and examination results constitute "statistical or factual tabulations or data" that are available.

Lastly and perhaps most importantly, §87(2)(b) of the Law provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Further, §89 (2)(b) and (c) provide additional guidance regarding the scope of the ability to withhold records based upon the privacy provisions. Specifically, §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 the 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."

Therefore, if no other grounds for denial appearing in §87(2) of the Freedom of Information Law may appropriately be cited as a basis for denial, an individual may inspect and copy records "pertaining to him" or her when reasonable proof of identity is presented.

If, for example, the Education Department maintains a list of names and the corresponding grades, a subject identified on the list should have the ability to gain access to that portion of the list that pertains to himself or herself. In order to protect the privacy of others identified, the agency could cover the entire record except that portion of the record indicating the name and the grade of the applicant and make a copy therefrom.

It is also clear that §89(3) of the Law enables an individual to obtain copies of accessible records upon payment or offer to pay a prescribed fee for photocopying.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Commissioner Ambach
Jean Coon

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1257

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 28, 1979

Mr. Burnell Hendricks
79A0868
Drawer B
Stormville, New York 12582

Dear Mr. Hendricks:

Due to my absence on vacation, I have been unable to respond to your letter as promptly as I would have liked. Please accept my apologies for the delay in response to your letter.

Your inquiry concerns the contents of a presentence report which, according to your letter, contains inaccuracies.

In my opinion, the only method of obtaining and reviewing the presentence report would involve making a request directed to the court in which you were tried. Please be advised that this office merely has the authority to advise with respect to the Freedom of Information Law. Further, in all honesty, I have little expertise regarding the criminal justice system or criminal procedure.

My opinion is based upon the language of Criminal Procedure Law, §390.50(1), which states in part that "[A]ny presentence report or memorandum submitted to the courts pursuant to this article...in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court". Further, my research indicates that there is no statute which specifically requires or permits access to records in question.

The Freedom of Information Law does not provide additional legal leverage, for §87(2)(a) of the Law states that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute", such as §390.50 of the Criminal Procedure Law.

In view of the foregoing, it is suggested that you seek to obtain authorization for the release of the records in question from the court in which you were tried.

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1258

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

September 28, 1979

John P. Bracken, Esq.
Chairman, Special Committee on
Administrative Adjudication Bureau
The Suffolk County Bar Association
Suite 406
4175 Veterans Memorial Highway
Ronkonkoma, New York 11779

Dear Mr. Bracken:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to directives or orders issued to administrative law judges by the Administrative Adjudication Bureau of the Department of Motor Vehicles.

In my opinion, the directives in which you are interested are accessible.

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).

The only exception to rights of access that is relevant to your inquiry is §87(2)(g), which 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, it appears that they are reflective of policy or an agency determination. As such, I believe that they are available.

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 advsiroy 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, based upon your letter and our ensuing conversation, it is clear that the administrative law judges rely on the directives in carrying out their official duties.

Lastly, it is noted that the Freedom of Information Law is not applicable to courts. According to the definition of "agency" [see §86(3)], the Freedom of Information Law includes within its scope all governmental entities in New York "except the judiciary..." "Judiciary" is defined to mean "the courts of the state, including any municipal or district court, whether or not of record." In conjunction with the foregoing, although administrative law judges may engage in quasi-judicial functions, they are employees of the Department of Motor Vehicles, which is not a court. As such, the definition of "agency", rather than the definition of "judiciary", would be applicable under the circumstances.

In sum, I believe that the records in which you are interested are subject to rights of access granted by the Freedom of Information Law and accessible pursuant to §87(2)(g)(ii) and (iii) 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:jm
cc:
Administrative Adjudication Bureau

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1259

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

September 28, 1979

Mr. Patrick M. Hanley, Sr.
[redacted]

Dear Mr. Hanley:

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

At this juncture, if you continue to believe that the Office of General Services has engaged in violations of the Freedom of Information, it would appear that your only course of action would involve the initiation of a lawsuit. It is emphasized that in order to commence a judicial proceeding, a person denied access must exhaust his administrative remedies by following the procedure regarding denials of access appearing in §1401.7 of the attached regulations. Should you opt to challenge the denial in court, you would be required to commence a proceeding under Article 78 of the Civil Practice Law and Rules.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1260

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

October 1, 1979

Ms. Jane Rosenberg
New York Public Interest
Research Group, Inc.
5 Beekman Street
New York, NY 10038

Dear Ms. Rosenberg:

I have received your letter of September 24 regarding a request made under the Freedom of Information Law directed to the State Banking Department.

Your letter indicates the records in which you are interested pertain to the Banking Department's procedure "for implementing community reinvestment laws..."

In my opinion, to the extent that records reflective of the procedures that you are seeking exist, they are accessible under the Freedom of Information Law. Specifically, §87(2)(g)(iii) of the Freedom of Information Law provides that an agency must grant access to intra-agency materials consisting of "final agency policy or determinations." Since a procedure would constitute the policy of the agency with respect to a specific area of its duties, it would in my opinion be available pursuant to the cited provision.

It is noted, however, that §36(10) of the Banking Law states that "reports of examinations and investigations, correspondence and memoranda..." concerning investigations made by the Banking Department "shall be confidential communications". While §36(10) of the Banking Law requires confidentiality of certain records, it does not appear that it would be applicable to the records in which you are interested.

It is suggested that you contact Michael Kenney of the Office of Counsel in the Banking Department in New York City. Mr. Kenney and I have had numerous conversations regarding the Freedom of Information Law, and I am sure that he would be willing to discuss the matter with you.

Lastly, as you are aware, the former Counsel to NYPIRG, Nancy Kramer, had established an excellent working relationship with the Committee, Certainly I will be most pleased to continue that relationship with you as Counsel. In addition, your name will be placed on the Committee's mailing list as you requested.

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: Michael Kenney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1261

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 2, 1979

Martin A. Shapiro, Esq.
Suite 304, Clinton House
Ithaca, New York 14850

Dear Mr. Shapiro:

I have received your letter regarding the rights of candidates who took the July, 1979, Licensure Examination for Registered Professional Nurse under the Freedom of Information Law to inspect and copy their individual grades on the examination.

It is noted at the outset that the question raised is related to an unusual situation in which the State Education Department has voided the examination due to disclosure of the examination prior to the date upon which it was given.

Nevertheless, in my opinion, an individual may obtain records or portions thereof that indicate his or her grades relative to the examination in question.

It is noted that §86(4) of the Freedom of Information Law defines "record" broadly to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, based upon the definition, any records in possession of the State Education Department concerning the examination, including grades, are subject to rights of access.

Further, 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 enumerated categories of deniable information appearing in paragraphs (a) through (h) of the cited provision.

It is also important to emphasize that an agency may deny access to "records or portions thereof" that fall within one or more of the grounds for denial. As such, an agency is obliged to review a record requested to determine which portions, if any, may justifiably be withheld.

Under the circumstances, I believe that three of the grounds for denial have a bearing upon rights of access, none of which, however, would in my view be applicable.

First, tangentially related to the request is §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." The quoted provision is obviously intended to enable an agency to withhold questions and answers that may be used in future examinations. However, it is clear that a request for grades does not include a review of examination questions or answers.

Second, assuming that the records have been compiled by the State Education Department, they could likely be considered "intra-agency" materials. In this regard, §87(2)(g) of the Law 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 noted that the provision quoted above contains what in effect is a double negative. Although an agency may withhold 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. With respect to the information sought, I believe that names and examination results constitute "statistical or factual tabulations or data" that are available.

Lastly and perhaps most importantly, §87(2)(b) of the Law provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Further, §89 (2)(b) and (c) provide additional guidance regarding the scope of the ability to withhold records based upon the privacy provisions. Specifically, §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 the 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."

Therefore, if no other grounds for denial appearing in §87(2) of the Freedom of Information Law may appropriately be cited as a basis for denial, an individual may inspect and copy records "pertaining to him" or her when reasonable proof of identity is presented.

If, for example, the Education Department maintains a list of names and the corresponding grades, a subject identified on the list should have the ability to gain access to that portion of the list that pertains to himself or herself. In order to protect the privacy of others identified, the agency could cover the entire record except that portion of the record indicating the name and the grade of the applicant and make a copy therefrom.

It is also clear that §89(3) of the Law enables an individual to obtain copies of accessible records upon payment or offer to pay a prescribed fee for photocopying.

With respect to the course of action that might be taken, it is suggested that requests be made by individual candidates who took the exam including reasonable proof of identity and sent to the records access officer for the Education Department. If the request is denied, an appeal must be taken in order to exhaust administrative remedies should a judicial challenge to a denial of access be necessary. I have enclosed a copy of the regulations promulgated by the Committee under the Freedom of Information Law which prescribe the procedural requirements 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/kk

Encs.

cc: Commissioner Ambach
Jean Coon

Section 89(4)(a) of the Freedom of Information Law provides that a person denied access may within thirty days of the denial appeal to the "head, chief executive or the governing body of the entity, or the person therefor designated by such head, chief executive, or governing body." The person or body designated to determine an appeal is required by §89(4)(a) of the Freedom of Information Law to "...fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought" within seven business days of receipt of an appeal. If a person is denied access to records on appeal, he or she may seek judicial review of the denial by initiating an Article 78 proceeding (Article 78 of the New York Civil Practice Law and Rules).

Section 89(4)(b) states that "[I]n the event that access to any record is denied pursuant to the provisions of subdivision two of section 87 of this article, the agency involved shall have the burden of proving that such record falls within the provisions of subdivision two" which lists eight exceptions to rights of access. Article 78 requires that administrative remedies be exhausted before a suit may be brought against a public officer.

If you wish to initiate a lawsuit yourself, or pro se, it is suggested that you go to a library and locate the appropriate form books regarding Article 78 proceedings. In the alternative, it would in my view be more appropriate to consult an attorney. Under the circumstances, it is possible that a civil liberties group might be interested in the situation that you described.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executiv Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1262

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

October 2, 1979

Dale M. Thuillez, Esq.
Hesson, Ford, Sherwood & Whalen
90 State Street
1522 National Savings Bank Bldg.
Albany, New York 12207

Dear Mr. Thuillez:

I have received your letter of September 28 which indicates that you believe that the State Education Department "has conducted a statistical analysis with respect to the allegations of cheating" regarding the July, 1979, Licensure Examination for Professional Registered Nurse. Your question is whether the statistical analyses and other "reports" related to the subject are accessible under the Freedom of Information Law.

First, it is important to note that the Freedom of Information Law grants access to existing records, and that §89(3) of the Law specifically states that an agency is not required to compile or create a record in response to a request. Therefore, if, for example, the Education Department has not compiled statistics relative to the examination in question in question, it is not required to do so in response to a request. Contrarily, if the Education Department has indeed compiled statistical analyses or reports regarding the examination, such records would be subject to rights of access granted by the Freedom of Information Law.

As you are aware, the Freedom of Information Law grants access to all records in possession of an agency, except those records or portions thereof that fall within one or more categories of deniable information enumerated in §87(2)(a) through (h).

It would appear that the only exception to rights of access that is relevant under the circumstances is §87(2)(g), which 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..."

In the context of the information requested, it is clear that statistical analyses or reports developed by the Education Department would constitute intra-agency materials. However, to the extent that such materials contain statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations, such records should in my view be made available.

This contention is bolstered by a letter sent to me by Mark Siegel, the Assembly sponsor of the bill that amended the original Freedom of Information Law (Ch. 933, L. 1977). After having quoted §87(2)(g) of the Law, Assemblyman 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 is solely reflective of the opinion of staff need not be made available."

In view of the foregoing it would appear that statistical analyses would be clearly available. If reports have been compiled which contain advice or statements of opinion, for example, such records could in my opinion be withheld to that extent.

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/kk

cc: Office of Counsel
State Education Department

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1263

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

October 3, 1979

Ms. Lorraine Bergstrom
[redacted]

Dear Ms. Bergstrom:

I have received your letter of September 16 in which you described your inability to gain access to records in possession of the New York City Police Department and requested advice regarding the steps you may take to challenge the denial.

Before a judicial proceeding is initiated, an applicant for records must follow the procedure described in the Freedom of Information Law and the regulations (see attached) in order to initiate a judicial challenge. Consequently, I have outlined below the complete procedure that must be exhausted before a lawsuit may be commenced.

Section 89(3) of the Law and §1401.5 of the regulations state that an agency must respond to a "written request for a record reasonably described" within five business days of its receipt. Within that period, the agency has three potential responses. It can grant access, deny access, or acknowledge receipt of a request in writing and provide an estimate of the date that a determination to grant or deny will be made. If the receipt of a request is acknowledged, the agency then has ten additional business days from the date of the acknowledgement to grant or deny access to the records. If a request is neither granted, denied, nor acknowledged within five business days of its receipt, the request is considered constructively denied pursuant to §1401.7(c) of the Committee's regulations and the applicant may appeal. In the event of a written denial, the denial must be in writing providing the reasons therefor, apprise the applicant of his or her right to appeal, and inform the applicant of the name and address of the person or body to whom an appeal should be directed.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1264

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

October 3, 1979

Paul Glickman, Esq.
Department of Law
Room 5487
Two World Trade Center
New York, New York 10047

Dear Mr. Glickman:

As promised, attached are a number of documents that indicate the recalcitrance of the Department of Insurance regarding its implementation of the Freedom of Information Law.

I have included several advisory opinions, a memorandum addressed to Morton Greenspan, Counsel to the Department, copies of determinations on appeal which have reiterated the same points for well over a year and the determination rendered in Broughton v. Lewis.

The Broughton determination was critical of the Department's actions regarding a particular denial of access and held that §87(2)(e) of the Freedom of Information Law, which enables an agency to withhold records "compiled for law enforcement purposes", can only be asserted by a criminal law enforcement agency. The determination is consistent with the advice provided by this office since the enactment of the Freedom of Information Law in 1974.

I appreciate your efforts in seeking compliance with the Freedom of Information Law. If I can be of further assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1265

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

October 3, 1979

M. Arthur Eiberson, Esq.
First Chief Deputy County Attorney
County of Nassau
Office of the County Attorney
Nassau County Executive Building
Mineola, New York 11501

Dear Mr. Eiberson:

Thank you for your interest in complying with the Freedom of Information Law. As you are aware, I have received your letter of September 24 and the materials appended to it.

Your inquiry concerns rights of access to an inventory compiled by the Nassau County Department of Health which identifies "Consumer Products Containing or Suspected of containing Harmful Organic Chemicals and having the potential of contaminating the Groundwater of Nassau County" (emphasis yours). You have indicated further that the inventory has not been completed and that it is possible that disclosure at this juncture might result in economic hardship to the firms that manufacture the products identified in the inventory.

It is noted at the outset that 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

In my opinion, it is questionable whether any of the grounds for denial may appropriately be asserted. Nevertheless, the following paragraphs will review possible grounds for denial.

First, §87(2)(b) of the Law states that an agency may withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". Moreover, §89(2)(b) lists five illustrative examples of unwarranted invasions of personal privacy. For example, §89(2)(b)(iv) provides 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..."

From my perspective, the quoted provision would not constitute a proper ground for denial, for the information is not in my opinion "of a personal nature". Further, it is clear that the information in question is "relevant" to the work of the agency maintaining it.

A second possible ground for denial is §87(2)(d), which provides that an agency may withhold 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..."

To the extent that the inventory contains trade secrets, its contents may in my opinion be withheld. Nevertheless, as we discussed, it is unlikely that the inventory contains trade secret information, for it merely includes a breakdown of ingredients in particular products which likely appear on the products' containers.

A third possible ground for denial is §87(2)(g), which states that an agency may withhold records or portions thereof which:

> "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 provision quoted above contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. Under the circumstances, the inventory could be characterized as "intra-agency". However, I believe that it consists solely of what may be characterized as "statistical or factual tabulations or data". As such, I do not believe that the cited provision could be cited as a ground for denial.

There is one other avenue that may be employed as a possible ground for withholding. Specifically, the courts have held that, notwithstanding the enactment of the Freedom of Information Law, the so-called "governmental privilege" continues to exist. The leading decision regarding the governmental privilege is Cirale v. 80 Pine Street Corp. [35 NY 2d 113 (1974)], which held that an agency may withhold information if it can demonstrate to a court that disclosure would, on balance, result in detriment to the public interest.

In addition, one Appellate Division decision found that premature disclosure of records related to an "inchoate transaction" might properly be withheld if disclosure would hamper the ability of government to consummate the transaction, thereby resulting in detriment to the public interest [see Sorley v. Village of Rockville Center, 30 AD 2d 822 (1969)]. While there is no "transaction" involved here, the inventory, according to your letter, is incomplete. Therefore, it is possible that the principle might under the circumstances be applicable.

In sum, I believe that it is unlikely that the Freedom of Information Law provides sufficient grounds for denial of access to the inventory. However, if it can be successfully argued that premature disclosure would result in detriment to the public interest, perhaps the records in question may be withheld on that basis.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1266

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

October 4, 1979

Mr. Mark Hellerer
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Hellerer:

I have received your letter of October 1 which concerns access to approved pistol license applications in possession of the New York City Police Department.

Appended to your inquiry is a letter addressed to you by Rosemary Carroll, Assistant Commissioner of the Police Department, which cites Turner v. Codd (NYLJ, July 3, 1975), which held that approved applications for pistol licenses may be withheld.

In my opinion, approved applications for pistol licenses are available and I believe that the decision in Turner v. Codd failed to recognize or even cite statutory language that provides clear direction regarding rights of access to approved applications.

Specifically, §400.00(5) of the Penal Law, which is entitled "Filing of approved applications", provides that:

> "[T]he application for any license, if granted, shall be a public record. Such application shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York... the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof..."

In view of the foregoing, the statutory language quoted above directs that applications for pistol licenses, when granted, are accessible records open to the public.

With respect to the Freedom of Information Law, I believe that a similar conclusion would be reached even if §400.00(5) of the Penal Law had not been enacted.

In my view, a decision by a licensing authority to grant a pistol license would be reflective of a final agency determination. As such, it would be available under §87(2)(g)(iii), which provides access to final agency determinations found within inter-agency or intra-agency materials.

Further, although individual licensees are identified in the applications, I do not believe that disclosure of the applications would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], for the issuance of a license essentially enables the public to know that a particular individual is qualified to engage in certain activity. In this instance, the granting of a license permits the public to know that a particular individual is qualified to possess a pistol. In other instances, licenses enable the public to know that particular individuals are qualified to hunt or fish, for example, or to engage in particular vocations. Under the circumstances, disclosure would in my view result in a permissible as opposed to an unwarranted invasion of personal privacy.

In addition, §89(5) of the Freedom of Information Law states that:

> "[N]othing 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."

Stated differently, the Freedom of Information Law cannot be construed to abridge rights of access granted by other provisions of law, such as §400.00(5) of the Penal Law, or by means of judicial determination.

Having studied Turner v. Codd, it is my view that the decision simply fails to recognize the specific language of §400.00(5) of the Penal Law. That decision apparently was based upon what was characterized as the "official privilege" and cited Matter of Langert v. Tenney, 5 AD 2d 586.

It is emphasized that Langert v. Tenney was decided in 1958. The State Legislature, however, took the opportunity to review the provisions of §400.00 of the Penal Law long after Langert v. Tenney was rendered. The focal point of this inquiry, subdivision (5), was amended in part by the Legislature in 1977 (Ch. 480, L. 1977). From my perspective, if the Legislature in its review of subdivision (5) felt that approved licenses should be withheld from public scrutiny, it would have so directed. Nevertheless, the access provisions of subdivision (5) were preserved. In addition, the "official privilege" is based upon the principle that an agency may withhold records when disclosure would result in detriment to the public interest. Again, I believe that the State Legislature in its review of subdivision (5) would have opted to alter rights of access if it agreed that disclosure of approved applications would indeed result in detriment to the public interest. No such alteration was made. Therefore, I contend that the absence of a change in the applicable statute in my view confirms that the Legislature intended to make approved applications available to the general public.

Lastly, while I can appreciate the concerns expressed by the Police Department, I believe that it is obliged to comply with extant statutory language. If the provisions of a statute prove to be insufficient or perhaps harmful, attempts to enact remedial legislation would in my opinion be the most appropriate course of action. At the present time, however, I do not feel that the applicable statutory provision, subdivision (5) of §400.00 of the Penal Law, provides the Police Department with the discretion to withhold any portion of an application for a pistol license that has been granted.

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: Rosemary Carroll

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1267

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

October 5, 1979

Mr. William G. Houston
Superintendent of Schools
Lake Shore Central Schools
959 Beach Road
Angola, New York 14006

Dear Mr. Houston:

I have finally received a copy of your determination on appeal rendered under the Freedom of Information Law addressed to Douglas Turner, Editor of the Buffalo Courier-Express. Although the determination is dated September 4 and postmarked September 5, it was delivered to this office on October 4 due to an insufficient designation of the Committee's mailing address.

For future reference, correspondence sent to the Committee should be addressed in accordance with the letterhead.

With regard to your determination, there are several points that you made which in my view are somewhat confusing.

The first item in the determination states that:

> "[T]he agenda contains, among other things, administrative recommendations concerning personnel; history; updating and opinions of counsel concerning current, pending and future legal matters of the district; detailed updates of pending negotiations with recommendations by the Board's negotiating team for counter-proposals and offers of settlement."

It is unclear what "other things" might be, and it is possible that those "other things" might consist of information that is available to the public. Further, I am curious to know how, for example, an administrative recommendation concerning personnel can be made without some statement reflective of the factual background that necessitates the drafting of recommendation. For instance, perhaps it is necessary to consider the expansion or elimination of staff of an English Department. While a recommendation may be made, would it not be preceded by a statement to the effect that the district has five positions that it must fill, or that five positions must be eliminated due to a lack of funds? If that is so, I believe that such statement would constitue "factual data" that is accessible under the Freedom of Information Law. The recommendation might be denied, but the factual basis for making the recommendation would in my opinion be available.

In your third point, you wrote that:

> "[T]o give an agenda containing only information obtainable under the act would require the Board to prepare a separate agenda, deleting much of the present agenda and re-writing the remainder. Such a document would not be one presently kept, held, filed or produced by the district."

In the statement quoted above, you mentioned that in order to give effect that the Freedom of Information Law, the board would be required to create a separate agenda "deleting much of the present agenda". If it can be assumed that portions of an agenda might be deleted appropriately under the Freedom of Information Law, I believe that it can also be assumed that the remainder would be available under the Freedom of Information Law. The basic point of my letter to Mr. Schubauer regarding the same issue was that the Board may delete portions of the agenda under grounds for denial appearing in the Freedom of Information Law, but that it must provide access to the remainder.

In a similar vein, as I advised Mr. Schubauer, the Freedom of Information Law is based upon a presumption of access. Although it may be burdensome to do so, the Freedom of Information Law requires an agency to review a record in its entirety to determine which portions, if any, may justifiably be withheld.

Lastly, I direct your attention to the focal point of the Freedom of Information Law, §87(2), which provides in relevant part that "[E]ach agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof..." that fall within one or more of the grounds for denial that ensue. As such, it is reiterated that the Board of Education, as represented by its records access officer and appeals officer, is required to review an entire record that is requested and made available those portions of the record that do not fall within any of the grounds for denial. Further, it is clear that even if substantial portions of a record might justifiably be withheld, an agency is obliged to permit the public to inspect and copy the remainder.

I hope that the preceding will serve to clarify the Freedom of Information Law and the obligations of the District regarding its responsibilities under the Law.

If you would like to discuss the matter in greater detail, I would be pleased to speak with you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Turner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1268

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

October 5, 1979

Mr. Wallace Nolen
President
S & W Collection Service
92 Academy Street
Poughkeepsie, New York 12601

Dear Mr. Nolen:

I have received your letter which describes a request made under the Freedom of Information Law directed to the Department of Law. In addition, appended to your letter is the response to the request by Richard Rifkin, Deputy Counsel to the Attorney General.

The correspondence indicates that you are seeking "to view any and all documents" in possession of the Department of Law regarding five particular individuals and/or companies. The request was denied on the basis that the records in question were compiled for law enforcement purposes, that disclosure would interfere with "an impartial investigation", that the records represent "matter prepared for possible litigation" which if disclosed could interfere with any judicial proceedings which may be brought, that the records constitute intra-agency materials that do not contain agency policy or a final determination and that the records contain material provided to the Department of Law on a confidential basis which would if disclosed impair the ability of the Department of Law to continue the investigation.

Although I do not concur completely which each ground for denial offered, it appears that sufficient grounds have been cited to deny access to the records.

The first two grounds for denial asserted by Mr. Rifkin must be construed in accordance with §87(2)(e)(i) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that are compiled for law enforcement purposes and which if disclosed would interfere with a law enforcement investigation. While an assertion that records have been compiled for law enforcement purposes without more would not in my view constitute a sufficient ground for withholding, that assertion coupled with a second statement that disclosure would interfere with an investigation would in my opinion bring the records within the scope of the grounds for denial appearing in §87(2)(e)(i).

The third basis for denial concerns material prepared for "possible litigation". In my opinion, records prepared for litigation are deniable. Section 87(2)(a) of the Freedom of Information Law provides that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute." Since §3101(d) of the Civil Practice Law and Rules exempts material prepared for litigation from disclosure, I believe that such records would be deniable under the Freedom of Information Law. However, it is important to note that it has been held judicially that the provisions cited may be appropriately asserted to deny access when materials are prepared "solely" for litigation [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234]. Therefore, if, for example, records are prepared for multiple purposes, one of which includes possible litigation, neither §87(2)(a) of the Freedom of Information Law nor §3101(d) of the Civil Practice Law and Rules could in my view be appropriately cited. However, if records are prepared for litigation and for law enforcement purposes, and disclosure would deprive a person of a right to a fair trial or impartial adjudication or interfere with an investigation, the records may be withheld under §87(2)(e)(i) or (ii) of the Freedom of Information Law.

The fourth ground for denial is based upon §87(2)(g) of the Freedom of Information Law, which 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..."

It is important to note that the quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records. From my perspective, §87(2)(g) essentially enables an agency to withhold deliberative or advisory matter, but requires that an agency disclose what has been characterized as the "secret law" of the agency, such as the statistics and facts, instructions to staff that affect the public, and statements of policy or determinations upon which an agency relies in carrying out its duties.

The final ground for denial is based upon the assertion that the records contain materials provided to the Department of Law "on a confidential basis" and that disclosure of such materials would impair the ability of the Department of Law to continue an investigation. In this regard, it is possible that §87(2)(e)(i) of the Freedom of Information Law, which was discussed earlier, could be properly cited to deny access. However, if no ground for denial in the Freedom of Information Law could be cited as a ground for denial, it is conceivable that the "governmental privilege" might be successfully asserted. The privilege, which developed in common law, is based upon the notion that government may withhold records which if disclosed would result in detriment to the public interest, notwithstanding rights of access granted by the Freedom of Information Law or other statutes [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. Since a determination regarding detriment to the public interest can only be made by a court, I could not conjecture as to the sufficiency of such as assertion under the circumstances. Nevertheless, it is important to point out that a "governmental privilege" exists concurrently with the Freedom of Information Law.

In sum, it would appear that one or more of the grounds for denial offered by Mr. Rifkin, cited in conjunction with one another, would constitute a sufficient basis for withholding.

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: Richard Rifkin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1269

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

October 5, 1979

[redacted]

I have received your letter and the correspondence appended to it regarding a denial of food stamps. Since the nature of your request regarding the Freedom of Information Law is unclear, the following consists of a review of applicable New York law on the subject. In addition, I have enclosed a copy of the Freedom of Information Law.

It is noted at the outset that records identifiable to applicants for and recipients of public assistance are confidential under §136 of the Social Services Law. As such, the records in question are outside the scope of the Freedom of Information Law.

However, regulations adopted by the New York State Department of Social Services indicate that public assistance records may in some circumstances be disclosed to a recipient of public assistance. Specifically, §357.3(c) of the regulations, entitled "[D]isclosure to applicant, recipient, or person acting in his behalf," states that:

> "(1) [T]he 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 of 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 view of the foregoing, there is no "right" to review public assistance records, and access is largely a matter of discretion on the part of a social services department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1220

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

October 9, 1979

Mr. Jeffrey A. Kelly
[redacted]

Dear Mr. Kelly:

I have received your letter of October 1. While I appreciate your situation and the points that you made, please try to accept the fact that I am bound to issue an opinion reflective of the current state of the law in New York, whether or not I agree with it.

For better or for worse, it is reiterated that the Freedom of Information Law does not apply to records in possession of a private hospital; it applies only to records in possession of government. Nevertheless, as I also indicated in my earlier letter to you, §17 of the Public Health Law may be used to gain access to records pertaining to you indirectly. Under the cited provision, while an individual has no right to gain direct access to medical records pertaining to him or her, a physician acting on behalf of an individual may gain access to records in possession of a hospital or another physician, for example.

Finally, whether either of us agrees with the law of New York relative to your inquiry, it is suggested that you use the legal tools available to you that are contained in §17 of the Public Health Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1271

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

October 10, 1979

Mr. William Torrey
DOCS I.D. #78-A-3181
Pouch 1
Woodbourne, New York 12788

Dear Mr. Torrey:

I have received your letter of September 27 concerning attempts to gain access to your presentence report.

While I am sympathetic to your situation, I do not believe that either a correctional facility or a probation or parole office has the authority to disclose a presentence report to you.

Please be advised that §390.50 of the Criminal Procedure Law states that presentence reports can be made available only 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 which you were tried.

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

RJE/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1272

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

October 10, 1979

Mr. Leonard Rosen
[redacted]

Dear Mr. Rosen:

I have received your letter of September 29 in which you described a series of difficulties with your former employer, the Bureau of Disability Determinations of the Department of Social Services.

Based upon your belief that the Bureau has engaged in wrongdoing, you have asked what courses of action you might take. In addition, you have inquired as to whether there is any way that you can obtain a copy of a report made regarding an observation that you were on a subway station platform during duty hours.

This Committee is charged with the responsibility of advising with respect to the Freedom of Information and the Open Meetings Laws. Consequently, I do not feel that I could appropriately offer direction regarding your charges. However, if you feel that the Bureau of Disability Determinations has engaged in wrongdoing, perhaps you should write to the State Commission of Investigation, which is located at 270 Broadway, New York, New York, 10007.

With regard to the report to which you made reference, it is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law (see attached) provides that all records in possession of an agency are accessible, except those records or portions thereof that fall within one or more enumerated categories of deniable information.

Relevant to rights of access to the report is §87(2)(g), which 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..."

It is important to point out that the provision quoted above contains what in effect is a double negative. While agencies may withhold inter-agency or intra-agency materials, they must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such records.

Under the circumstances, the report could likely be characterized as an "intra-agency" document. However, to the extent that it contains statistical or factual data, for example, I believe that it must be made available to you.

I have enclosed for your consideration a copy of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law. In order to request a copy of the report, it is suggested that you follow the procedure described in 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 1023

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

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EXECUTIVE DIRECTOR

ROBERT J. FREEMAN

October 11, 1979

Mrs. Kathryn Schnur
Canastota Teacher's
Association
205 Prospect Street
Canastota, New York 13032

Dear Mrs. Schnur:

I have received your letter of October 4 concerning an interpretation of the Freedom of Information Law. Specifically, you have asked whether it is "legal for a school district to release for publication in newspapers, an employee's name, current salary, and salary under next year's contract". Assuming a school district cannot disclose such information, you have also asked what recourse the employees might have.

In my opinion, the employees have no recourse, for the information in question must be made available on request to any person, including a newspaper.

You have cited both §87(3)(b) and §89(2) of the Freedom of Information Law regarding your questions. The former provides that each agency, which includes a school district, is required to maintain a payroll record consisting of the name, public office address, title and salary of all officers or employees of the agency. The latter provides guidance regarding the withholding of records on the ground that disclosure would result in an "unwarranted invasion of personal privacy".

Payroll information analogous to that identified in §87(3)(b) of the Freedom of Information Law was made available pursuant to judicial determination long before the passage of the Freedom of Information Law. The rationale for the disclosure of such information is based upon the principle

that government must be accountable to the public. Further, in construing the privacy provisions of the Freedom of Information Law, this Committee has advised and the courts have upheld the notion that records relevant to the performance of the official duties of public employees are available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy. Since payroll records represent "important fiscal as well as operational information", the courts have long held that it is available to the public [see e.g., Winston v. Mangan, 338 NYS 2d 654, 662 (1972); Chambers v. Kent, 201 NYS 2d 439 (1960)].

While §§87(2)(b) and 89(2)(b) enable an agency to protect against disclosures that would result in an unwarranted invasion of personal privacy, I do not believe that the cited provisions could successfully be asserted to withhold the information in question due to the direction provided by §87(3)(b) and the prior case law.

In sum, I believe that the information that was disclosed by a school district and published in newspapers is currently available under the Freedom of Information Law. As such, a district is required to disclose the information to any person who seeks 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/kk

cc: Canastota School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1224

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

October 11, 1979

Mr. D. Loggins
[redacted]

Dear Mr. Loggins:

I have received your card in which you asked whether New York State licensing exams and New York City employment tests are subject to disclosure under the New York Freedom of Information Law.

The Freedom of Information Law is based upon a presumption of access. All records in possession of government are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached).

Relevant to your inquiry is §87(2)(h) which states that an agency may withhold records or portions thereof that:

> "are examination questions or answers which are requested prior to the final administration of such questions."

Stated differently, if examination questions or answers are requested under the Freedom of Information Law prior to the final administration of the questions, those portions of an examination may be withheld.

In my opinion, the thrust of this ground for denial is obvious, for a testing agency should not be required to disclose questions and answers that will be given in the future.

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/kk
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1225

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

October 11, 1979

Mr. Ira Lipsky
[redacted]

Dear Mr. Lipsky:

I have received your letter of October 2, as well as the materials appended to it.

You have indicated that you have obtained return receipt "green cards" following your request for records sent to the Department of Correctional Services, but that no response to your request, which was dated September 17, has been given as yet.

Your questions concern the legal status of your request and the steps that should now be taken.

First, according to the departmental directive attached to your letter as well as the regulations promulgated by the Committee, an agency, including the Department of Correctional Services, is required to respond to a request within five business days of its receipt of a request. The response can take one of three forms. It can be granted, denied, or if, for example, no response can be given within five business days, a request may be acknowledged in writing. If receipt of a request is acknowledged, the agency has ten additional business days to determine to grant or deny access to the records sought. Under §1401.7(c) of the Committee's regulations, which have the force and effect of law, if no response is given within five business days, the request is considered constructively denied. Therefore, since your request has been neither granted, denied nor acknowledged, you may appeal.

The person to whom an appeal should be directed at the Department of Correctional Services is Patrick Fish, Counsel. The appeal should be made in writing and identify the date and location of your original request, the records that were denied, and your name and return address. It is noted that an appeal must be made within thirty days of a denial.

In addition, it is noted that §89(4)(a) of the Freedom of Information Law requires that an agency transmit to the Committee copies of appeals as well as the determinations that ensue.

It is emphasized that an applicant cannot initiate a judicial proceeding until all administrative remedies have been exhausted. Therefore, it is suggested that you appeal. I do not believe that it is necessary to contact an attorney at this juncture.

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/kk

Enc.

cc: John Burns
Patrick Fish
Brian Malone

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1276

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

October 11, 1979

Mr. Edwin Duryea
[redacted]

Dear Mr. Duryea:

I have received your letter of September 27 concerning your requests for information directed to Mr. Michael R. Pender, Commissioner of the Nassau County Department of Public Works.

In all honesty, I am not completely familiar with the dispute in which you are involved. Therefore, if you believe that I can be of further assistance after having received additional materials that you might send, I would be happy to review earlier correspondence. However, it is emphasized that the Committee has no authority to compel compliance with the Freedom of Information Law. It merely has the capacity to give advice. As such, even if I were to agree with your point of view, that alone would not guarantee that you would gain access to the information in which you are interested.

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law. I direct your attention to §89(3) of the Freedom of Information Law and §1401.2(6) of the regulations. In relevant part, the former provides that an applicant may request that an agency certify "that it does not have possession" of a record requested or that "the record cannot be found after diligent search. Similarly, the cited provision of the regulations states that upon request, an applicant may request a certification which states that:

> "(i) The agency is not the custodian for such records, or
>
> (ii) The records of which the agency is a custodian cannot be found after diligent search."

In view of the foregoing, you may seek a certification in writing to the effect that the information in which you are interested is not maintained by the Department of Public Works or that it cannot be found after diligent 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1277
OML-AO-372

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

September 18, 1979

Ms. Emily March
[redacted]

Dear Ms. March:

I have received your letter concerning your inability to gain access to minutes of a meeting of the Port Jervis Housing Authority.

Your letter indicates that approximately ten days after a meeting, you requested a copy of minutes and were informed that the minutes would be mailed to you. However, as of the date of your letter, September 5, you had not received the minutes.

In my opinion, to the extent that minutes exist, they must be made available to you. Further, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. The response to a request can grant access, deny access or acknowledge receipt of a request. If the receipt of a request is acknowledged, the agency then has ten additional business days to decide to grant or deny access. If no response is given within five business days of receipt of a request or within ten business days from the date of an acknowledgment, the request is considered constructively denied. In such a case, you may appeal the denial to the head or governing body of an agency, which has seven business days to grant access to the records or fully explain the reasons for further denial in writing. In addition, the person or body designated to determine appeals is required to transmit to this Committee copies of appeals and the determinations that ensue.

It is also noted that amendments to the Open Meetings Law that will become effective on October 1, will require that minutes of open meetings be compiled and made available within two weeks of the date of the meeting.

Lastly, your letter indicates your belief that the Authority has broken the law, and you have questioned why the Authority or its membership has not been "fined as the law states". In this regard, please be advised that the Freedom of Information Law does not contain any provisions regarding the fining of public officials who may have failed 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
Executive Director

RJF/kk

cc: Port Jervis Housing Authority

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-388
FOIL-AO-1278

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

October 12, 1979

Mr. Joseph DeSantis, President
Parents of C.O.L.D.
P.O. Box 88
Rocky Point, New York 11778

Dear Mr. DeSantis:

I have received your letter of September 27 as well as the materials appended to it concerning the Freedom of Information Law and the Open Meetings Law (see attached).

Based upon statements made in your letter and the materials, it appears that the Board of Education of the Shoreham-Wading River Central School District has a fundamental misunderstanding of both statutes. The ensuing discussion will pertain to the Freedom of Information Law initially, and an explanation of the Open Meetings Law will follow.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a school district, are available, except to the extent that records or portions thereof fall within one or more among eight enumerated grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law. In addition, §86(4) of the Freedom of Information Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency. Therefore, all records in possession of a school district are subject to rights of access granted by the Law.

Further, it is important to note that the introductory language of §87(2) provides that an agency may deny access to "records or portions thereof" that fall within the categories of deniable information. Therefore, it is clear that the Legislature recognized that there may be situations in

which records are accessible or deniable in part. It is also clear that an agency in receipt of a request for records must review the records in their entirety to determine which portions, if any, fall within any of the grounds for denial.

The first ground for denial under the Freedom of Information Law, §87(2)(a), provides that an agency may withhold records or portions of records that are "specifically exempted from disclosure by statute". Stated differently, if an act passed by the State Legislature or by Congress specifically prohibits an agency from disclosing certain records, the cited provision would be applicable. Records falling within such statutory prohibitions would be considered "confidential". The only other situation in which a record may be considered "confidential" would involve a circumstance in which a court determined that disclosure would result in detriment to the public interest [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. Therefore, a record can be considered "confidential" in but two circumstances, i.e. when a statute prohibits disclosure or when a court determines that disclosure would be detrimental to the public interest. An agency cannot classify a record as "confidential" without the presence of one of the two legal bases described above.

The second ground for denial states that an agency may withhold records or portions thereof which is disclosed would result in an "unwarranted invasion of personal privacy" [§87(2)(b)]. There may be situations in which the deletion of names, for example, or other identifying details could be accomplished without compromising the privacy of any individual whose name might appear. In such a case, I believe that the District would be required to delete identifying details, while providing access to the remainder. Further, although subjective judgments must often be made in order to determine whether a person's privacy might be compromised in an unwarranted fashio by means of disclosure, the courts have held that records concerning public employees that are relevant to the performance of their official duties are accessible, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 664 (Court of Claims, 1978)].

The third ground for denial states that an agency may withhold records or portions thereof "which if disclosed would impair present or imminent contract awards or collective bargaining negotiations" [§87(2)(c)]. The key word in the quoted language is "impair", and the provision enables an agency to withhold records or portions of records when disclosure would hamper the ability of government to engage in a contractual relationship. Therefore, if records contain information regarding the District's collective bargaining strategy and disclosure would place the District in an unfair bargaining position, those portions of the record could in my view be withheld. On the other hand, if the District is engaged in public bidding regarding a particular contract, disclosure would not likely impair the ability of the District to consummate a contractual relationship. Therefore, such records would be available.

The fourth ground for denial concerns trade secrets and information that is maintained for the regulation of commercial enterprise which if disclosed "would cause substantial injury to the competitive position of the subject enterprise" [§87(2)(d)]. In my view, this exception to rights of access would rarely arise, because the School District would not likely obtain trade secrets and because the District is not engaged in the regulation of commercial enterprise.

The fifth exception concerns records compiled for law enforcement purposes [§87(2)(e)]. Again, since the School District is not a law enforcement agency, I do not believe that this ground for denial would arise with any regularity.

The next ground for denial states that an agency may withhold information "which if disclosed would endanger the life and safety of any person" [§87(2)(f)]. For obvious reasons, it is extremely unusual that this exception is appropriately cited.

The seventh exception to rights of access 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..." [§87(2)(g)].

The quoted provision contains what in effect is a double negative. Although an agency may withhold intra-agency materials, it must disclose statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials. According to the Assembly sponsor of the amendments of the Freedom of Information Law, the exception is intended to enable an agency to withhold statements of opinion or advice, but that the statistical or factual data upon which an agency relies for carrying out its duties should be made available (letter from Assemblyman Mark Siegel to Robert J. Freeman, July 21, 1977). Therefore, in my opinion, to the extent that the agenda contains statistical or factual data, instructions to staff that affect the public, statements of policy or determinations, it is accessible unless another ground for denial can properly be cited.

Lastly, an agency may withhold records or portions thereof that "are examination questions or answers which are requested prior to the final administration of such questions" [§87(2)(h)]. Stated differently, if an examination question will be given in the future, the question and the answer may be withheld.

The foregoing represent the only grounds for denial that may be cited to withhold records under the Freedom of Information Law.

The following paragraphs concern the Open Meetings Law.

First, it is emphasized that the state's highest court, the Court of Appeals, has construed the definition of "meeting" appearing in §97(1) of the Law expansively [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947]. In brief, the Court held that any convening of a quorum of a public body for the purpose of discussing public business is a meeting that must be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized.

Second, §97(3) of the Open Meetings Law defines "executive session" as that portion of an open meeting during which the public may be excluded. Further, §100 (1) of the Open Meetings Law prescribes a procedure that must be followed by public bodies prior to entry into executive session. 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, provided however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, an executive session may be held only after a public body has convened an open meeting. In addition, the motion must identify in general terms the subject or subjects intended for discussion in executive session and carried by a majority vote of the total membership of a public body. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting.

It is also important to point out that a public body cannot enter into executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the subject matter that may appropriately be discussed during executive session.

According to the minutes of a special meeting held on September 15, the motion to enter into executive session failed to identify the nature of the subject matter to be discussed. As such, the Open Meetings Law was apparently violated. The minutes of the executive session held on September 18 indicate that the subject matter discussed concerned "proposals for additional space to accomodate the public library." Based upon a review of the grounds for executive session, none in my view could appropriately have been cited to hold an executive session to discuss the proposals identified in the motion.

As in the case of the Freedom of Information Law, in which it is presumed that records are available unless they fall within one or more grounds for denial, it should be presumed under the Open Meetings Law that a public body must deliberate in full view of the public, except when an executive session may properly be convened.

With regard to minutes of executive session, §101(2) of the Open Meetings Law requires that:

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

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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 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 2d 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 act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law requires all public bodies to compile and makeaavailable a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Shoreham-Wading River Central School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1279

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

October 15, 1979

Ms. Frances Zamnik
[redacted]

Dear Ms. Zamnik:

Your letter dated October 1 concerning access to information in possession of the New York State Identification and Intelligence System was received by this office on October 12.

I have contacted a representative of the Division of Criminal Justice Services on your behalf, who requested that I transmit your letter to that office for response. Consequently, you will be receiving a letter shortly from the Department of Criminal Justice Services which specifies the manner in which you can request records pertaining to you.

As a general matter, I believe that the Division of Criminal Justice Services provides access to records pertaining to individuals to the individuals based upon submission of fingerprints.

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: Adam D'Alessandro
Director of Data Systems
Division of Criminal Justice Services
Stuyvesant Plaza
Executive Park Tower
Albany, NY 12203

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1280

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

October 15, 1979

Ms. Patricia Schroeder
[redacted]

Dear Ms. Schroeder:

I have received your letter of October 5 this morning, which contains a "demand" that the Committee disclose your scores to you regarding the examination for Registered Professional Nurse.

Please be advised that the Committee on Public Access to Records is responsible for giving advice with respect to the Freedom of Information Law. It does not maintain custody of records generally, nor does it have the capacity to compel an agency to comply with the Freedom of Information Law. Consequently, I have transmitted your request to the Records Access Officer of the agency that does maintain custody of the records in which you are interested, the State Education Department.

It is also noted that I prepared an advisory opinion at the request of a nurses' group in which it was advised that records indicating the scores of nurses should be made available to them under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gene Snay, Records Access Officer
Marcia Scharfman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1281

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

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 15, 1979

Ms. Loretta R. Morelli
Executive Vice President
Department of State
CSEA Local 689
162 Washington Avenue
Albany, New York 12231

Dear Ms. Morelli:

I have received your letter of October 11 in which you requested an interpretation of the Freedom of Information Law. In order to obtain clarification regarding the scope of your inquiry, it was suggested that I contact Ms. June Scott, President of Local 689. Ms. Scott specified your areas of inquiry and the following paragraphs will serve to respond to the points made during our conversation.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. In brief, §87(2) of the Law (see attached) is based upon a presumption of access. The cited provision states that all records in possession of an agency are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of §87(2). In addition, §86(4) of the Law defines "record" to include any information in possession of an agency "in any physical form whatsoever". Consequently, all records in possession of government in New York are subject to rights of access granted by the Freedom of Information Law.

The first question concerns access to a payroll roster. In this regard, §87(3)(b) of the Freedom of Information Law requires that each agency compile a payroll record consisting of the name, public office address, title and salary of all officers or employees of an agency. Two additional points should be made with respect to the payroll record. Although the Freedom of Information Law generally does not require an agency to create records in response to a request [see §89(3)], §87(3) of the Law requires agencies to create certain records, one of which is the payroll listing. Moreover, although the Law

provides that an agency may withhold records when disclosure would result in an unwarranted invasion of personal privacy [see §87(2)(b)], the courts held long before the passage of the Freedom of Information Law that payroll information is available to any taxpayer [see e.g. Chambers v. Kent, 201 NYS 2d 439 (1960); Winston v. Mangan, 338 NYS 2d 654 (1972)]. As a general matter, the Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy.

The second question concerns rights of access to lists of individuals who may have passed a Civil Service examination. The lists to which you made reference are generally known as "eligible lists". In my opinion, once an eligible list is created, it is available under the Freedom of Information Law and §71.3 of the rules and regulations promulgated by the Department of Civil Service, which states that:

> "[E]ligible lists may be published with the standing of the persons named in the, but under no circumstances shall the names 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 and regulation four."

As such, although a member of the public may not gain access to a list that includes the names of all candidates who took an examination, he or she may gain access to an eligible list that indicates the identity and standing of those who passed.

Your last question concerns what has been identified as a "PR form", which is completed by an agency when a promotion or a new appointment is made. In my view, as the form has been described, it is accessible. Relevant to rights of access to the form is §87(2)(g), which 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 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 found within such materials. Under the circumstances, the form that you described could be characterized as an intra-agency record. However, its contents would appear to consist of factual data, and a final determination made by an agency to grant a promotion or make an appointment. Further, as noted previously, each agency must create a payroll record that includes the name, public office address, title and salary of all officers or employees of the agency. When a promotion is granted or an appointment is made, I believe that such information would be reflected in the payroll record. Therefore, the information in which you are interested should be available by means of the form in question as well as the payroll record.

To make a request, it is suggested that you follow the procedures contained in the regulations promulgated by the Committee (see attached). The regulations govern the procedural aspects of the Freedom of Information Law and have the force and effect of law.

Lastly, it is noted that an agency may assess a fee for photocopying not in excess of twenty-five cents per photocopy, except when a different provision of law enables an agency to assess a higher fee.

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/kk

Encs.

cc: June Scott

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1282

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

October 15, 1979

Mr. William M. Riordan
[redacted]

Dear Mr. Riordan:

I have received your letters of September 29 and October 5 regarding your inability to gain access to records in possession of the Nassau County Civil Service Commission. Specifically, your letter of September 20 addressed to the County Civil Service Commission indicates that you have requested records related to Exam No. 66-681 for police officers, which was given in 1976, as well as records regarding all subsequent qualifying examinations.

In my view, the results of an examination need not be made available until an eligible list is created.

To the best of my knowledge, candidates for police officer are required to engage in a series of examinations, including written, medical, and physical agility examinations to qualify for employment. In this regard, I do not believe that an eligible list is or can be created until each aspect of the examination is completed. Further, §3.6 of the rules and regulations promulgated by the State Civil Service Commission provides in relevant part that:

> "[E]very candidate who attains a passing mark in an examination as a whole and who meets the standards prescribed, if any, for separate subjects or parts of subjects of the examination shall be eligible for appointment to the position for which he was examined and his name shall be entered on the eligible list in the order of his final rating..."

Although the quoted provision does not make reference to access to eligible lists, it does make clear that an eligible list may be established only after candidates have attained

a passing grade in an examination "as a whole" and that the candidate must meet each of the standards prescribed separately to qualify for a position.

In view of the foregoing, it appears that the intent of §3.6 of the regulations is that an eligible list may be established only after the entire examination process has been completed. Consequently, the names of candidates need not in my opinion be disclosed until they have fully qualified by means of passing each of the examinations they are required to take.

Further, a list of names of candidates who took a particular examination need not in my opinion be made available, for such a disclosure could result in the identification of candidates who failed an examination or a component thereof. As such, disclosure of a list of candidates taking an examination could result in an unwarranted invasion of personal privacy pursuant to the provisions of §87(2)(b) of the Freedom of Information Law. This contention is bolstered by §71.3 of the rules and regulations promulgated by the Department of Civil Service, which states that:

> "[E]ligible lists may be published with the standing of the persons named in them but under no circumstances shall the names of persons who failed examination be published nor shall their examination papers be exhibited or any information given about them, except as provided in this regulation and regulation four."

As such, although a member of the public may not gain access to a list that includes the names of all candidates who took an examination, he or she may gain access to an eligible list that indicates the identity and standing of those who passed.

In sum, it would appear that neither the Civil Service Law, the rules and regulations promulgated thereunder, nor the Freedom of Information Law would permit access to records in which you are interested prior to the creation of an eligible 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
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO - 392
FOIL-AO - 1283

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

October 16, 1979

Mr. Robert J. Whalen
[redacted]

Dear Mr. Whalen:

I have received your letter of October 4 as well as the materials appended to it. The contents concern both the Freedom of Information Law and the Open Meetings Law.

According to the first paragraph of your letter, which concerns the necessity of having a tape recording of meetings of the School Board, a request was made at a meeting in August by a Board member to have an item placed on the agenda for the next Board meeting. You have indicated further that although a motion was made to have the item placed on the agenda, reference to the motion does not appear in the minutes of the meeting. In this regard, §101 of the Open Meetings Law (see attached) provides minimum requirements regarding the contents of minutes. Although it is clear that minutes of an open meeting need not include reference to every comment that was made at a meeting or consist of a verbatim transcript of a meeting, subdivision (1) of the cited provision states that minutes of open meetings "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 foregoing, if a motion was made during a meeting, whether or not it was carried, minutes of the meeting must in my opinion include reference to the motion.

According to the second paragraph of your letter, at a special meeting of the Board of Education held in May, a member of the Board voted by telephone. In my opinion, the Open Meetings Law precludes voting be telephone. Section 97(1) of the Law defines "meeting" to

mean "the official convening of a public body for the purpose of discussing public business." Similar language regarding the convening of a public body was found in the Open Meetings Law as originally enacted, and which was in effect at the time of the meeting held in May. Further, the definition of "public body" appearing in §97(2) of the Law makes reference to the requirement that an entity act by means of a "quorum". "Quorum" is defined in §41 of the General Construction Law and specifically requires that a public body can act only be means of a quorum "at a meeting". Since a public body cannot perform its duties without having first accomplished an act of "convening", I believe that the presence of members is required. Consequently, a member of a public body cannot in my opinion vote in absentia by means of a telephone call. Such activity would in my view be contrary to the thrust of the provisions cited above and the Open Meetings Law in general, which is intended to open the deliberative process to the public.

The third paragraph in your letter indicates that you were billed for a copy of a tape recording furnished to you by the School District. In this regard, you have questioned the capacity of the District to charge a trustee for reproducing a tape. Similar questions have arisen in the past and it has consistently been advised that a member of a school board, for example, acting independently and not under the aegis of the board should be accorded the same treatment as any member of the public. If your request had been made at the direction of a majority of the members of the School Board, I believe that it would be inappropriate to assess a fee. However, if the request was made independently, it would appear that the Board could assess a fee for reproduction of the tape recording based upon the actual cost of reproduction.

The second page of your letter makes reference to an opinion from Robert Stone, Counsel to the State Education Department, in which he advised that minutes of executive session are not required under the Education Law. I agree with Mr. Stone's contention. Section 101(2) of the Open Meetings Law provides that:

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

Therefore, minutes of executive session are required to be compiled only when action is taken during executive session.

Public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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 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 2d 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 act only during an open meeting.

In addition, §87(3)(a) of the Freedom of Information Law requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

Your final question concerns the use and maintenance of a "Freedom of Information" form. I may have suggested to you in the past that the Committee has advised that the public is not required to complete a prescribed form in order to apply for records. Contrarily, the Committee has advised that any request made in writing that reasonably describes the records sought should be sufficient. In addition, the Committee's regulations (see attached) state that although an agency may require that a request be put in writing, it need not. For example, if a request is made for a record that is readily accessible, perhaps an oral request would be acceptable; if a request is made for several records that would involve a search and a review of their contents, it is likely that a written request would be required.

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

Encs.

cc: G. Guy DiPietro, Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1284

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

October 16, 1979

Mr. John J. Cannon
[redacted]

Dear Mr. Cannon:

I have received your letter of October 8. Your inquiry concerns the ability of a member of the public to gain access to "the records related to his or her score and evaluation affecting eligibility for appointment" to a position after having taken the state trooper examination.

In this regard, I have enclosed copies of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the law and have the force and effect of law. In brief, the Freedom of Information Law provides that all records in possession of an agency are available, except those records or portions of records that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Under the circumstances, I believe that rights of access to a score and an evaluation regarding eligibility depend upon the creation of an "eligible list".

To the best of my knowledge, candidates for police officer are required to engage in a series of examinations, including written, medical, and physical agility examinations to qualify for employment. In this regard, I do not believe that an eligible list is or can be created until each aspect of the examination is completed. Further, §3.6 of the rules and regulations promulgated by the State Civil Service Commission provides in relevant part that:

> "[E]very candidate who attains a passing mark in an examination as a whole and who meets the standards prescribed, if any, for separate subjects or parts of subjects of the examination shall be eligible for appointment to the position for which he was examined and his name shall be entered on the eligible list in the order of his final rating..."

Although the quoted provision does not make reference to access to eligible lists, it does make clear that an eligible list may be established only after candidates have attained a passing grade in an examination "as a whole" and that the candidate must meet each of the standards prescribed separately to qualify for a position.

In view of the foregoing, it appears that the intent of §3.6 of the regulations is that an eligible list may be established only after the entire examination process has been completed.

Further, a list of names of candidates who took a particular examination need not in my opinion be made available, for such a disclosure could result in the identification of candidates who failed an examination or a component thereof. As such, disclosure of a list of candidates taking an examination could result in an unwarranted invasion of personal privacy pursuant to the provisions of §87(2)(b) of the Freedom of Information Law. This contention is bolstered by §71.3 of the rules and regulations promulgated by the Department of Civil Service, which states that:

> "[E]ligible lists may be published with the standing of the persons named in them but under no circumstances shall the names of persons who failed examination be published nor shall their examination papers be exhibited or any information given about them, except as provided in this regulation and regulation four."

As such, although a member of the public may not gain access to a list that includes the names of all candidates who took an examination, he or she may gain access to an eligible list that indicates the identity and standing of those who passed.

It is also emphasized that §89(3) of the Freedom of Information Law states that an agency is not required to create a record in response to a request. Therefore, if records have not yet been produced that relate to an individual's score or eligibility, the agency need not create such records in response to 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

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-393
FOIL-AO-1285

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

October 17, 1979

Councilwoman Michelle Powers
Town of Southeast
Brewster, New York 10509

Dear Councilwoman Powers:

I have received your letter of October 9 and thank you for your interest in complying with the Open Meetings Law.

The first question concerns the application of the Law to an industrial development agency. In my opinion, an industrial development agency is a "public body" subject to the Open Meetings Law in all respects. Section 97(2) of the Law as amended defines "public body" to mean:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

Further, §856(2) of the General Municipal Law, which concerns the organization of industrial development agencies, provides that such an agency "shall be a corporate governmental agency, constituting a public benefit corporation". Since §66 of the General Construction Law defines "public corporation" to include a public benefit corporation, such as an industrial development agency, the corporate board of directors of an industrial development agency is an entity which consists of at least two members, is required to act by means of a quorum (see General Construction Law, §41) and performs a governmental function for a public corporation. Therefore, it is a "public body" as defined by §97(2) of the Open Meetings Law.

A town board of ethics is in my view also a "public body" subject to the Open Meetings Law based upon similar reasoning as that offered with respect to industrial development agencies. An ethics board is an entity consisting of at least two members that is required to act by means of a quorum and that performs a governmental function for a public corporation, a town. It is noted, however, that much of the business of an ethics board could be conducted during an executive session. In this regard, §97(3) of the Open Meetings Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. Further, one of the grounds for executive session, §100(1)(f) states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Since discussions would likely deal with the employment history of a particular individual or a matter leading to the discipline of a particular individual, discussions in executive session could be held in many instances by a town ethics board.

Your final question is whether minutes of such boards or agencies are required. Section 101 of the Open Meetings Law concerns the minimum requirements of minutes and the time limits during which the minutes must be compiled and made available. Subdivision (1) of §101 concerns minutes of open meetings and states that such minutes shall consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Subdivision (2) states that "[M]inutes shall be taken at executive session of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..." Subdivision (3) provides that minutes of open meetings must be compiled and made available within two weeks of the meetings and that minutes of executive sessions must be available within one week of an executive session.

It is noted that §101(2) concerning minutes of executive session states that those minutes "need not include any matter which is not required to be made public by the freedom of information law..." With respect to an ethics board, it is possible that some aspects of minutes could result in an "unwarranted invasion of personal privacy" if disclosed. Under such circumstances, records or portions thereof which if disclosed would result in an unwarranted invasion of personal privacy may be withheld under §87(2)(b) of the Freedom of Information Law. Nevertheless, it is emphasized that this Committee had advised and the courts have upheld the notion that disclosure of records relevant to the performance of the official duties of public employees are available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 664 (Court of Claims, 1978)]. Therefore, if, for example, an ethics board determines that a particular public employee should be disciplined, records indicating the disciplinary action would in my view 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1286

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

October 17, 1979

Mr. Joseph Romanchak
[redacted]

Dear Mr. Romanchak:

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 of State and is responsible for advising with respect to the Freedom of Information Law.

Your letter indicates that you are interested in obtaining all records concerning you for the period of thirty-seven years in which you were a resident of New York.

Please be advised that New York State does not maintain a central location for storage of its records, nor does it maintain an index that identifies all records pertaining to particular individuals. Further, §89(3) of the Freedom of Information Law, a copy of which is enclosed, requires that an individual "reasonably describe" the records in which he or she is interested in obtaining. It is also noted that the regulations promulgated by the Committee (see attached), which have the force and effect of law, require that each agency designate a "records access officer" responsible for responding to requests for records under the Freedom of Information Law. As such, it is suggested that you direct requests individually to the agencies that you believe may have possession of records pertaining to you.

Also enclosed 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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1287

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

October 18, 1979

Mr. Thomas Weichbrodt
[redacted]

Dear Mr. Weichbrodt:

I have received your letter of October 13 regarding your ability to copy records contained within the "Interpretation Service" maintained by the Unemployment Insurance Division of the Department of Labor.

Several telephone calls have been made on your behalf to gain information regarding the Interpretation Service. I have been informed that the contents of the Interpretation Service are accessible to the public. Further, the fee for copies would be twenty-five cents for the first page and ten cents thereafter for pages or portions thereof. The policy is in my view completely consistent with the Freedom of Information Law, which provides that an applicant may request copies of accessible records upon payment or offer to pay a prescribed fee. In addition, the Freedom of Information Law provides that an agency may charge no more than twenty-five cents per photocopy, unless a different fee is otherwise prescribed by law.

To obtain copies of the records in which you are interested, it has been suggested that you transmit a written request describing the records in which you are interested to :

Florence Dreizen
Deputy Industrial Commissioner
for Legal Affairs
Department of Labor
Two World Trade Center
New York, New York 10047

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1288

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

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EXECUTIVE DIRECTOR

ROBERT J. FREEMAN

October 19, 1979

Donald A. MacHarg, Esq.
Special Assistant for
Legal Affairs
New York State Department
of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Re: Park Terrace
Nursing Home

Dear Mr. MacHarg:

Thank you for sending me a copy of your determination rendered on appeal relative to a request for audits regarding the Park Terrace Nursing Home conducted by the Department of Health.

I concur with your determination to grant access, notwithstanding the opinion expressed by James E. Kohler, Special Assistant Attorney General for the Special Prosecutor for Nursing Homes.

As you are aware, the Freedom of Information Law as originally enacted in 1974 specifically granted access to "internal or external audits". Further, the amendments to the Freedom of Information Law effective January 1, 1978, strengthened the statute by reversing its presumption. Rather than providing access to particular categories of records as in the case of the original statute, the new Law provides that all records in possession of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial enumerated in §87(2)(a) through (h).

From my perspective, although the audits in question may be relevant to litigation, they are nonetheless available. If, for example, the audits were requested prior to the initiation of an investigation or litigation, they would

in my view be unquestionably accessible under the Freedom of Information Law, as originally enacted and as amended. Further, it is also clear that the audits were prepared in the ordinary course of business and do not constitute material prepared for litigation.

I disagree with the interpretation offered by Mr. Kohler concerning §3102(f) of the CPLR. The cited provision states that:

> "[I]n an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person, except that it may be obtained only by order of the court in which the action is pending and except further that it may not include interrogatories or requests for admissions."

I offer several points with respect to the quoted provision.

First, if Mr. Kohler's interpretation is correct, the Freedom of Information Law would be of absolutely no effect when the state is involved in litigation, regardless of the nature of records requested, the reason for which records were compiled, or the date of their compilation. In my opinion, such an interpretation would be unreasonable, for it would effectively nullify rights of access granted by the Freedom of Information Law when the state becomes involved in litigation, even if the records would otherwise be accessible as of right.

Second, should Mr. Kohler's interpretation be correct, other prohibitions from disclosure would be unnecessary with regard to the state. Stated differently, the state would never be required to contend that records should be withheld on the basis that they constitute material prepared for litigation, or attorney work product, for example, if §3102(f) of the CPLR were as broad as Mr. Kohler has suggested. In short, no statute pertaining to disclosure that either grants or prohibits access would be operative under Mr. Kohler's interpretation.

Third, I think it is important to note that there is a distinction between disclosure under the CPLR and disclosure under the Freedom of Information Law. The former pertains to the release of information that is inaccessible to all but those who have an interest in the litigation. As a general rule, discovery is available only to those who can demonstrate that records are "material and necessary" to their participation in litigation. The Freedom of Information Law, however, provides that accessible records are available to any person, notwithstanding the status or interest of an applicant [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. As such, unlike CPLR disclosure devices, the Freedom of Information Law requires no showing of materiality or relevance. Very simply, the only question that may arise under the Freedom of Information Law when a request is received involves the extent, if any, to which records or portions of records fall within one or more of the grounds for denial.

Lastly, the Advisory Committee's notes appearing in the Consolidated Law Service's publication of the CPLR regarding subdivision (f) of §3102 indicates that the provision was added at the suggestion of the Department of Law, but it also states that "[I]t is contemplated...that disclosure will be rather freely granted by the Court of Claims". Based upon the quoted language, it would appear that §3102(f) was intended to pertain to litigation before the Court of Claims. As such, in the instant situation, I do not believe that §3102(f) is relevant, or that it can be appropriately cited as a ground for withholding.

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/kk

cc: James E. Kohler

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1289

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

October 22, 1979

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

Dear Mr. Sheehan:

I have received your letters of October 2 and October 9 as well as responses to your inquiries made by the City of Binghamton.

Since we have discussed the policy adopted by the City of Binghamton regarding your requests, I would prefer not to provide additional commentary on the subject at this time. However, I would like to discuss your comments regarding the "police blotter" furnished to you by the City of Olean.

As I may have explained three or four years ago, the term "police blotter" has never been specifically defined by either a statute or regulation. On the contrary, it is a term that has been developed over a period of years by means of custom and usage. For example, shortly after the original Freedom of Information Law became effective in 1974, the Committee invited several chiefs of police to discuss the Law and the scope of the term "police blotter". Very simply, since the term is not specifically defined, police departments across the state have adopted differing points of view regarding their contents. Some police departments state that they do not maintain a police blotter but rather records characterized as "incident reports" or "aid its". In some instances, the reports so classified might be considered "police blotters" by some. In short, there appears to be no specific definition of the nature and contents of a police blotter, other than the direction provided in the litigation in which you were involved, Sheehan v. City of Binghamton.

Based upon that determination, it would appear that the record designated as a police blotter by the City of Olean contains more information than the document that has traditionally been considered a police blotter. To be sure, I am not contending that the City of Olean has adopted a policy that is in any way wrong. On the contrary, I am merely suggesting that the term "police blotter" means different things to different police departments.

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/kk

bcc: Paul A. DiNardo
Hon. Alfred J. Libous
John W. Park

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1290

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

October 22, 1979

Mr. Henry Gaskin
#78-C-0491
Drawer B
Stormville, New York 12582

Dear Mr. Gaskin:

I have received your letter of October 14.

As requested, enclosed is a copy of the Committee's regulations, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law.

In addition, you have inquired whether the District Attorney's office in Brooklyn and the New York City Police Department are considered "agencies" under the Freedom of Information Law.

In my opinion, since the definition of "agency" appearing in §86(3) of the Law includes any governmental entity performing a governmental function, all district attorneys offices and police departments are in my opinion subject to the Freedom of Information Law. It is also noted that I have had contact with both of the offices to which you made reference, and it is clear that they agree that they are 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
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1291

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

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DOUGLAS L.TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 24, 1979

Chief William E. Slattery
Chief of Police
Town of Cicero
Town Hall
Cicero, New York 13039

Dear Chief Slattery:

I have received your letter of October 18. Your inquiry concerns a situation in which the Town Supervisor, Mr. Girard Hogan, has advised the Police Department that he wishes to inspect all the police files in possession of the Police Department. Your question is whether the Supervisor has the right to do so.

In my opinion, when a member of a town board or a town supervisor seeks to act unilaterally, he or she has no greater right to inspect records under the Freedom of Information Law than any member of the public. Stated differently, unless otherwise provided by law, I believe that the Town Supervisor cannot act independently without the consent of the majority of the total membership of the Town Board. As such, the rights of the Supervisor with respect to access to Police Department records are governed by the provisions of the Freedom of Information Law and other applicable statutes concerning access to Police Department records.

For example, although the Freedom of Information Law is based upon a presumption of access, §87(2)(e) provides that an agency may withhold records compiled for law enforcement purposes under circumstances specified in the Law. Further, since you indicated that the son of the Supervisor was arrested, it is important to note that if the person arrested is considered a juvenile, §784 of the Family Court Act provides that police records related to the arrest and disposition of a person subject to the Family Court Act:

> "...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 foregoing, a court order would be required to permit inspection of records subject to the provisions of §784 of the Family Court Act.

You have also stated that it is your understanding "that anyone who allows access to confidential police files without proper authority may be prosecuted". I agree with your contention, for the provisions of the Family Court Act cited earlier as well as other statutes applicable to certain police records require confidentiality. Further, although I am not suggesting that such a situation would arise, it is important to note that §175.20 of the Penal Law states that:

> "[A] person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant."

In addition, §175.25 of the Penal Law states that:

> "[A] person is guilty of tampering with public records in the first degree when, knowing that he does not have the authority of anyone entitled to gran it, and with intent to defraud, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant."

In sum, I would like to reiterate the two basic points made in the preceding paragraphs. First, I do not believe that the Town Supervisor or his designee when acting unilaterally and without the consent of the majority of the total membership of the Town Board has any greater rights under the Freedom of Information Law than a member of the public. Second, it is clear that some records in possession of a police department are confidential and cannot be disclosed except by means of a court order.

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/kk

cc: Girard M. Hogan, Town Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1292

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

October 25, 1979

Ms. Pauline Fiore
[redacted]

Dear Ms. Fiore:

I have received your letter of October 15 regarding rights of access to a "guidelines and exemption" code used by your appointed assessor performing his duties.

In my opinion, to the extent that such records exist, they are accessible, for they are reflective of the policy used by an assessor to carry out his duties. Since §87(2)(g)(iii) of the Freedom of Information Law specifically provides that agency policy found within inter-agency or intra-agency materials is accessible, the records should be available to you.

However, I would like to point out that I contacted an attorney for the Division of Equalization and Assessment on your behalf to obtain additional information regarding your inquiry. I was informed that to the extent that records exist analogous to those described, they would not likely be particularly helpful to you since they contain only minimal and basic information. Nevertheless, if you wish to request the exemption code or similar information, it is suggested that you write to:

Steven Harrison, Esq.
Office of Counsel
Division of Equalization and Assessment
Agency Building 4
Empire State Plaza
Albany, New York 12223

It is also noted that the Freedom of Information Law permits agencies to charge up to twenty-five cents per photocopy when records are reproduced.

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/kk

bcc: Steven Harrison, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1293

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

October 25, 1979

Mr. Joseph Fournier
77-A-3575
Box B
Dannemora, NY 12929

Dear Mr. Fournier:

I have received your letter of October 16 relative to a denial of access to the subject matter list and rules and regulations of the Office of Court Administration. You also attached a letter of appeal addressed to the Hon. Herbert B. Evans, Chief Administrative Judge.

In your letter to Judge Evans, you obviously cited points that I have made in advisory opinions regarding the status of the Office of Court Administration under the Freedom of Information Law.

Once again, I must express my disagreement with the stance taken by the Office of Court Administration. From my perspective, the exemption from coverage of the Freedom of Information Law of the "judiciary" is intended to apply only to courts. In my view, the Office of Court Administration is not a court and has no authority to interpret the Law. Consequently, I must continue to advise that the Office of Court Administration is in my opinion an "agency" subject to the Freedom of Information Law in all respects.

Should my point of view be accepted judicially (I believe that the issue is now being litigated), the Office of Court Administration would be required to develop rules and regulations no more restrictive than those promulgated by the Committee. In addition, it would also be required to devise a subject matter list of its records in accordance with §87(3)(c).

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: Hon. Herbert B. Evans

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1294

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

October 29, 1979

Ms. Lucy Wrightington
Town Clerk
Box 275
South Otselic, NY 13155

Dear Ms. Wrightington:

Thank you for your letter of October 24 and your interest in complying with the Freedom of Information Law.

Your inquiry concerns the ability of members of the public to inspect tax books in possession of the Town of Otselic. Further, you have cited a provision of law which states that the books in question are available "to the inspection of any taxpayer or registered voter." The question is whether the quoted provision restricts inspection to taxpayers or registered voters of the Town only, or whether others, such as non-residents, are entitled to inspect the books.

In my opinion, the tax books as well as other records that are accessible under the Freedom of Information Law are available to the inspection of any person.

My contention is based upon judicial decisions rendered years ago under the General Municipal Law, §51, as well as the Freedom of Information Law. Specifically, as early as 1905, the Court of Appeals in Matter of Egan (205 NY 147) held that "any taxpayer" essentially means any person. Further, in a much more recent decision, it was held that the Freedom of Information Law "broadens the category of those to whom records are required to be made available beyond the disclosure required by" other provisions of law which restrict access to taxpayers or qualified voters, for example [see Matter of Duncan, 394 NYS 2d 362 (1977)]. Moreover, the courts have held under the Freedom of Information Law that accessible records should be made available to any person, "without regard to status or interest" [see Burke v. Yudelson, 51 AD 2d 673 (1976)].

In sum, it is my opinion that the Freedom of Information Law places no restrictions in terms of rights of access based upon the status of an applicant for records. Very simply, I believe that records that are accessible to a member of the public who is a taxpayer or registered voter of the Town are available to any person, regardless of where that person resides.

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-1295

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

October 30, 1979

Mr. William F. White
[redacted]

Dear Mr. White:

I have received your letter of October 15 regarding your difficulty in obtaining records relating to an application for a Community Development Block Grant from the Town of Wilson.

In order to obtain additional information regarding the situation, I have taken the liberty of contacting Ms. Marilynn Allgeier, the Town Clerk. Ms. Allgeier informed me that there was never an intent to withhold the information in which you were interested. On the contrary, it appears that the firm that prepared the pre-application for the Town was late in submitting the information to the Town. I believe that the lateness of the transmission of information from the firm to the Town resulted in the delay. Further, Ms. Allgeier informed me that Mrs. White has obtained the information in question.

As a general matter, however, both the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, require that an agency respond to a request within five business days of the receipt of a request (see attached, Freedom of Information Law §89(3); regulations §1401.5(d)). Within five business days of receipt of a request, the agency has three options. It can grant access, deny access in writing, or, if for example, more time is needed to locate records or determine rights of access, the agency may acknowledge receipt of a request in writing and take ten additional business days to determine to grant or deny access.

It is suggested that you review the regulations, which specify the nature of the response that must be given by government and the appeal process should an agency deny access to 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/kk

Encs.

bcc: Marilynn Allgeier

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1296

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

October 30, 1979

Mr. Daniel Jean Lipsman
[redacted]

Dear Mr. Lipsman:

I have received your letter of October 20 concerning a request for photocopies of transcripts of sixty-five graduates of the City College program in the social foundations of education. Your request specifies that you are not interested in the names or other identifying details pertaining to the individuals to whom the transcripts relate.

The provisions of the New York Freedom of Information Law as well as the federal Family Educational Rights and Privacy Act are relevant to your inquiry. Those enactments respectively enable or require an agency to withhold information to protect personal privacy. In the case of the Freedom of Information Law, §89(2)(b) provides that an agency may withhold information when disclosure would result in "an unwarranted invasion of personal privacy". It is noted that the Freedom of Information Law is permissive; while an agency may deny access to certain records, there is no requirement that an agency must deny access to records. Conversely, the Family Educational Rights and Privacy Act requires an educational agency or institution subject to the Act to withhold education records from third parties when disclosure could identify a particular student or students. The Act essentially prohibits disclosure of student records except when a request is made by a parent of a student under the age of eighteen or an eligible student to whom a record pertains who has reached the age of eighteen.

Under the circumstances, I do not feel that it would be appropriate to advise that the records are either available or deniable. Without greater knowledge of the contents of particular transcripts, the uniqueness of the program or the variation among the courses that may have been taken, for example, I do not feel that I could advise without hesitation that disclosure would or would not identify particular students in the program.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1297

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

October 31, 1979

Mr. Leo Chancer
[redacted]

Dear Mr. Chancer:

Thank you for your letter of October 27. Your inquiry concerns rights of access to records regarding the attendance of the Superintendent of the Lakeland School District.

In my opinion, to the extent that records of attendance of public employees exist, they are available.

It is emphasized at the outset that the Freedom of Information Law generally grants access to existing records. Consequently, an agency is not obliged to create a record in response to a request. Therefore, if records are not kept regarding the attendance of the Superintendent, they need not be created in response to a request. However, if such records do exist, they are subject to rights of access granted by the Freedom of Information Law.

Further, the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law (see attached) 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 appearing in paragraphs (a) through (h) of the cited provision.

Under the circumstances, I do not believe that any of the grounds for denial could appropriately be asserted with respect to attendance records.

While §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy," case law interpreting the privacy provisions of the Law in my view can be cited as a basis for disclosure. The courts have consistently determined that public employees require less protection in terms of privacy than the public generally. In brief, the courts have held that records that are relevant to the performance of the official duties of public employees are accessible, for disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g. Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees which have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Although the records in question would identify a particular public employee, the case law cited above in my opinion indicates that the records would be available, for they are relevant to the performance of the official duties of a public employee.

Another ground for denial that might be cited is §87(2)(g), which 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 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 final agency policy or determinations found within such records. In this case, attendance records could likely be characterized as "intra-agency" materials. Nevertheless, the portions of the attendance records in which you are interested that indicate the times during which the Superintendent was present would constitute factual data. Therefore, I believe that the information that you are seeking, to the extent that it exists, should be made 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/kk

Enc.

cc: Dr. William McPhee

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1298

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

November 1, 1979

Janet Axelrod, Esq.
Assistant Counsel
New York Educators Association
107 Washington Avenue
Albany, New York 12210

Dear Ms. Axelrod:

I have received your letter of October 23 in which you requested an advisory opinion under the Freedom of Information Law. According to your letter and the correspondence appended to it, the State University has denied access to records indicating the sex designation of employees of the SUNY Professional Services Negotiating Unit. It is noted that I have discussed the matter with Mr. Willsey, who made the request, as well as a representative of the Office of Counsel at SUNY.

In my opinion, the only issue raised with respect to the request is whether disclosure of the sex designation of the employees in question would result in "an unwarranted invasion of personal privacy" under §87(2)(b) of the Freedom of Information Law.

As you are aware, §87(2)(b) of the Law refers to the provisions of §89(2), which in paragraph (a) gives the Committee the authority to "promulgate guidelines regarding deletion of identifying details" to prevent unwarranted invasions of personal privacy. The Committee has never issued such guidelines, for issues surrounding privacy must of necessity in many instances be based upon subjective judgments. Although privacy has been the subject of numerous discussions, the Committee does not believe that it could appropriately impose its subjective judgments regarding privacy upon others. In short, while one reasonable person might contend that disclosure of a particular record

would result in an unwarranted invasion of personal privacy, an equally reasonable person might contend that disclosure of the same record would result in a permissible invasion of personal privacy. Further, often the agencies in custody of records are in the best position to determine the affects of disclosure relative to the protection of privacy.

Section 89(2)(b) lists five examples of unwarranted invasions of personal privacy. Although some of the examples are useful in terms of guidance, others are in my view of virtually no assistance, for they would be applicable to situations which could arise rarely, if ever. In addition, it is emphasized that the examples are in my opinion merely illustrative and represent but five among conceivably dozens of unwarranted invasions of personal privacy.

Under the circumstances, I am unaware of any statutory or case law that is clearly applicable to rights of access. Consequently, I feel uncomfortable but nonetheless compelled to advise that the issue is open to question, that it could be decided either in favor of or against access, and that it will likely have to be determined judicially.

On one hand, the Committee has advised and the courts have generally upheld the notion that records relevant to the performance of the official duties of public employees are available, for disclosure would in such instances result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g. Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees which have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Ordinarily, I believe that it would be appropriate to advise that records indicating the sex designation of particular public employees would be deniable, for the sex of a particular individual likely has no relevance to the manner in which that person performs his or her duties.

On the other hand, however, since affirmative action programs have been initiated by both the state and federal governments, the sex designation may be important to determine whether or not a particular agency has met the goals or requirements of such a program. While the sex designation might not be relevant to the performance of duties of particular employees to whom the records relate, they may be relevant to the manner in which an agency, such as SUNY, carries out its official duties. If a court determined that release of records indicating sex designation would be necessary to determine the efficacy of an affirmative action program, it is possible that a court would find that disclosure under such circumstances would result in a permissible as opposed to an unwarranted invasion of personal privacy.

In sum, I do not believe that it would be fair or appropriate to advise without hesitation that the information in question is available or deniable due to the considerations expressed 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
Executive Director

RJF/kk

cc: Carolyn Pasley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 403
FOIL-AO - 1299

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

November 8, 1979

Mr. Michael J. Lurie
[redacted]

Dear Mr. Lurie:

Thank you for your letter of October 28 and your interest in compliance with the Open Meetings Law. You have raised four questions and I will attempt to answer each of them.

First, you have asked whether the board of a fire district may hold a "budget meeting" without a public notice, "in light of the fact that the action was not taken at a regular meeting". In this regard, §99 of the Open Meetings Law requires that notice be given prior to all meetings, whether regularly scheduled or otherwise. If a meeting is scheduled at least a week in advance, notice must be given to the news media and posted in one or more designated public locations not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given to the news media and posted in the same manner as described earlier "to the extent practicable" at a reasonable time prior to the meeting.

Second, you have asked whether a budget meeting of a fire diestrict board could be considered a "public hearing" at which the public is entitled to speak. It is important to note that there may be a distinction between a meeting and a hearing. A meeting generally pertains to a situation in which a public body deliberates collectively. A hearing might involve a situation in which members of the public are specifically given an opportunity to express their views. Further, as a general matter, the Open Meetings Law permits the public to "attend and listen to" the deliberations of public bodies. It is silent with respect to public participation. Consequently, the Committee has consistently advised that

the Open Meetings Law confers no right upon the public to participate at meetings. Therefore, if a public body chooses to permit public participation, it may do so, but it need not.

Your third question concerns the right of a non-resident fireman to request a copy of "public information". In this instance, the Freedom of Information Law governs rights of access. That statute provides and the courts have interpreted it to mean that accessible records should be made equally available to any person, without regard to status or interest. As such, the interest or the residence, for example, of an individual who requests records is irrelevant to rights of access.

Your final question again pertains to the ability of the public to participate at meetings or hearings. To reiterate, the Open Meetings Law does not provide a right on the part of the public to participate at meetings. In the case of a public hearing, I believe that the courts have held that any person who wishes to speak at a public hearing should be given a reasonable opportunity 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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1300

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

November 8, 1979

Joel F. Spitzer, Esq.
Legal Aid Society of Albany, Inc.
55 Columbia Street
Albany, New York 12207

Dear Mr. Spitzer:

I have received your letter of October 30 addressed to Commissioner Blum and Mr. Mullany of the State Department of Social Services, and to me.

It is important to note at the outset that the Committee is charged with the duty of providing advice with respect to the Freedom of Information Law. It does not maintain custody of records generally, nor does it have the capacity to compel compliance with the Freedom of Information Law.

Nevertheless, I would like to take this opportunity to make the following points.

First, the initial portion of your request concerns "all statistical summaries regarding state fair hearing decisions prepared since January 1977". If statistical summaries analogous to those to which you made reference exist, they are in my opinion available under §87(2)(g)(i) of the Freedom of Information Law. The cited provision states that "statistical or factual tabulations or data" found within intra-agency materials are accessible. However, if the summaries in which you are interested have not been prepared or do not exist, the Department of Social Services is not obliged to compile statistical findings on your behalf. As a general rule, §89(3) of the Freedom of Information Law states that an agency need not create a record in response to a request.

Second, §136 of the Social Services Law requires that records identifiable to recipients of or applicants for public assistance be kept confidential. Due to the confidentiality requirements of the Social Services Law, such records may in my view be withheld under §87(2)(a) of the Freedom of Information Law, which provides that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute".

As you indicated, however, you are not interested in gaining access to the identities of the individuals to whom the fair hearing decisions relate. On the contrary, it would appear that you are interested in reviewing the substance of the determinations. If that is the case, and if the identity of the subjects of the hearings can be deleted, the remainder should in my view be provided to you.

Having discussed the matter with Mr. Mullany of the Department of Social Services, I was informed that the Department renders approximately 70,000 fair hearing decisions annually. A review of each of the decisions would likely involve making photocopies followed by deletion of the identifying details. Since the Freedom of Information Law enables an agency to charge a fee of up to twenty-five cents per photocopy, your request as presented could involve the assessment of substantial fees for photocopies. Perhaps after reviewing the statistical summaries, you will be able to narrow your request and diminish the fees for copying.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Commissioner Blum
Peter Mullany

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1301

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

November 8, 1979

Mr. Elliot Seiden
[redacted]

Dear Mr. Seiden:

Thank you for your letter of October 30 and your continued interest in the Freedom of Information Law.

You have indicated that you requested a report provided to the School Board by the Citizens Advisory Committee on the School Budget. The correspondence appended to your letter indicates that approximately two-thirds of the report was furnished to you, but that the remainder was withheld.

In my opinion, it is possible that the portion of the report that was denied may have been withheld in compliance with the Freedom of Information Law.

As you are aware, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a school district, are available, except to the extent that records or portions thereof fall within one or more enumerated grounds for denial appearing in §87(2)(a) through (h).

Under the circumstances, it appears that one of the grounds for denial in the Freedom of Information Law might be cited appropriately to withhold the portion of the report that was denied. Specifically, §87(2)(c) provides that an agency may withhold records or portions thereof which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations."

From my persepctive, the intent of the provision is to enable government to withhold records when disclosure would place it at a disadvantage at the bargaining table. If, for example, disclosure of the records in which you are interested would impair the ability of the District or its Board to engage in collective bargaining effectively, the records in question may in my view be justifiably withheld.

If, on the other hand, disclosure of the records sought would not impair the collective bargaining negotiations in which the School District is or will be engaged, §87(2)(c) of the Freedom of Information Law could not in my opinion be appropriately cited as a means of withholding.

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: David Schwartz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1302

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

November 13, 1979

Mr. Bruce Scruton
Knickerbocker News
645 Albany-Shaker Road
Albany, New York 12212

Dear Mr. Scruton:

Please accept my apologies for the delay in responding to your inquiry. I am pleased to report, however, that my tardiness was due to the birth of my son.

Your question concerns the propriety of a determination to deny access to records indicating the names of persons who might be eligible for youth offender status by Daniel A. Dakin, Deputy Superintendent of Division of State Police.

It is noted that many questions analogous to your own have arisen and that there appears to be widespread confusion regarding access to the records you are seeking.

Deputy Superintendent Dakin has transmitted to the Committee a copy of the determination rendered on appeal. The denial of access was sustained based upon a finding by the Division's Freedom of Information Appeal Committee that:

> "the records you seek are exempt from disclosure under Section 87.2(a) and 87.2(b) in that the disclosure of the specific information you request would be an unwarranted invasion of privacy. It is the further opinion of the Committee that the records are intra-agency material and excepted from disclosure as set forth in Section 87.2(i)[sic] and 87.2(g) of the Freedom of Information Law."

In my view, based upon the facts as you described them, none of the grounds for denial offered by the State Police may appropriately be cited to withhold the information in question.

The first ground for denial appearing in the denial is §87(2)(a), which provides that an agency may withhold records or portions thereof that "are specifically exempted from disclosure by state or federal statute". While records concerning youthful offenders might at some point fall within a statutory exemption from disclosure, that point has not yet been reached with respect to the records sought.

Most relevant to the issue is §720.15 of the Criminal Procedure Law, which as amended by Chapter 411 of the Laws of 1979, provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
>
> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and with the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action to be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the quoted provisions, it is clear that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth." Further, the amendment to subdivision (3) of §720.15 has narrowed the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings. As such, I do not believe that records pertaining to eligible youths become "exempted from disclosre" by statute unless or until a court adjudicates them as youthful offenders. And to reiterate, under the amendment to §720.15(3), the provisions regarding the sealing of an accusatory instrument are not applicable at all, as I interpret the amendment, if a youth has been charged with a felony.

The second ground for denial is §87(2)(b), which states that an agency may withhold records the disclosure of which would result in "an unwarranted invasion of personal privacy". In many instances, subjective judgments must be made regarding the protection of privacy due to the flexibility of the standard provided in the Law. However, it is clear that if there can be "unwarranted" invasions of privacy, there can also be "permissible" invasions of privacy. With regard to the issue considered here, I believe that it is important to review the recent legislative activity in conjunction with §720.15 of the Criminal Procedure Law. In my opinion, if the Legislature wanted to protect the privacy of all persons who might be characterized as youthful offenders, it would have done so. Nevertheless, the recent amendment to §720.15(3) indicates that the Legislature has decreased the ability of a court to protect the privacy of apparently eligible youths. By so doing, I contend that the Legislature implicitly directed that disclosure of the names of youths prior to their adjudication as youthful offenders would result in a permissible as opposed to an unwarranted invasion of personal privacy. In essence, I feel that the arrest or booking records of such persons prior to their adjudication as youthful offenders should be treated in the same fashion as arrest records generally, i.e., they are available until they are sealed under §720.15 or other applicable provisions of law, such as §160.50 of the Criminal Procedure Law. As such, I do not feel that §87(2)(b) could appropriately be cited as a ground for denial prior to the adjudication of a youth as a youthful offender.

The third ground for denial is based upon §87(2)(g), which permits an agency to withhold inter-agency or intra-agency materials. However, the cited provision in its entirety 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 an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations, instructions to staff that affect the public, or final agency policy or determinations found within such records. Under the circumstances, the record of the arrest might properly be classified as "intra-agency" material. Nevertheless, the contents, including the name of the person arrested, constitute factual data that must in my view be made available. Therefore, I believe that §87(2)(g)(i) provides a right of access to the information sought rather than a ground for withholding.

Lastly, although the denial cites "Section 87.2(i)", there is no such provision in the Freedom of Information Law. I would conjecture, however, that the citation is intended to make reference to §87(2)(e)(i), which states that an agency may withhold records compiled for law enforcement purposes which if disclosed would "interfere with law enforcement investigations or judicial proceedings". It is important to emphasize at this juncture that the introductory language of §87(2) provides that an agency may withhold records "or portions thereof" that fall within one or more of the grounds for denial that ensue. Therefore, if a portion of a record compiled for law enforcement purposes would if disclosed interfere with an investigation, that portion of the record may be withheld. However, I do not believe that the information sought would if disclosed interfere with an investigation or judicial proceeding. Routinely, analogous information is provided with respect to adults who may have been arrested. I cannot see how disclosure of the same information with regard to youths would result in the harmful effects of disclosure cited in the letter of denial. Again, under certain circumstances, §720.15 of the Criminal Procedure Law enables a court to seal records and close proceedings relative to a youthful offender. Until a youth is so adjudicated, however, I believe that the records remain open for public inspection.

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/kk

cc: Daniel A. Dakin
Francis P. Stainkamp

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1303

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

November 15, 1979

Ms. Alice Murray
[redacted]

Dear Ms. Murray:

Please accept my apologies for the delay in response to your letter. I am pleased to report, however, that my tardiness was due to the birth of my son.

Thank you for keeping me abreast of your efforts to gain access to records in possession of the Islip Union Free School District.

With respect to your questions, I have contacted the Office of Counsel for the Division of Equalization and Assessment, which is most familiar with the requirements concerning the assessment of real property.

Based upon information that I have received, school districts generally do not file maps identifying landowners with the state. Some school districts may have in their possession maps which indicate the boundaries of a district. However, the districts in all likelihood do not have maps that identify individual parcels of land and their owners.

The second question is whether records of ownership are maintained by the State Education Department. Again, I was informed that the State Education Department does not maintain custody of such records.

Third, copies of real estate tax bills are apparently not submitted to the state. However, as you are aware, the Department of Audit and Control has general jurisdiction with regard to the duties of municipalities to maintain financial accountability.

Lastly, there is no state agency that is responsible for insuring that municipalities list properties on the tax rolls properly. Nevertheless, I believe that there are forms that are distributed by the Department of Equalization and Assessment to local assessors. If you would like to gain additional information regarding the duties of municipalities regarding assessment, it is suggested that you write to:

Steven Harrison, Esq.
Office of Counsel
Division of Equalization and Assessment
Agency Building 4
Empire State Plaza
Albany, New York 12223

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1304

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

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR

ROBERT J. FREEMAN

November 15, 1979

Mr. Greg Brown
Oswego Palladium Times
211 Oneida Street
Fulton, New York 13069

Dear Mr. Brown:

I apologize for the delay in response to your letter. It is with pleasure, however, that I report to you that my tardiness was due to the birth of my son.

Your letter concerns the status of records pertaining to youths who may be eligible to receive youthful offender status under the Criminal Procedure Law.

I recently wrote an advisory opinion in response to an inquiry similar to your own. Consequently, rather than restating each of the points made in that letter, I have enclosed a copy for your review.

I believe that the only question from your letter that was not answered in the earlier advisory opinion concerns the ability to seal records relative to youthful offenders charged with misdemeanors. As I interpret the provisions of §720.15 of the Criminal Procedure Law, an apparently eligible youth may be adjudicated a youthful offender as soon as an accusatory instrument is filed with a court.

If you need further clarification, please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

RJF/kk

Robert J. Freeman
Executive Director

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1305

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

November 16, 1979

Mr. Donald Hayward
06983-158-B
P.O. Box 1000
Sandstone, Minnesota 55072

Dear Mr. Hayward:

Please accept my apologies for the delay in response to your letter. I am pleased to inform you, however, that my tardiness was due to the birth of my son.

I have reviewed the correspondence appended to your letter and would like to make the following suggestions.

First, it is noted that although New York State has enacted a Freedom of Information Law, there is no "privacy act" in New York analogous to the federal Privacy Act. Consequently, the federal Privacy Act may in some instances provide rights of access to records pertaining to you with respect to records in possession of federal agencies that do not exist under the laws of New York. In a related sense, it is suggested that you direct similar requests to the appropriate federal agencies under the federal Freedom of Information and Privacy Acts for memoranda and similar records exchanged between the New York City Police Department and federal agencies.

It is important to note that there is something of an oddity in the relationship between the state Freedom of Information Law and the federal Freedom of Information Act. Specifically, §86(3) of the New York Freedom of Information Law defines "agency" to include unites of government in New York. Similarly, 5 USC §551 defines "agency" for the purposes of the federal Freedom of Information Act to include only federal agencies. Consequently, while the New

York City Police Department is an agency under the New York Freedom of Information Law and the United States Drug Enforcement Administration is an agency under the federal act, materials exchanged between the federal and state governments do not constitute inter-agency materials. Therefore, such materials could not in my opinion be withheld as inter-agency materials under either §87(2)(g) of the New York Freedom of Information Law or §552(b)(5) of the federal act.

Second, as you are aware, §89(4)(a) of the New York Freedom of Information Law requires that an agency render a determination on appeal within seven business days of the receipt of an appeal. If no response is received within seven business days of the receipt of an appeal, I believe that such inaction results in a constructive denial of access that may be followed by an initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

Third, I mentioned earlier that one of the grounds for denial under the New York Freedom of Information Law concerns inter-agency and intra-agency materials. It would appear that some of the documents in which you are interested, or portions thereof, such as those sent from the New York City Police Department to state agencies would fall within the scope of the cited exception to rights of access.

Lastly, if at all possible, it is suggested that you might want to renew your request and provide additional specificity regarding the records in which you are interested. For example, if you could provide dates, charges, docket numbers or similar information, perhaps the possibility of success in obtaining the information would be enhanced.

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1306

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

November 16, 1979

Mr. Edward G. Laraby
Box 149 74C392
Attica, New York 14011

Dear Mr. Laraby:

I have received your letter concerning a request directed to the Sheriff of Monroe County regarding the "Attorney Visit Log", and specifically, the dates on the log which pertain to you.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as Monroe County, are available, except those records or portions thereof that fall within one or more enumerated categories of deniable records appearing in §87(2)(a) through (h) of the Law (see attached).

In my opinion, the only ground for denial that is relevant to your request is §87(2)(b), which states that an agency may withhold records or portions of records which if disclosed would result in "an unwarranted invasion of personal privacy". Under the circumstances, I believe that those portions of the log in which you are interested that pertain to you are available, but that the remainder of the log which identifies other inmates and their attorneys may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

It is also emphasized that §89(2)(c) of the Freedom of Information Law states that unless records requested are otherwise considered deniable:

"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."

Based upon the foregoing, I believe that those portions of the Attorney Visit Log pertaining to you 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Sheriff William Lombard

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1307

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

November 20, 1979

Honorable Roger J. Robach
Member of Assembly
Room 824
Legislative Office Building
Albany, New York 12248

Dear Assemblyman Robach:

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

Please accept my apologies for the delay in responding to your letter, which I am pleased to report was due to the birth of my son.

As you requested, I have contacted officials of the Town of Greece to determine the extent to which fees are assessed under the Freedom of Information Law. According to Ms. Janet DiPalma, Town Clerk, the Town has adopted rules that set fees at ten cents per photocopy. However, she also informed me that the Police Department, by means of policy, has adopted a fee of five dollars for the search and reproduction of police accident reports. I also spoke with Mr. Robert Frye, the Director of Finance, who also informed that it is his belief that fees for accident reports are based upon policy, rather than any provision of law.

I advised Ms. DiPalma and Mr. Frye that the five dollar fee in my view is contrary to the Freedom of Information Law.

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 less than two years, 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 Traffice 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.

From my perspective, the proposal to replace "law" with "statute" in §87(1)(b)(iii) of the Freedom of Information Law would clarify the Law and preclude the assessment of excessive fees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Janet DiPalma
Robert Frye

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1308

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

November 20, 1979

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

Dear Ms. Bernstein:

Thank you for your continued interest in compliance with the Freedom of Information Law and your letter of October 30. Your inquiry pertains to the interpretation of the Freedom of Information Law relative to two issues.

The first concerns a situation in which a fireman suspended by a fire district was refused a copy of the district's by-laws, which according to your letter, the district "distributes freely as a 40-page pamphlet to all firemen". The rationale for the denial is based upon the contention that he is no longer a fireman and therefore must pay "at the rate of $1 per page, or $40 plus a $3 administrative fee".

The second situation concerns a request for statistical information in possession of a school district that has been denied on the ground that the information sought is contained within "working papers".

With respect to your initial inquiry concerning fees, several points should be made. Specifically, §87(1)(b)(iii) of the Freedom of Information Law provides that an agency, which in the opinion of the Committee includes a fire district or a volunteer fire company, may assess fees for photocopies "which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except

when a different fee is otherwise prescribed by law". Stated differently, when a record is requested that is required to be duplicated by means of conventional photocopying methods, the maximum that may be charged is twenty-five cents per photocopy, unless another provision of law directs that a different fee may be assessed. The by-laws adopted by a fire company, which provide for fees in excess of twenty-five cents per photocopy, do not in my view constitute "law". As such, I believe that the by-laws of the fire district insofar as they relate to fees are contrary to the Freedom of Information Law. To reiterate, the maximum fee that may be charged for photocopies is twenty-five cents per photocopy. Further, if as you stated, a supply of pamphlets exist, and if they are made available "freely" to other persons at no cost, I do not believe that a fee should be assessed with respect to the fireman who has requested the pamphlet. In brief, if a record is provided at no cost to one, it should be provided at no cost to another. And finally, it is noted that the Freedom of Information Law provides that an agency may assess a fee based upon the actual cost of reproduction of records that are not subject to photocopying. For example, if an agency maintains a tape recording on a cassette and a request is made for a copy of the tape recording, the agency would have the capacity to base its fee upon the actual cost of reproduction, i.e., the cost of an additional cassette.

The second area of inquiry concerns a denial of access to statistics found within records characterized as "working papers" by a school district. In my opinion, the denial as you have described it is without foundation.

Section 86(4) of the Freedom of Information Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency, such as a school district. Therefore, the classification or characterization of records as "working papers" does not remove papers from the scope of rights of access granted by the Law. In short, virtually any record in possession of an agency is subject to rights of access.

Further, the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law states that all records in possession of an agency are available, except those records or portions thereof that fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

Relevant to your inquiry 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 determination."

It is emphasized that the quoted provision contains what in effect is a double negative. 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 final agency policy or determinations found within such records.

Under the circumstances, although the working papers might be considered "intra-agency materials", the "statistical or factual tabulations or data" found within those materials are in my view clearly available.

Lastly, in conjunction with your request during our telephone conversation, I have enclosed fifty pamphlets entitled "The Freedom of Information & Open Meetings Laws... Opening the Door". If you need additional copies, I will be happy to make them available to you at no cost.

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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1309

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

November 21, 1979

Mr. T. Frankewich
[redacted]

Dear Mr. Frankewich:

I have received your letter of November 18 and have enclosed a copy of the pamphlet on the Freedom of Information and Open Meetings Laws.

The Committee has not published any similar booklet regarding the ability to obtain court records. It is noted that the Freedom of Information Law, §86(3) (see attached) specifically excludes the courts from its coverage. Nevertheless, as a general rule, most court records are available under various provisions of law.

If you would be willing to be more specific regarding the nature of court records in which you are interested, I certainly would be willing to provide you with additional 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

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1310

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

November 21, 1979

Jody Adams
[redacted]

Dear Ms. Adams:

I have received your letters of November 2 and November 10 and apologize for the delay in response. I am pleased, however, to inform you that my tardiness was due to the birth of my son.

Your letters contain a number of questions and/or points and I will attempt to respond to each of them.

First, the names of the Committee members are indicated on the letterhead. It is noted, however, that the Governor recently appointed Dr. Marcella Maxwell to fill the expired term of T. Elmer Bogardus.

Second, there is no Senate voting record regarding the bill to amend the Freedom of Information Law, for the legislation never reached the floor of the Senate. As such, there was neither a debate nor a vote taken with respect to the bill.

Third, I believe that the documentation to which you made reference that was sent to you last year consisted of the Committee's annual report on both the Freedom of Information Law and the Open Meetings Law. The report to the Governor and the Legislature on the Freedom of Information Law is due on December 15. The Committee will meet shortly to draft a report and I will send you a copy when it is issued. The report to the Legislature on the Open Meetings Law is due on February 1. A copy of that report will also be sent to you when it is issued.

Fourth, with respect to one of the central points of your letter concerning the deletions of portions of records, I believe that there may be valid reasons for so doing. As you are aware, the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states that all records are available, except to the extent that records "or portions thereof" fall within one or more of the enumerated grounds for denial. If, for example, a police department receives information from a confidential source in conjunction with a criminal investigation, §87(2)(e)(iii) provides that information that would identify the confidential source may be withheld. Nevertheless, should a trial follow an investigation, I would assume that the prosecutor would call witnesses or a confidential informant to testify. Consequently, although the Freedom of Information Law permits an agency to withhold information that would identify a confidential source, a person would in many instances have the capacity to "face" his or her accuser in a trial that follows. Similarly, there may be instances in which disclosure of a name, for instance, would result in an unwarranted invasion of personal privacy. Often the name of an individual is largely irrelevant to the work of a governmental agency; what is more important is the nature of a complaint and whether or not is has merit. Moreover, the courts have held that the substance of a complaint is available, but that the identities of complainants may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see e.g., Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978)].

Fifth, with regard to the means by which a request is made, I believe that an agency is required to accept a written request for records reasonably described [see §89(3)], whether the request is made in person or by mail. Nevertheless, in either case, it is clear that an agency is not required to respond immediately, for the Law states that an agency grant or deny access, or acknowledge receipt of a request within five business days. As such, an agency official is not required to "drop everything" and respond to a request made in person.

Sixth, with respect to denials of access, the Committee's regulations (see attached) clearly require that the reasons for a denial be given in writing (§1401.7). Therefore, an agency cannot merely deny access without more, and if deletions are made, the reasons for the deletions, which may be construed as denials of access, should be stated.

Seventh, I have reviewed the response sent to you by Frederic C. Foster, an Assistant Suffolk County Attorney. Although his letter does not specify the report requested by number, he did characterize it as "a report filed by Detective LaGrasse of the Seventh Squad concerning yourself". As such, I am not sure that a failure to identify the report by number is in any way crucial. Along with the determination rendered on appeal, Mr. Foster sent me copies of your letter of October 20 in which you appealed to the County Attorney, your letter of October 24 addressed to Captain Henry Johnson and copy of the letter of October 29 sent by Captain Johnson to you. He did not send any portion of the documentation that you requested.

Eighth, you have asked for my comments concerning the deletions made on the supplementary report. Without knowing more about the nature of the information deleted, it is difficult to conjecture as to the propriety of the deletions. Nevertheless, in several instances, it appears that names have been deleted. As noted earlier, the deletions may be proper if disclosure would result in an unwarranted invasion of personal privacy, or if the report was compiled for law enforcement purposes and disclosure in its entirety would reveal the identities of confidential sources.

Lastly, as I mentioned earlier, the Committee will in December issue its annual report on the Freedom of Information Law. I have recommended to the Committee once again that the Law be amended by permitting a court to award reasonable attorney fees. In all honesty, I am reasonably hopeful that the Legislature will pass such a measure during its 1980 session.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1311

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

COMMITTEE MEMBERS
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THOMAS H. COLLINS
MARIO M. CUOMO
WALTER W. GRUNFELD
HOWARD F. MILLER
JAMES C. O'SHEA
BASIL A. PATERSON
IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L.TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 21, 1979

Honorable Roger J. Robach
Member of Assembly
Legislative Office Building
Room 824
Albany, New York 12248

Dear Assemblyman Robach:

I have received your letter of November 14 this morning and thank you once again for your interest in compliance with the Freedom of Information Law.

According to your letter, Mr. Jacob Kurkchee has complained that the Town of Greece has failed to comply with the procedural aspects of the Freedom of Information Law. Consequently, the following consists of a brief recitation of the procedural responsibilities of government under the Law.

First, each agency, which includes municipalities such as the Town of Greece, must designate one or more records access officers by means of rules and regulations. Such rules must be consistent with and no more restrictve than those promulgated by the Committee. The responsibilites of a records access officer are detailed in §1401.2 of the Committee's regulations.

Second, agencies must respond to requests within specified periods of time. Section 89(3) of the Freedom of Information Law and 1401.5 of the regulations state that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can be granted, denied, or if, for example, the records must be reviewed or if they cannot be located within five business days, the agency may acknowledge receipt of the request in writing within five

business days and thereafter take ten additional business days to determine to grant or deny access. Further, if no response of any sort is given within five business days, the request is considered constructively denied and is appealable [see regulations §1401.5(d) and §1401.7(c)].

Third, in the event of a denial made within five business days, the agency must provide the reasons for the denial in writing, inform the applicant of his or her right to appeal and provide the name and address of the person to whom an appeal should be directed [see regulations §1401.7].

Fourth, §89(4)(a) of the Law states that a person may appeal a denial of access to the head or governing body of an agency, or whomever has been designated to determine appeals. Again, the appeals person or body must be identified in the agency's regulations. The person or body designated to determine appeals has seven business days from the receipt of an appeal to grant access to the records sought or fully explain the reasons for further denial in writing. In addition, §89(4)(a) of the Law requires that agencies transmit to the Committee copies of appeals and the determinations that ensue.

Fifth, in the event of a final denial rendered on appeal, an applicant may initiate a judicial challenge to the denial under Article 78 of the Civil Practice Law and Rules. Generally, the burden of proof in an Article 78 proceeding is on a petitioner to demonstrate that an agency's determination is unreasonable. However, §89(4)(b) of the Freedom of Information Law specifically requires that the agency prove that records withheld fall within one or more of the eight grounds for denial enumerated in §87(2)(a) through (h) of the Law. Moreover, the Court of Appeals recently held that an agency cannot merely assert grounds for denial to prevail; on the contrary, the agency must prove that the harmful effects of disclosure described in §87(2) would indeed arise [see Church of Scientology v. State, 46 NY 2d 906 (1979)].

Lastly, with respect to Mr. Kurkchee's complaint that no notice has been posted, I direct your attention to §1401.9 of the regulations. The cited provision states that each agency is required to publicize the location where records are available and the names and addresses of the records access and appeals officers "by posting in a conspicuous location and/or by publication in a local newspaper of general circulation". Therefore, although an agency may comply with the regulations by means of posting, in the alternative, it may also comply by placing a notice in a local newspaper. As such, it is questionable whether the failure to post constitutes a violation of law.

Enclosed for you, for Mr. Kurkchee and for the Town of Greece are copies of the Freedom of Information Law, the Committee's regulations, and model regulations which may be used as a guide to compliance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: Mr. Kurkchee
Town of Greece

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1312

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

November 23, 1979

Mrs. J. Robert Kulp
[redacted]

Dear Mrs. Kulp:

I have received your letter of November 6 concerning access to vital records that are necessary to a geneological search.

In short, rights of access granted by the Freedom of Information Law do not apply to vital records. Access to the records in question is governed by §§4173 and 4174 of the Public Health Law, which provide that birth and death records are available upon a showing of a "proper purpose". The problem is that "proper purpose" is undefined, and the vagueness of the phrase has resulted in conflicting interpretations among the various clerks who maintain custody of vital records.

In addition, although the Freedom of Information Law precludes the charging of fees for searching records and limits the fee for photocopies to twenty-five cents per photocopy, the provisions of the Public Health Law and the regulations promulgated by the State Department of Health permit the assessment of substantial fees for both searching and copying vital records. Such fees are entirely legal, for §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge no more than twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by law". Since the Public Health Law and the Health Department's regulations prescribe "a different fee", the higher fees may be charged.

It is possible that you may be able to obtain the records from a different source. Specifically, the records maintained by the local registrars of vital records are duplicate copies of original records in custody of the Bureau of Vital Records at the New York State Health Department. Therefore, if you would like to direct a request to the Bureau of Vital Records, you may do so by contacting:

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

However, it would not be unlikely for the Health Department to take more time in response to your requests than the local registrar.

In order to give you a more complete description of the problem, I have enclosed a copy of an earlier opinion written at the request of an assemblyman.

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/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1313

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

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EXECUTIVE DIRECTOR

ROBERT J. FREEMAN

November 23, 1979

Robert P. Long, Esq.
400 Wall Street
Suite 2900
New York, NY 10005

Dear Mr. Long:

I have received your letter of November 8 and thank you for your interest in complying with the Freedom of Information Law.

Your inquiry concerns a situation in which a teacher, who is also president of a teachers' union, initiated a grievance, which was eventually determined by means of arbitration. You have indicated that the arbitrator's decision and award include the name of the teacher and his or her position as president of the union and have asked whether the decision and award constitute a "record" available for public inspection and copying, or whether disclosure would result in "an unwarranted invasion of personal privacy."

First, the decision and award are in my opinion clearly subject to rights of access granted by the Freedom of Information Law, for they fall within the definition of "record" appearing in §86(4) of the Law. 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..." Since the decision and award constitute information kept and produced for an agency, in this instance a school district, such records are subject to the Freedom of Information Law in all respects.

Second, I believe that the decision and award are accessible. Although §87(2)(b) of the Law permits an agency to withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy, the courts have generally held that public employees enjoy a

lesser degree of privacy than the public at large. Further, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are accessible, for disclosure in such circumstances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees that have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 27, 1977).

Under the circumstances, I believe that the arbitrator's decision and award are clearly relevant to the manner in which the subject of the records has performed his or her official duties as a teacher. Consequently, disclosure in my view would result in a permissible as opposed to an unwarranted invasion of personal privacy.

Further, if the award and decision could be considered "intra-agency materials" they would be available under §87(2)(g)(iii) of the Freedom of Information Law, for they constitute a "final determination".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1314

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

November 23, 1979

Mr. King Davis
78 C 428
135 State Street
Auburn, New York 13021

Dear Mr. Davis:

I have received your letter of November 5 concerning requests directed to the New York City Police Department under the Freedom of Information Law.

First, I have enclosed a copy 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. A review of the regulations may be important, for they specify the time limits for response by agencies as well as the duties of applicants for records. It is unclear to me whether you have exhausted your administrative remedies. If, for example, a request was denied on October 8, an appeal of the denial must be made within thirty days of the denial. Further, if you have been denied on appeal, there are no additional administrative appeals; your only means of challenging the denial further would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

Second, your letter indicates that names of victims have been deleted from some of the records. In this regard, without knowing more about the contents of the records, I could not conjecture as to the propriety of the deletions. Nevertheless, I would like to point out that the Freedom of Information Law does state that an agency may withhold records "or portions thereof" when records or portions of records fall within one or more among eight grounds for denial enumerated in §87(2)(a) through (h) of the Law. Moreover, it

is possible that the deletions may have been made in conjunction with particular grounds for denial. For example, §87(2)(b) provides that an agency may withhold records or portions of records when disclosure would result in an unwarranted invasion of personal privacy. Section 87(2)(e)(iii) states that an agency may withhold records compiled for law enforcement purposes if disclosure would identify a confidential source. Section 87(2)(f) provides that an agency may withhold records which if disclosed would "endanger the life or safety of any person".

Again, I have no knowledge of whether any of the grounds for denial described in the preceding paragraphs would justify the deletions. However, based upon those provisions, it is possible that the deletions were appropriate.

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/kk

Enc.

bcc: Richard L. Reers

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1315

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

November 26, 1979

Nelson W. Stiles, Esq.
Assistant County Attorney
County of Chenango
42 South Broad Street
Norwich, New York 13815

Dear Mr. Stiles:

Thank you for your letter of November 7 and your interest in complying with the Freedom of Information Law. Please accept my apologies for the delay in response to your letter, which, I am pleased to report, was due to the birth of my son.

You have described a situation in which a request has been directed to Chenango County for microfilm and computer tapes containing reproductions of individual real property tax maps. You also wrote that assessors generally make individual tax maps and other assessment records available. As such, the request in question is reflective of a desire on the part of an applicant to obtain copies of records that would be made available if requested individually. According to your letter, the County Board of Supervisors has expressed a desire not to make the information available "on other than a parcel-by-parcel basis", due to a fear that disclosure "would lead to the invasion of privacy of Chenango County landowners and would lead to commercial use of the information".

As noted in our telephone conversation, the problem appears to be that modern technology now enables individuals to gain access to a vast number of records in a convenient and relatively inexpensive form. Unless I am mistaken, we agreed that each piece of information contained within the microfilm or computer tapes would be made available if requested individually. Consequently, I advised then that the computer tapes and microfilm are likely accessible upon payment of the actual cost of reproduction.

Although I continue to believe that the computer tapes and microfilm are accessible, it is possible that a court might hold to the contrary based upon the following rationale.

You indicated that the County Board of Supervisors is fearful that disclosure of the information sought could result in the invasion of privacy of Chenango County landowners. In this regard, §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy" based upon the standards provided in §89(2) of the Law. Section 89(2)(b) lists for the purpose of guidance five illustrative examples of unwarranted invasions of personal privacy. Relevant to the issue here is subparagraph (iii), which 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". While the records sought could not be characterized as "lists", it appears likely that the request was made for commercial purposes.

It is noted at this juncture that rights of access granted by the Freedom of Information Law are not generally conditioned upon the status or interest of an applicant (see Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673). Nevertheless, there appears to be an internal conflict in the Law, for §89(2)(b)(iii) specifically makes reference to the purpose of a request.

In view of the foregoing, it might be appropriate to contact the applicant to request information regarding the purpose for which the request has been made. If he informs you that the purpose is for commercial solicitation, a court might look more favorably upon a denial of access based upon the privacy provisions of the Law than it would if there was no expression of an intent to use the information 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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 409
FOIL-AO-1316

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

November 26, 1979

Mr. Frank L. Spalik
[redacted]

Dear Mr. Spalik:

I have received your letter of November 12, which raises questions concerning the interpretation of both the Freedom of Information Law and the Open Meetings Law.

First, you have described a situation in which a letter pertaining to you was written by a member of the Board of Assessors and sent to the Windsor Town Board. You have indicated that it is your belief that the letter contains accusations concerning you. The question is how you may obtain a copy of the letter.

First, it is noted that the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) of the Law provides that all records in possession of an agency, such as a Town, are available, except those records or portions thereof that fall within one or more among eight grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

In my opinion, there is but one ground for denial that may appropriately be raised with respect to the letter in question. Section 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."

It is emphasized that the quoted provision contains what in effect is a double negative. While government may withhold inter-agency materials (records transmitted from one agency to another) or intra-agency materials (records transmitted from an employee of an agency to another employee of the same agency), 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.

Therefore, if the letter in question could be considered "intra-agency" in nature, those portions of the letter consisting of statistical or factual information, for example, should be made available to you.

In terms of procedure, I have enclosed a copy 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. Each agency in the state, including the Town, is required to adopt its own rules and regulations consistent with and no more restrictive than those promulgated by the Committee.

Your second question concerns the legality of holding meetings "pertaining to budgets or otherwise without informing the public by putting a notice in the newspapers". In this regard, §99 of the Open Meetings Law requires that notice be given prior to all meetings, whether regularly scheduled or otherwise. If a meeting is scheduled at least a week in advance, §99(1) requires that notice be given to the news media and posted in one or more designated public locations not less than seventy-two hours prior to a meeting. If a meeting is scheduled less than a week in advance, §99(2) of the Open Meetings Law requires that notice be given to the news media and posted in the same fashion as described earlier "to the extent practicable" at a reasonable time prior to the meeting. Therefore, it is clear that notice must be given to the news media and posted in one or more public locations prior to all meetings.

Third, the Open Meetings Law was recently amended (see attached memorandum). One of the changes concerns the definition of "meeting". Under the original Law, the state's highest court held that the definition of "meeting" includes any situation in which a quorum of a public body convenes for the purpose of conducting public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized (see Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947). From my perspective,

the amended definition of "meeting" merely codifies the holding of the Court of Appeals. As such, I believe that meetings held for the purpose of discussing a budget or other subject matter must be convened open to the public and preceded by notice given in accordance with §99.

Lastly, you stated in your letter that the Supervisor read the letter to which you referred earlier to the members of the Town Board "before the meeting, behind closed doors". Although it is possible that such a discussion might have been appropriate for executive session [see §100(1)(f)], §100(1) of the Open Meetings Law requires that an open meeting be convened prior to entry into executive session and that a vote must be taken during an open meeting in order to enter into executive session. Therefore, if your allegation is accurate, the Board's discussion of your letter prior to the meeting may have constituted a violation of the Open Meetings Law.

Enclosed for your consideration is a new pamphlet that may be useful to you entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

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/kk

Encs.

cc: Town Board, Town of Windsor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1317

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

November 26, 1979

Mr. Robert Sperber
The Post-Standard
P.O. Box 4915
Syracuse, New York 13221

Dear Mr. Sperber:

As you are aware, I have received your letter of November 13, which raises questions concerning rights of access to records in possession of the Liverpool School District. The records in question pertain to a situation in which an elementary school principal has been placed on leave without pay and in which the Board has determined to terminate the principal's tenure. You have indicated that, to date, the District "has been unwilling to provide any written materials pertaining to the matter."

With respect to the foregoing, you have asked whether records reflective of the reasons for the District's desire to remove the principal are open to the public, despite the fact that they involve a "personnel matter". In this regard, it is important to point out at the outset that there may be situations in which a discussion may appropriately be held during an executive session under the Open Meetings Law, but in which records related to the discussion may be accessible under the Freedom of Information Law. For example, the provision of the Education Law that you cited as "3028", which is in fact §3020-a, provides that a school board shall determine the existence of probable cause following the filing of charges against a school district employee during an executive session. Nevertheless, if probably cause has been determined, I believe that the charges as well as records indicating a finding of probable cause are available under the Freedom of Information Law.

Therefore, if the District has compiled records that specify the reasons for removal, such records are in my view available, for they represent both factual data and a determination accessible under §87(2)(g)(i) and (iii) of the Freedom of Information Law.

Although the records might concern a "personnel matter", they could not in my opinion likely be withheld under §87(2)(b) of the Freedom of Information Law. While the cited provision permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy", the courts have generally held that public employees enjoy a lesser degree of privacy than the public at large. Further, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are accessible, for disclosure in such circumstances would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, portions of records that identify public employees that have no relevance to the performance of their official duties may justifiably be withheld, for disclosure would in such instances result in an unwarranted invasion of personal privacy (see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 27, 1977).

Under the circumstances, I would contend that the determination made by a school board and any written reasons for terminating tenure are available on the ground that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy, for such records are relevant to the performance of the official duties of both the School Board and the employee who is the subject of the records.

Your second question is whether a "transcript or any other materials" created pursuant to the proceeding initiated under §3020-a of the Education Law are available. It is noted at this juncture that §86(4) of the Law defines "record" to include any information "in any physical form whatsoever" in possession of or produced for an agency, such as a school district. Therefore, records created in conjunction with a §3020-a proceeding are subject to rights of access granted by the Freedom of Information Law.

From my perspective, there are two grounds for denial that may in part be applicable. First, §87(2)(g) of the Law 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..."

However, it is important to point out that the quoted provision contains what in effect is a double negative. While 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 final agency policy or determinations found within such records.

Although the transcript and similar materials might be characterized as "intra-agency materials" the contents of the materials consisting of statistical or factual data, for example, would be available.

A second ground for denial is §87(2)(b), which as stated earlier, states that an agency may withhold records or portions of records when disclosure would result in an unwarranted invasion of personal privacy. If, for example, a transcript identifies witnesses or particular students, the names or other identifying details might properly be deleted if disclosure would result in an unwarranted invasion of personal privacy.

Finally, your third question concerns records of any "financial settlement" regarding the dispute between the principal and the District, as well as any resolutions adopted by the Board regarding the dispute. In my view, such records would again constitute "intra-agency materials". Nevertheless, records indicative of a financial settlement would constitute "statistical or factual tabulations or data" that are available under §87(2)(g)(i). Further, resolutions adopted by the Board would be required to be found in minutes and in my opinion would be available, for they represent either the policy of the District or a final determination made by the School Board.

In addition, although a school board may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies billed or received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cooke, 372 NYS 2d 10 (1975)].

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/kk

cc: Liverpool School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1318

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

November 26, 1979

Ms. Loretta Prisco
Parents Action Committee
for Education
30 Westbury Avenue
Staten Island, New York 10301

Dear Ms. Prisco:

I have received your letter of November 16 regarding unanswered requests made under the Freedom of Information Law to Community School District 31 in Staten Island and the New York City Board of Education.

You have indicated that you requested the "staff payroll of the District and P.S. 28 as of June 1979 and October 1, 1979; the individual school organizations for June 1979 and October 1979; and class pupil registers for October 1979 and June 1979."

In my opinion, much, if not all of the information, in which you are interested is available. However, prior to a discussion of rights of access to the records sought, several points should be made.

It is noted initially that you wrote that your requests were directed on September 28 to Community School District 31 and on October 4 to the New York City Board of Education. In neither case was a response to your request given. In this regard, I would like to review the procedural requirements imposed upon government by the Freedom of Information Law.

Section 89(3) of the Freedom of Information Law (see attached) and §1401.5 of the Committee's regulations (see attached), which have the force and effect of law and with which each agency must comply, provide that an agency must respond to a request made in writing that reasonably describes the records sought within five business days of the receipt of a request. The response made within five business days can take one of three forms. It can grant access, deny access, or, if, for example, the agency cannot locate the records within five business days or must review their contents

to determine rights of access, it may acknowledge receipt of a request and take ten additional business days to grant or deny access. In the event of a denial, the reasons for the denial must be stated in writing and the applicant must be informed of his or her right to appeal and be given the name and address of the person or body to whom an appeal should be directed.

With respect to the circumstances that you described in which no response was given, §§1401.5(d) and 1401.7(c) state that if an agency has failed to grant or deny access within the time limits prescribed, the request is considered a denial that is appealable. It is also noted that the rules and regulations adopted by an agency, which must be consistent with those promulgated by the Committee, must identify both a records access officer responsible for responding to requests and an appeals officer or body. At this point, I believe that you may consider your request to have been "constructively denied" and that you may appeal the request as a denial.

With regard to the scope of your request, it is noted that §89(3) of the Law states that an agency need not create a record in response to a request, except in situations specified in the Law. Therefore, if there is no record indicating "individual school organizations", for example, the school district need not create such a record on your behalf. If, however, such records do exist, they are available, for they constitute factual data required to be made available under §87(2)(g)(i) of the Law.

The staff payroll is in my view clearly available, for §87(3)(b) of the Law requires that each agency maintain a record consisting of the name, public office address, title and salary of all officers or employees of the agency. The cited provision represents one of the situations in the Law in which a record must be compiled. As such, even if no payroll record currently exists, it must be created and made available.

The last area of inquiry concerns "class pupil registers for October 1979 and June 1979". Rights of access to records reflective of this portion of your request are determined not by the Freedom of Information Law, but rather by the federal Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment" (20 U.S.C. §1232g).

In brief, the Buckley Amendment states that education records in possession of an educational agency or institution are confidential to all but the parents of students under the age of eighteen, and that students who have attained the age of eighteen acquire the rights of their parents. Nevertheless, both the Buckley Amendment and the rules adopted by the United States Department of Health, Education and Welfare state that "directory information", such as a pupil register, concerning students is available if an educational agency or institution has adopted a policy concerning directory information. To adopt such a policy, a school district would be required to transmit a notice to parents indicating its intention to disclose specific aspects of directory information. A parent may thereafter "veto" the disclosure of any of the directory information identifiable to his or her child.

Consequently, I believe that pupil registers are available only if a policy on directory information has been adopted.

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/kk

cc: Community School District 31
New York City Board of Education.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 410
FOIL-AO-1319

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

November 28, 1979

Gene R. Matusow, M.D., P.C.
Greenridge Medical Pavilion
12 Greenridge Avenue
White Plains, New York 10605

Dear Mr. Matusow:

I thank you for your letter of November 13 and congratulate you on your recent election to the Town Board of the Town of North Castle.

Your first question concerns the application of the Open Meetings Law to chance meetings of members of the Town Board as well as meetings of a majority of the Town Board at political gatherings. In my opinion, the Open Meetings Law would not be applicable either to a chance meeting or a political caucus.

As you are likely aware, the Open Meetings Law was recently amended. One of the alterations in the Law concerns the definition of "meeting", which now includes "the official convening of a public body for the purpose of conducting public business" [§97(1)]. The new definition is in my view intended to reflect the Court of Appeals' decision in Orange County Publications v. Council of the City of Newburgh, 45 NY 2d 947, which held that any convening of a quorum for the purpose of discussing public business falls within the scope of the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized.

The memorandum in support of the amendments to the Law submitted by the Assembly Committee on Rules states that the use of the word "official" in the definition was intended to "...avoid inadvertently including chance meetings and social gatherings." As such, if members of the Town Board

happen to run into each other and thereafter discuss public business, such a situation would not in my opinion constitute a "meeting".

Further, "quorum" is a term that is specifically defined by §41 of the General Construction Law. One of the conditions precedent to the convening of a quorum is a requirement that reasonable notice be given to each member of a public body. In the case of a chance meeting, notice would not be given to each member. In the case of a political caucus, assuming that a board does not consist entirely of members of one political party, again, reasonable notice would not likely be given to each member.

In addition, §103(2) of the Open Meetings Law exempts from its scope "deliberations of a political committees, conferences and caucuses."

The second question concerns minutes of executive sessions and who may have access to them. In this regard, I direct your attention to §101(2) of the Law, which provides that:

> "[M]inutes shall be taken as executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedomoof information law..."

In view of the foregoing, it is clear that minutes of executive sessions need not include reference to each and every comment made during an executive session. On the contrary, such minutes must consist only of "a record or summary of the final determination" of action taken during executive session, "and the date and vote thereon."

With respect to rights of access, subdivision (3) of §101 states that minutes of executive session shall be made available within one week of executive session. Generally speaking, §87(2)(g)(iii) of the Freedom of Information Law requires that final determinations made by an agency, which includes a town, must be made available. From my perspective, there are rare circumstances in which a portion of a determination would be deniable in the Freedom of Information Law. Nevertheless, if, for example, a determination made in executive session includes reference to the identity of a member of the public, and if disclosure would result in "an unwarranted invasion of personal privacy", the name or

other identifying details could likely be deleted. In such a situation, the public would have the ability to gain access to minutes reflective of the nature or substance of a determination after having deleted appropriate portions of the determination to protect 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:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-413
FOIL-AO-1320

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

November 30, 1979

Mr. Anthony J. Spennacchio
Assistant Superintendent
for Administration
Gates Chili Central School
District
910 Wegman Road
Rochester, New York 14624

Dear Mr. Spennacchio:

I am in receipt of your letter of November 13 concerning the status of records in possession of the Advisory Task Force Committee on Declining Enrollment, which was created by the Gates Chili School District Board of Education.

It is noted at the outset that your letter was addressed to Mr. Gene Snay of the Committee on Public Access to Records. Please be advised that Mr. Snay is the records access officer for the State Education Department. I have sent a copy of your inquiry to Mr. Snay and he might want to respond to your inquiry as well.

According to your letter, the Advisory Task Force Committee on Declining Enrollment (hereafter "the Committee") was created by the Board of Education in November 1978. Your letter indicates that, following its formation, the Advisory Committee voted to have closed meetings due to the "confidential nature" of its discussion. In addition, although the School Board has freely provided access to the final report of the Committee, requests for minutes of the meetings of the Advisory Committee as well as "any charts, documents, data and other records of the Task Force may have utilized during its study" have been rejected by the Committee.

You have asked what your responsibilities might be with respect to requests for records still in possession of the Task Force. Your letter also indicates that the chairperson of the Committee has expressed his or her intention that the records sought are considered "confidential and will stay that way".

In my opinion, the facts as you have described them represent past violations of the Open Meetings Law and potential violations of the Freedom of Information Law.

First, with respect to the Open Meetings Law, I believe that the decision by the Committee to close its meetings represented a violation of the Open Meetings Law. It is emphasized that the Law as it existed until recently was different from the Law as it exists now due to the passage of amendments that became effective on October 1, 1979. While the scope of the definition of "public body" [§97(2)] was somewhat uncertain under the Law as originally enacted, I believe that the Committee was subject to the Open Meetings Law in all respects since its creation in 1978.

Under the original Open Meetings Law, "public body" was defined to mean:

> "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."

By breaking the definition into its components, this Committee consistently advised that committees analogous to that in question were subject to the Law. The committee in question was an entity consisting of more than two members. It was required to act by means of a quorum pursuant to the definition of "quorum" appearing in §41 of the General Construction Law. It is emphasized that the definition of "quorum" is applicable not only to groups consisting of public officers, but also to persons "charged with any public duty to be performed or exercised by them jointly by a board or similar body". Further, the Committee in question "transacted" public business. Although the Committee may not have had the capacity to take final action, the state's highest court affirmed an Appellate Division finding that the word

"transact" should be interpreted based upon its ordinary dictionary definition, i.e. "to discuss" [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947]. Lastly, it is clear that the Committee performed its duties for a public corporation, in this case a school district.

Moreover, in a similar situation, it was held judicially that a citizen's committee designated by a public corporation was a public body subject to the Open Meetings Law [see Pissare v. City of Glens Falls, Sup. Ct., Warren Cty. (1978)]. In discussing the issue, the court found that the members of a citizen's committee were "formally requested" to serve and further stated that:

> "[W]hile the members jointly and collectively did not have any authority and did not exercise any authority in the sense of taking final and binding action..., the members certainly had 'power' greater than that possessed by the other citizens of Glens Falls to influence the Common Council's decisions and deliberations...The Court holds that when persons are formally requested to advise the legislative and executive officers of a municipality and to assist legislative officers in deliberating that such persons are charged with a public duty (see General Construction Law §41)...Accordingly, these public bodies formally convened for the purpose of officially transacting public business whenever they gathered to foreseeably effect or actually effect the discharge of their public duty."

In view of the foregoing, I do not believe that the committee in question had the legal authority to close all of its meetings. This is not to say that executive sessions may not have been proper. If, for example, particular personnel were discussed or if the value of particular parcels of real property would be affected by public discussion, certainly such discussions would have been proper for executive session.

Nevertheless, all meetings of the Committee should have been convened as open meetings. To the extent that executive sessions could have been appropriately held, they should have been held by following the procedure for entry into executive session described in §100(1) of the Open Meetings Law.

Second, with respect to access to records, I believe that the records are in the legal custody of the School District, even though they may be in the personal custody of the Chairperson of the Committee.

Two statutes are cited to bolster this contention. Section 2116 of the Education Law has since 1947 stated that:

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

In addition, §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 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."

Based upon the direction provided by the two provisions quoted above, it is clear that the records in question now in possession of the Chairperson of the Committee are in the legal custody of the School District under §2116 of the Education Law and constitute "records" subject to rights of access under the Freedom of Information Law.

This is not to say that all records requested are available, for records or portions thereof might be properly denied based upon the categories for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law. In brief, that provision states that all records are available, except to the extent that records "or portions thereof" fall within one or more grounds for denial enumerated in the Law.

It is also emphasized that the word "confidential" is much over-used and in my opinion can be appropriately cited in but two circumstances. First, records are confidential when an act passed by the State Legislature or Congress specifically precludes an agency from disclosing. Such records are clearly deniable under §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are "specifically exempt from disclosure by state or federal statute". The other instance in which records may be deemed confidential would occur in a situation in which a court finds that an agency has proven that disclosure would, on balance, result in detriment to the public interest [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113]. Under the circumstances, I do not believe that the records requested could be considered "confidential".

There may be portions of records which if disclosed would result in an "unwarranted invasion of personal privacy" under §§87(2)(b) and 89(2)(b) of the Freedom of Information Law. If so, identifying details might be deleted to protect privacy, while providing access to the remainder of the records.

Lastly, the records might be characterized as "intra-agency materials". In this regard, §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..."

It is emphasized that the quoted provision contains what in effect is a double negative. While 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 final agency policy or determination found within such records.

Although it is unlikely that the records requested contain instructions to staff that affect the public or final agency policy or determinations, it is quite likely that they contain "statistical or factual tabulations or data". To that extent, they are in my view accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Mr. Gene Snay

bcc: Gates Chili News

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1321

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

December 4, 1979

Mr. Edwin Duryea
[redacted]

Dear Mr. Duryea:

I have received your most recent letter and the correspondence attached to it. Please accept my apologies for the delay in response, which I am pleased to report was due to the birth of my son.

Having reviewed the correspondence, it appears that two issues remain. The first concerns the existence of a report made by a county engineer. The second pertains to the identity of the engineer who inspected the sidewalks on or near your property.

With respect to the report, once again it is important to emphasize that the Freedom of Information Law specifically provides that an agency need not create a record in response to a request [see §89(3)]. Therefore, if no report exists, the county is not obliged to create such a record on your behalf.

However, throughout the correspondence, Commissioner Pender asserted that the engineer inspected the sidewalk on an "informal" basis and that no "formal" report was prepared. I have no knowledge as to whether an "informal" report may have been prepared and submitted by the engineer. Although it would appear that no written record was made, if there was an "informal" report, it is a "record" as defined by §86(4) of the Freedom of Information Law and is subject to rights of access.

While I am not asserting any belief that an "informal" report exists, assuming that it does, the most relevant provision of the Freedom of Information Law would be §87(2)(g). The cited provision states that an agency, such as Nassau County 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 provision quoted above contains what in effect is a double negative. Although an agency may deny access to "inter-agency or intra-agency materials", it must provide access to portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Stated differently, §87(2)(g) provides access to statistics and facts and the so-called "secret law" of an agency, while enabling the agency to withhold records reflective of advice or opinion.

Under the circumstances, once again assuming for the sake of argument that an "informal" report might exist, it could be characterized as an "intra-agency" document. Its factual findings would be available; its statements of opinion, impression or advice, for example, would be deniable.

The second issue concerns the name of the engineer who inspected the sidewalks. As stated in my earlier letter, home addresses of public employees may generally be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. However, in construing the quoted language, the courts have held that disclosure of records that identify public employees would result in a permissible as opposed to an unwarranted invasion of personal privacy to the extent that the records are relevant to the performance of official duties [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); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978)]. For example, that portion of a record indicating a public employee's home address has no relevance to the manner in which he or she performs his or her official duties. Therefore, the home address may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Jan. 11, 1979]. Conversely, if a record exists which identifies the engineer in conjunction with his inspection of the sidewalk, that portion of the record would in my view be available, for it is relevant to the performance of his official duties. I believe that this contention is bolstered, assuming that your letter of January 23 is factually accurate, by your assertion that engineer in question spoke with your son and indicated "who he was".

I have enclosed for your consideration copies of the Freedom of Information Law and a new pamphlet on the subject 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/kk

Encs..

cc: Commissioner Pender

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 414
FOIL-AO- 1322

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

December 5, 1979

Paul M. Whitaker, Esq.
[redacted]

Dear Mr. Whitaker:

I have received your letter of November 19 and the correspondence appended to it. Please accept my apologies for the delay in response, which I am pleased to report was due to the birth of my son.

Having reviewed the materials, it appears that the responses given to your clients by SUNY officials are reflective of several inconsistencies. Moreover, in my opinion, it is likely that portions of the records requested by your clients should have been made available under the Freedom of Information Law and that violations of the Open Meetings Law may have occurred.

Your first question pertains to a "planning staff evaluation" that apparently "was effectively adopted" by the SUNY Board of Trustees.

Without having the benefit of inspecting the planning staff evaluation, I can only conjecture as to rights of access. Nevertheless, the document in question, as you pointed out, appears to have been characterized differently by Chancellor Wharton and the SUNY officials who responded to Mr. Felsen's request. While Chancellor Wharton intimated that the staff evaluation served as the basis for a decision made by the SUNY Board of Trustees, the responses by SUNY officials indicate that the evaluation contains no factual information upon which the SUNY Board of Trustees based its determination.

In this regard, I agree with your contention that even if the staff evaluation could be characterized as "an internal document", statistical or factual tabulations or data found within the report should be made available.

Most relevant to the request is §87(2)(g) of the Freedom of Information Law, which 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..."

It is emphasized that the quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policies or determinations found within such records.

Under the circumstances, I believe that the planning staff evaluation could properly be characterized as an "intra-agency" document. However, in the responses given by Richard Gillman and Sanford Levine, both wrote that the evaluation is not nor does it contain "statistical or factual tabulations". Nevertheless, §87(2)(g)(i) of the Law grants access to "statistical or factual tabulations or data, found within intra-agency materials (emphasis added). In my view, the words "or data" were included in the amendments to the Freedom of Information Law due to the uncertainty involved in the construction of the term "tabulation". While the report in question might not contain "statistical or factual tabulations", to the extent that it does contain statistical or factual data, it is in my opinion available. In addition, a recent decision rendered by the Court of Appeals found that statistical or factual information found within internal documents is available. Even if that information is not used to develop or make policy, it is independently available [see Matter of Doolan v. Nassau County BOCES, _____ NY 2d_____, November 27, 1979]. This contention is bolstered by another recent decision which held that:

> "[T]his exemption permits access to records or portions thereof which contain any statistical or factual information, policy or determinations upon which the agency relies. On the other hand, written memoranda or letters sent from an official of one agency to an official of another or to an official within the same agency are not available if the communication is purely advisory in nature" [Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176, 181 (1979)].

It is noted, too, that the Court of Appeals in Doolan specifically cited the page in Miracle Mile from which the previous language was quoted. Consequently, even if the evaluation contains no statistical or factual tabulations, to the extent that it does contain statistical or factual information in any form, I believe that it is available.

Your second question concerns the propriety of an executive session held by the SUNY Board of Trustees during which the planning staff evaluation was considered.

In brief, the Open Meetings Law provides that all meetings of a public body, including the SUNY Board of Trustees, must be open, except to the extent that an executive session may appropriately be held in conformity with the provisions of §100(1)(a) through (h) of the Law. Under the circumstances, it appears that there is but one possible ground for executive session that may have been cited by the Board. Specifically, §100(1)(h) of the Open Meetings Law, at the time of the meeting, permitted a public body to enter into executive session to discuss:

> "the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value of the property."

The quoted provision clearly does not permit every discussion pertaining to the proposed acquisition, sale or lease of real property to be held during an executive session. On the contrary, such deliberations may be conducted in executive session only when public discussion would "substantially affect the value of the property". Although I could not advise with certainty that public discussion would or would not affect the value of the property under consideration, it is clear that the Crossgates Mall proposal has been a subject of substantial controversy and public interest for several months, and it is no secret that the property in the vicinity of the proposed mall can be readily identified. Consequently, I feel that it is questionable at best whether public discussion could have in fact substantially affected the value of the property in question. If public discussion could not have substantially affected the value of the property, the executive session was in my view held in violation of the Open Meetings Law.

With respect to the request for minutes of the executive session made by Mr. Felsen, Mr. Gillman, the records access officer wrote that:

> "[A]s the discussion was not an action by formal vote, minutes were not taken and are not required to be taken in accordance with Public Officers Law §101(2) (Open Meetings Law)."

I agree with Mr. Gillman's contention that if a particular subject is discussed in executive session which does not result in action taken by a public body that minutes of the executive session need not be compiled. However, as Mr. Felsen pointed out, a letter addressed to Mr. Sproul of Crossgates by Chancellor Wharton indicates that the evaluation was "reviewed by the Board of Trustees which concluded that, based on all the information now available, such a proposal would not be in the best interest...of the University Center at Albany". From my perspective, to be consistent, it could not be asserted on one hand that no "formal vote" was taken, and on the other that the Board of Trustees "concluded". If an executive session was properly held, and if indeed a conclusion was reached, I believe that it should be referenced in minutes of the executive session, regardless of the manner in which the vote, consensus

or conclusion might be characterized. The fact is, according to Chancellor Wharton, that a determination was made.

And third, your client requested a detailed list of all records in possession of SUNY "concerning the proposed transfer of property to the Department of Transportion." In a related sense, you have intimated that the University likely created a list of such records in order to respond to the requests made under the Freedom of Information Law.

In this regard, it is clear that the subject matter list required to be compiled pursuant to §87(3)(c) of the Freedom of Information Law need not make reference to every record in possession of an agency. On the contrary, the list is in my opinion intended to be a compilation presented in reasonable detail by subject matter that identifies the records in possession of an agency by category. Further, it is also clear that the Freedom of Information Law does not require an agency to create or compile a record in response to a request [see §89(3)]. Nevertheless, if a list exists which identifies particular records relevant to the proposed transfer of property, it would in my opinion be available. Assuming that such a list has been created, it would itself, as Mr. Felsen contended, constitute a "factual tabulation" accessible under §87(2)(g)(i). Further, although the list might make reference to records that are deniable in their entirety or in part, those references alone would not disclose the contents of the records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Karl E. Felsen
Richard Gillman
Sanford H. Levine

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1323

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

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JAMES C. O'SHEA
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GILBERT P. SMITH, Chairman
DOUGLAS L.TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 6, 1979

Mr. Gene Walter Perro
79-A-39
Box 149
Attica, New York 14011

Dear Mr. Perro:

I have received your letter regarding an unsuccessful attempt to gain access to your criminal history record (rap sheet) from the Division of Criminal Justice Services.

As a general matter, I believe that the Division of Criminal Justice Services provides access to records pertaining to individuals to the individual themselves based upon the submission of fingerprints and other identifying information. Although you indicated that you sent your thumbprint to the Division, in all honesty, I am not certain as to which prints or other information must be sent.

To obtain a clarification regarding the information that you must submit, it is suggested that you write to:

Adam D'Alessandro
Director of Data Sytems
Division of Criminal Justice Services
Executive Park Tower
Albany, New York 12203

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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1324

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

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EXECUTIVE DIRECTOR

ROBERT J. FREEMAN

December 10, 1979

Mr. Gwaine Little
Box R
#79-A-2310
Napanoch, New York 12453

Dear Mr. Little:

I have received your letter of November 17. Although I am not completely sure of the nature of your inquiry, it appears that you would like to obtain and present information which indicates that a charge against you had been dismissed.

In this regard, I believe that the Division of Criminal Justice Services provides access to records pertaining to individuals to the individual themselves based upon the submission of fingerprints and other identifying information.

To obtain clarification concerning the information that you must submit, it is suggested that you write to:

Adam D'Alessandro
Director of Data Systems
Division of Criminal Justice Services
Executive Park Tower
Albany, New York 12203

Further, it is possible that records related to charges that have been dismissed might be sealed under the provisions of §160.50 of the Criminal Procedure Law. It is suggested that you contact an attorney or Prisoners' Legal Services, for example, 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

RJF/kk

Robert J. Freeman
Executive Director

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-415
FOIL-AO-1326

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

December 11, 1979

Mr. Louis Muniente
Holland Patent
New York 13354

Dear Mr. Muniente:

I have received both of your recent letters and apologize for the delay in response.

Your questions pertain to the responsibility of a school district with regard to the imposition of taxes. In this regard, you have asked how a school board may be restrained from passing higher budgets each year and expending increasing amounts of the taxpayers' money.

In all honesty, I have no expertise regarding the fiscal responsibilities of school boards. However, you mentioned "home rule" and questioned the capacity of school boards to keep raising taxes. As I understand it, the responsibility to keep school district expenditures in check rests on the shoulders of the public. Although the voters in your district may have passed budgets over the years, they could reject a budget. Further, if you disagree with the policy of a particular board member or members, perhaps you and others could combine to elect the representatives of your choice.

In addition, the two Laws administered by the Committee, the Freedom of Information Law and the Open Meetings Law, permit you to learn more about the factual bases for the making of policy, including the imposition of taxes.

For example, the Freedom of Information Law is based upon a presumption of access. In brief, that Law states that all records in possession of an agency, including a school district, are available, except those records or portions thereof that fall within one or more amoung eight

enumerated grounds for denial listed in the Law. Similarly, the Open Meetings Law requires that all meetings of public bodies, including school boards, must be open unless there is a ground for a closed or "executive" session. As in the case of the Freedom of Information Law, a meeting is presumed to be open, except to the extent that an executive session may properly be convened based upon the grounds for executive session listed in the Law.

Enclosed for your consideration are copies of both laws, as well as the pamphlet to which you made reference. I believe that these documents will be helpful to you. If you would like additional copies, I will be happy to provide them on request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

FOIL-AD-1327

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

December 11, 1979

[redacted]

[redacted]:

As I informed you in a recent telephone conversation, I have received and reviewed the documentation sent over a period of several weeks to this office. The following will consist of my comments regarding the responses to your inquiries offered by the officials of Community School District 10.

First, in response to a request for records made on September 20, Fred Goldberg, the Records Access Officer, replied in writing that numerous portions of the request could not be answered, for there are no records in existence that correspond to the information sought. In this regard, you requested a certification from Mr. Goldberg pursuant to §89(3) of the Freedom of Information Law. In answer to your request for a certification, Mr. Goldberg wrote that his original letter of October 12 was "fair and accurate". In terms of your rights, the fairness or accuracy of the response is in my opinion irrelevant, for the cited provision of the Freedom of Information Law requires that agency officials provide the certification described in the Law upon request.

In relevant part, §89(3) of the Freedom of Information Law states that an agency must upon request "certify to the correctness" of copies made available "if so requested, or as the case may be...certify that it does not have possession of such record or that such record cannot be found after diligent search". In addition, §1401.2 of the regulations promulgated by the Committee, which have the force and effect of law and with which each agency in the state must comply, requires that a records access officer is responsible for assuring that:

"(5) Upon request, certify that a record is a true copy; and

(6) Upon failure to locate records, certify that:

(i) The agency is not the custodian for such records, or

(ii) The records of which the agency is a custodian cannot be found after diligent search."

Based upon the provisions quoted above, if a member of the public requests a certification in writing to the effect that records sought do not exist or that they cannot be found after having made a diligent search for the records, the records access officer is responsible for completing such a certification. Again, the "fairness" or "accuracy" of an initial response has no bearing upon the requirement that a records access officer provide the certification required under the Law.

Second, I would like to comment with respect to the contents of a letter dated October 26 sent to you by Norman Kaufman, the Principal of the Junior High School attended by one of your daughters. Mr. Kaufman wrote that the District would not provide access to photocopies of teachers' marking books, because the marking books are "their own personal property" and "contain information about other children, which you are not entitled to have". I disagree with Mr. Kaufman's conclusion.

It is noted initially that the New York 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..." Since a teacher's marking book is kept by a teacher, an employee of an agency, in this case a school district, it is a "record" subject to rights of access granted by the Freedom of Information Law. Although it has been argued in the past that records similar to teachers' marking books are private property, the courts have held to the contrary in both New York and at the federal level. With respect to such records, one question might be asked: Would a teacher maintain such a record if he or she was not employed in his or her capacity as a teacher? It is obvious in this instance that a teacher maintains marking books in

the performance of his or her official duties. Consequently, the marking books are in my view "records" that fall within the scope of the Freedom of Information Law.

Third, the fact that records may be subject to rights of access does not necessarily mean that they are available in their entirety. On the contrary, I agree with Mr. Kaufman's assertion that portions of the records that identify students other than your own children are deniable. One ground for denial is based upon §87(1)(a) of the Freedom of Information Law which states that an agency may withhold records "or portions thereof" that are "specifically exempted from disclosure by state or federal statute". There is in this instance a federal statute, the Family Educational Rights and Privacy Act, which precludes an educational agency or institution from disclosing education records identifiable to particular students to third parties without the consent of the parents. In the alternative, even if the Family Educational Rights and Privacy Act had not been enacted, portions of the marking books identifiable to students other than your children could be withheld under §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Nevertheless, those portions of the records in question that pertain to or identify your own children are in my opinion available under both the Freedom of Information Law of New York and the Family Educational Rights and Privacy Act. Further, while the Family Educational Rights and Privacy Act does not require that an educational agency or institution photocopy records available to parents, the Freedom of Information Law does require that the agency make copies of available records upon request and upon payment of the requisite fee. I am not suggesting that the entire record be made available as a photocopy. On the contrary, as noted earlier, the Freedom of Information Law permits an agency to withhold or delete records "or portions thereof" that fall within one or more of the grounds for denial enumerated in the Law. Since portions of the teachers' marking books may justifiably be withheld, it is suggested that the school district might photocopy the relevant pages and delete or excise those portions of the documents that pertain to children other than your own.

It is also noted that Mr. Kaufman's letter of October 26 which denies access to the teachers' records books appear to conflict with a statement made by Mr. Kaufman in a letter dated September 19. In the earlier correspondence, it was written that you and your husband "had full and repeated access to Jacqueline's records including teacher's (sic) marking and grade books". If the records had been made available in the past, it is unclear why the same records should not be made available when requested a month later.

Lastly, with respect to the existence of a coded grading system, our conversations appear to indicate that there have been inconsistencies in response to your requests for records relative to such a system or systems. On one hand, you indicated orally and by means of correspondence that your daughter received a grade of 48 in physical education. When you questioned school officials about the grade, you were apparently informed that it was reflective of truancy, based upon a code. As such, it would appear that such an admission indicates that a coded grading system of some sort does indeed exist. It is also unclear whether the grade of 48 represents the existence of one coded grading system that is distinguishable from a different coding system based upon a "1" to "5" designation as you have suggested.

Unfortunately, all that I can advise with respect to the existence of one or more coded grading systems is that the certification that you requested if completed fairly and accurately should indicate whether or not records relative to one or more coded grading systems exist. Further, to the extent that coded grading systems do exist, it would appear that they represent the policy of the agency and therefore should be accessible under §87(2)(g)(iii) 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/kk

cc: Fred Goldberg
Norman Kaufman
bcc: Ben Liebman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1328

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

December 12, 1979

Mr. Paul D. Rosenberg
[redacted]

Dear Mr. Rosenberg:

I have received both of your letters dated November 30 concerning requests made under the Freedom of Information Law directed respectively to the Division of Historic Preservation of the Office of Parks and Recreation and the City of Beacon.

First, with regard to the request sent to the Division of Historic Preservation, I have contacted Linda Fisher, the Records Access Officer for the Office of Parks and Recreation, on your behalf. Ms. Fisher informed me that she knew of your inquiry and recognized that officials of the Office of Parks and Recreation did not respond to your request as promptly as the Law requires. I have been assured that corrective action has been taken to preclude similar delays in the future. In addition, Ms. Fisher informed me that the materials requested were copied and sent to you on December 7.

Second, the response sent to you by Mr. Gallio of the City of Beacon does not in my view represent recalcitrance regarding disclosure, but rather a lack of familiarity with the provisions of the Freedom of Information Law and the regulations promulgated pursuant to the Law by the Committee.

In terms of substance of your request, I believe the survey performed by Historic Architecture & Decorative Arts Consultants for the City of Beacon is available.

The Freedom of Information Law is based upon a presumption of access and states that all records in possession of an agency are available, except those records or portions thereof that fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law. Under the circumstances that you described, none of the grounds for denial could in my opinion be appropriately cited as a basis for withholding the survey.

Lastly, with respect to procedural compliance with the Law by the City of Beacon, enclosed are copies of the Committee's regulations, which govern the procedural aspects of the Freedom of the Freedom of Information Law, model regulations designed to assist agencies in complying with the Law, and an explanatory pamphlet on the subject. Copies of the materials will also be sent to the City of Beacon.

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

Encs.

cc: Linda Fisher
Joseph Gallio

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-419
FOIL-AO-1329

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

December 13, 1979

Mr. Raymond W. Russo
[redacted]

Dear Mr. Russo:

As you are aware, I have received your letter of December 3 as well as the correspondence appended to it. Your inquiry concerns a request for "the entire record" relative to a complaint made against Dr. Peter Schaad, a veternarian, "including the minutes and vote of the State Board for Veterinary Medicine and any correspondence with the Attorney General's Office."

In response to your request, Gene Snay, the Assistant Records Access Officer for the Department of Education, answered that your request was denied pursuant to §65.10 (sic) of the Education Law and §87(2)(a) of the Freedom of Information Law.

Having reviewed the correspondence, I agree in part with Mr. Snay's determination, but it is clear that his response to you dealt only with one aspect of your request.

It is true that §6510 of the Education Law requires that administrative warnings made by professional conduct officers must be kept confidential. Consequently, an administrative warning is beyond the scope of rights of access granted by the Freedom of Information Law, for §87(2)(a) of the Freedom of Information Law enables an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute." Under the circumstances, since the Education Law requires that an administrative warning be confidential, it is in my view specifically exempted from disclosure.

Nevertheless, you requested not only the administrative warning, but any other records related to the complaint made against Dr. Schaad. Since I am not familiar with the nature of the records that may exist, I can only conjecture as to rights of access.

It is important to point out, however, that the 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 an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law. In my opinion, there are three grounds for denial that may be relevant to your request for records other than the administrative warning. To the extent that those grounds for denial may properly be cited, the Education Department may justifiably withhold records or portions of records from you.

The first ground for denial is §87(2)(b), which states that an agency may withhold records or portions thereof 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. It is noted at this juncture that the privacy standard is flexible and is subject to conflicting interpretations. For example, while one reasonable man might believe that disclosure of a particular record would result in an unwarranted invasion of personal privacy, an equally reasonable man might consider that disclosure of the same record would result in a permissible invasion of personal privacy.

It is possible that portions of the records in which you are interested would if disclosed result in an unwarranted invasion of personal privacy. For instance, if witnesses came forward to offer testimony or evidence, I believe that their names or other identifying details could be withheld. However, the privacy provisions do not in my view enable the Education Department to protect the records in their entirety for the following reasons. It is clear that you know the identity of the person against whom the complaint was made, for you made the complaint. Moreover, the records compiled with respect to the complaint are relevant to the manner in which the Education Department and its components perform their duties; they are also relevant to the manner in which a person licensed by the state performs his duties. In order to obtain a

a license, a person must meet specific standards designed by government. From my perspective, it is in the public interest to know whether the standards are being met. I contend that the public interest in knowing whether the standards are met diminishes the capacity of an agency to withhold information on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

The second ground for denial of relevance 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;
>
> 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 provision quoted above could not appropriately be cited to withhold the records, even though an investigation may have been made. Under both the Freedom of Information Law as originally enacted and as amended, the courts have held that the "law enforcement purposes" exception may be raised only by a criminal law enforcement agency [see e.g., Young v. Town of Huntington, 388 NYS 2d 978 (1976); Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)]. While the Education Department may engage in a law enforcement function, it is not a criminal law enforcement agency. Moreover, the specific grounds for denial listed in §87(2)(e) can no longer arise, for the investigation has been completed and the case has been closed.

Finally, §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..."

It is important to note that the quoted provision contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must disclose statistical or factual data, instructions to staff that affect the public, or agency policy or determinations found within such records.

Under the circumstances, it is doubtful that the records contain instructions to staff or statements of policy. The determination that was made, the administrative warning, is confidential under §6510 of the Education Law. However, the records may contain statistical or factual data. For example, the Education Department may have prepared or developed a number of records in response to the investigation which contain "factual data". Although they may be considered intra-agency materials, the factual data contained within such materials would be available unless a different exception to rights of access could properly be raised. Similarly, records transmitted between the Education Department and the Department of Law would be considered "inter-agency materials". Again, however, to the extent that they consist of statistical or factual data, instructions to staff, or agency policy or determinations, they are available.

With respect to minutes and votes, assuming that a board or committee or similar body dealt with the complaint, it is possible that such an entity may have created records relative to the complaint, such as minutes or a record of votes. Ordinarily, the meetings of public bodies must be convened as open meetings pursuant to the provisions of the Open Meetings Law. However, §103(1) of the Open Meetings Law provides that quasi-judicial proceedings are exempted from the Open Meetings Law. Since the proceedings of a board or committee would under the circumstances be quasi-judicial in nature, they would fall outside the scope of the Open Meetings Law.

However, §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 this regard, while a quasi-judicial body might not be required to adhere to the provisions of the Open Meetings Law, it would nonetheless be required to compile a record of the votes of each member and how the member voted in every instance in which a vote was taken. Therefore, if any vote was taken, a record of that vote should be compiled and 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:jm

cc: Gene Snay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1330

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

December 13, 1979

Mr. Kevin Mastellon
News Director
WWNY Radio and Television
Box 211
Watertown, NY 13601

Dear Mr. Mastellon:

I have received your letter of November 28 as well as the correspondence appended to it.

The issue concerns a request directed to the State Department of Labor for a survey conducted by the Watertown Job Service Office in order to determine which company should receive an award on the basis of its hiring of disabled veterans. You have also indicated that the survey identifies approximately ten employers and that the identity of the recipient of the award was made public at a ceremony held on Veterans' Day. In response to your request, Mr. Gary McGivney of the Department's Watertown Office denied access based upon the provisions of §537 of the Labor Law.

I disagree with the determination and believe that the survey in which you are interested is accessible under the Freedom of Information Law.

First, it is true that §537 of the Labor Law requires that the Department of Labor maintain the confidentiality of certain records. Nevertheless, it is clear that the scope of §537 does not extend to all records maintained by the Department of Labor. On the contrary, §537 pertains to information acquired from employers and employees pursuant to Article 18 of the Labor Law, which deals solely with unemployment insurance. From my perspective, §537 is intended to protect the privacy of both employers and employees relative to situations in which individuals may have lost their jobs for any number of reasons. In this instance, the survey was apparently conducted not to locate jobs for unemployed persons, but rather only to determine the extent to which firms in the

Watertown area had assisted disabled veterans in their hiring practices. It is clear that you have not requested the names of any individuals who may have been hired or any of the details concerning the manner in which they may have been hired. Consequently, I do not believe that §537 of the Labor Law could justifiably be cited to withhold the records.

Further, if §537 could be cited as a basis for non-disclosure, it would have been violated by disclosing the identity of recipient of the award.

Lastly, as you have described it, the survey consists solely of what may be characterized as "statistical or factual tabulations or data" which are accessible under §87(2)(g)(i) 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/kk

cc: Gary McGivney
Florence Dreizen
Gary Hughes

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1331

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

December 17, 1979

Joel M. Markowitz, Esq.
[redacted]

Dear Mr. Markowitz:

Thank you for your letter of November 28 and the correspondence appended to it.

Your letter pertains to a situation in which your client has made a request for records in possession of the Village of Nissequogue. The request, according to your letter, was never answered and, in fact, ensuing requests for regulations required to be promulgated by the Village were apparently ignored.

Under the circumstances, it appears that several violations of the Freedom of Information Law have been committed by the Village.

First, §87(1)(a) of the Freedom of Information Law requires the governing body of each public corporation, including a village, to adopt rules and regulations consistent with those promulgated by this Committee.

Second, both the Freedom of Information Law and the Committee's regulations require that an agency respond to a request within five business days of its receipt of a request [see respectively, the Freedom of Information Law, §89(3); regulations, §1401.5]. Further, the regulations specify that a failure to respond within five business days of the receipt of a request constitutes a constructive denial of access that may be appealed to the head or governing body of an agency, or whomever has been designated to determine appeals [see regulations, §1401.7(c)].

Third, §89(4)(a) of the Law requires that agencies transmit to the Committee copies of appeals and the determinations that ensue. The records of the Committee indicate that no appeal and no determination thereon have been sent to this office.

Fourth, in terms of substance, 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 available, except those records or portions thereof that fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

In my opinion, having reviewed the correspondence attached to your letter, it does not appear that any of the grounds for denial could appropriately be cited to withhold the records sought by your client.

I have enclosed copies of the Freedom of Information Law, an explanatory pamphlet on the subject, the Committee's regulations and model regulations designed to assist government in complying with the procedural implementation of the Law. In order to inform the Village of its obligations under the Law, copies of this letter and the materials described above will be sent to the Village.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Village of Nissequogue

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1332

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

December 17, 1979

Mr. Francis G. Adee
79-C-152 9-1 C-5
354 Hunter Street
Ossining, New York 10562

Dear Mr. Adee:

I have recently received your letter of November 26. As requested, enclosed is a copy of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

With respect to the requests which you are in the process of making, without greater knowledge of the records in which you are interested, I cannot provide specific advice. Nevertheless, in addition to the pamphlet, I have enclosed copies of the Freedom of Information Law and the regulations promulgated by the Committee. The regulations govern the procedural aspects of the law and have the force and effect of law, and each agency must adopt regulations no more restrictive than those promulgated by the Committee.

It is noted that §89(3) of the Law and 1401.5 of the regulations specify that an agency must respond to a request within five business days of its receipt of a request. Further, §1401.7(b) of the regulations states that a failure to respond within the time limits specified earlier results in a "constructive" denial of access that may be appealed to the head of the agency or whomever has been designated to determine appeals.

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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1333

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

December 17, 1979

Mr. David C. Shampine
Staff Writer
Watertown Daily Times
Watertown, New York 13601

Dear Mr. Shampine:

I have received your letter of December 11 concerning access to records in possession of the State Police. You have made reference specifically to arrest reports, accident reports and police blotters.

It is noted that the Freedom of Information Law is based upon a presumption of access. The Law 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 grounds for denial enumerated in §87(2)(a) through (h) of the Law. It is also emphasized that §89(5) of the Law states that nothing in the Law shall be construed to limit or abridge rights of access previously granted by the courts or by other provisions of law.

In my view, the records in which you are interested are available.

First, arrest reports have been determined to be available by the courts for years. In fact, the original Freedom of Information Law, which was less expansive with respect to disclosure than the current Law, specifically provided access to "police blotters and booking records" [see original Freedom of Information Law, §88(1)(f)]. While the amended Freedom of Information Law enables an agency to withhold records compiled for law enforcement purposes under certain circumstances [see §87(2)(e)], those circumstances would in my view rarely if ever arise to enable a law enforcement agency to withhold arrest records.

Police blotters are in my opinion also accessible. Although the term "police blotter" is derived from custom and usage, a relatively recent judicial decision determined the scope of what constitutes a police blotter and found that it is available. In Sheehan v. City of Binghamton, 59 AD 2d 808 (1977), the Appellate Division, Third Department, held that a police blotter is a log or diary in which any event reported by or to a police department is recorded. Further, the court specified in its opinion that a police blotter as described contains no investigative information.

Lastly, accident reports have been available under §66(a) of the Public Officers Law since 1941. Further, case law rendered since the enactment of the Freedom of Information Law has confirmed that accident reports are available to the public [see e.g., Yungworth v. New York, 402 NYS 2d 124 (1978)].

With respect to the time limit for completion of an accident report, all that I can suggest is that the Freedom of Information Law does not require an agency to create records in response to a request [§89(3)]. Therefore, if an accident report has not yet been created, there is no record to be provided by a police agency. However, it is also noted that §86(4) of the Law defines "record" to include any information in any physical form whatsoever in possession of an agency. Consequently, as soon as an accident report exists, 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/kk

cc: Frank B. Benosky
George Dana
Francis Steinkamp

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1334

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

December 17, 1979

Ms. Jeanne Bednarski
Education Reporter
Syracuse Herald American
P.O. Box 4915
Syracuse, New York 13221

Dear Ms. Bednarski:

I have received your letter of November 28, which concerns a denial of access to records by the Syracuse City School District. According to your letter, the records pertain to a situation in which a tenured teacher has been brought up on disciplinary charges. You have indicated that the teacher in question has been charged formally and suspended from her position. Relative to the controversy, you have requested records reflective of the teacher's name and the specific charges made against her. Further, your letter and the correspondence appended to it indicate that the records in the opinion of District officials are "confidential" and "exempted by statute other than the Freedom of Information Law".

In my opinion, records indicating both the identity of the teacher charged and the charges made against her are available.

It is noted at the outset that 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 available, except those records or portions thereof that fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision. None of the grounds for denial could in my view be appropriately cited as a means for withholding.

Both your letter and the response to your request by Lionel R. Meno, the Superintendent of Schools, indicate that officials of the Syracuse City School District believe that the records in question are confidential, and exempt from disclosure by statute. If the records were indeed exempt from disclosure by statute, they would clearly be deniable under §87(2)(a) of the Freedom of Information Law. Nevertheless, I cannot find any such exemption.

In my view, the word "statute" can pertain only to an act passed by the State Legislature or by Congress. With respect to §87(2)(a) of the Freedom of Information Law, its application arises only in situations in which either an act of Congress or the State Legislature precludes an agency from disclosing particular records. Superintendent Meno has cited §82.9 of the regulations promulgated by the Commissioner of Education as the basis for withholding. In my opinion, the reliance upon the cited provision is misplaced. The Superintendent's letter to you dates October 31, states that:

> "Section 82.9 of the Commissioner's Regulations, relating to the holding of tenure hearings, further provides that tenure hearings will be private unless the employee demands a public hearing. There is no exception in these Regulations providing for public disclosure of any of the events or proceedings relating to a private hearing."

In this regard, it is clear that regulations neither constitute nor have the force of a statute. Further, it is also clear that regulations cannot supersede or override the direction given by a statute. Perhaps most importantly, §82.9 pertains only to hearings related to tenure; it does not pertain in any way to records that may relate to the hearings. In a similar vein, §3020-a of the Education Law also makes reference to closed hearings. Nevertheless, there is no direction in §3020-a to the effect that records pertaining to the hearings should be considered "confidential".

In sum, there is no statute of which I am aware which specifically exempts the records in which you are interested from disclosure.

Second, the Freedom of Information Law provides that an agency may withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy" [§87(2)(b)]. However, both the Freedom of Information Law and the interpretation of the Law by the courts indicate that public employees enjoy a lesser right to privacy than the public generally. Moreover, this Committee has advised and the courts have upheld the notion that records that are relevant to or have a bearing upon the manner in which a public employee performs his or her duties are available, for disclosure of such records would result in a permissible, as opposed to an unwarranted invasion of personal privacy [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); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978)]. Conversely, if a record or portion thereof identifying a public employee has no relevance to the manner in which he or she performs his or her official duties, that record or portion thereof may justifiably be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Under the circumstances, both the identity of the teacher who has been charged and the charges made against her are in my opinion relevant to the performance of her official duties. Consequently, such information is in my opinion available, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

This contention is in my view bolstered by means of an analogy. When a person is charged with a crime, the indictment is generally made available. The fact that an indictment has been made does not indicate a person is guilty or innocent, but rather that there is probable cause to go further. In the case of a charge made against a public employee, again, the charge does not indicate "guilt" or "innocence". On the contrary, I believe that the issuance of charges merely indicates that there is probable cause to go further.

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/kk

cc: Dr. Robert E. Cecile
Lionel R. Meno
Robert E. Sturge

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1335

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

December 18, 1979

Mr. Thomas E. Mills
Archivist III
Office of Cultural Education
State Archives
State Education Department
Albany, New York 12230

Dear Tom:

As you are aware, I have received your letter of November 23 concerning the efforts of the Office of Mental Health and the State Archives regarding the possible disclosure of client records by the Archives under specified circumstances.

While I believe that the draft agreement represents a good beginning, I also feel that some of the assumptions upon which the draft agreement is based are mistaken.

For example, you wrote that the Office of Mental Health "insists that §33.13 of the Mental Health Law strictly prohibits access to the records for anyone outside OMH, except as specified in subsection (c) and (d) of the law". I concur with the finding that subdivisions (c) and (d) represent the only circumstances in which clinical records regarding patients may be disclosed. Nevertheless, disclosure is not in my view restricted only to employees of the Office of Mental Health.

Specifically, I direct your attention to §33.13(c)(4), which states that information about patients reported to the Department of Mental Health and clinical records prepared at department facilities may be disclosed:

> "with the consent of the commissioner and the consent of the patient or of someone authorized to act on the patient's behalf, to:
>
> (i) physicians and providers of health, mental health, and social or welfare services involved in caring for, treating, or rehabilitating the patient, such information to be kept confidential and used solely for the benefit of the patient.
>
> (ii) other persons who have obtained such consent".

In my view, the Commissioner may consent to disclose to anyone, including the State Archivist, so long as the consent of the patient or someone authorized to act on the patient's behalf has been obtained. In many instances, it is likely that the records that might be transferred to the Archives would pertain to patients who are no longer living. As such, I believe that the only condition precedent required for disclosure would be the consent of the Commissioner. Stated differently, if the persons to whom the records relate are dead, the records may in my opinion be disclosed to any person who has obtained the consent of the Commissioner. As such, I disagree with the contention that only employees of the Office of Mental Health may gain access to patient records.

Moreover, I feel the concept of an archives is based upon the idea that an archives is a repository of records that do not have continuing utility, but rather have value of an historical nature. In addition, as we have discussed in the past, ideally, when an agency consents to transfer records to the State Archives, legal custody should also be transferred from the agency that created or initially maintained custody of the records to the Archives. Nevertheless, under the circumstances, I understand and appreciate that the Office of Mental Health has an interest in preserving confidentiality and requiring that the Archives agrees to conditions designed to preclude unnecessary or unauthorized disclosures.

In this regard, I disagree with the requirement found in §II(1) of the draft agreement, which states that "all patient case records transferred to the Archives remain the legal property of the Office of Mental Health". From my perspective, the Archives generally obtains records when an agency has requested to destroy records pursuant to the provisions of §186 of the State Finance Law, under which the State Archivist, acting on behalf of the Commissioner of Education, determines that records have historical value. After reviewing the records and determining that they do indeed have historical value, the Archives may, in the words of §142 of the Education Law assume "the official custody" of such records. Since the State Archives is a relatively new office, it appears that the relationship between the Archives and state agencies is unclear. However, based upon §142 of the Education Law, it also appears that it was intended that the Archives maintain legal custody of records transferred to the Archives under §186 of the State Finance Law or other applicable agreements or provisions of law. Again, I understand the concerns of the Office of Mental Health; yet, concurrently, I feel that agreements between the Archives and state agencies should optimally include provisions for the legal transfer of custody to the Archives with conditions attached in appropriate cases.

For example, perhaps it is possible to engage in agreements with state agencies under which the legal custody of records would be given to the State Archives under conditions stated in an agreement which require the original legal custodian of the records to approve requests or limit the capacity to inspect the records based upon parameters specified in an 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
Executive Director

RJF/kk

cc: Michael Volpe

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1336

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

December 18, 1979

Mr. Frederic C. Foster
County of Suffolk
Veterans Memorial Highway
Hauppauge, New York 11787

Dear Mr. Foster:

Thank you for your letter of November 23 and your continued interest in complying with the Freedom of Information Law. Your inquiry pertains to access to witness statements obtained in conjunction with a criminal investigation or in conjunction with criminal activity. According to your letter, witness statements have been sought by individuals who had been under active criminal investigation and also in relation to civil proceedings.

As you are aware, 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 available, except those records or portions thereof that fall within one or more enumerated grounds for denial appearing in paragraphs (a) through (h) of the cited provision. As I view the exceptions, they are intended to permit government to withhold information when disclosure could be damaging to either an individual identified in the records or to some governmental process.

From my perspective, there are three possible grounds for denial that might appropriately be cited to withhold witness statements. It is emphasized, however, that the propriety of any or all grounds for denial can be determined only a case by case basis.

First, §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Further, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. I

believe that the examples should be considered merely as five illustrations among conceivable dozens of unwarranted invasions of personal privacy; I do not believe that the five examples should be considered restrictively and as the only bases upon which a denial may under the privacy provisions could be asserted. In this regard, there may be situations in which the identifying details regarding a witness could if disclosed result in "personal hardship" to the subject of the record. Again, although the examples listed in §89(2)(b) may provide particular instances of unwarranted invasions of personal privacy, I believe that they are merely illustrative and exist only to provide direction concerning the scope of the "privacy" exception to rights of access.

A second possible ground for denial is §87(2)(e), which concerns records compiled for law enforcement purposes. As noted earlier, the grounds for denial in the Freedom of Information Law are based largely upon the effects of disclosure. In the case of §87(2)(e), when an investigation is terminated, several of the grounds for denial essentially disappear. Nevertheless, I believe that two of the grounds appearing in §87(2)(e) might continue to be effective, even though an investigation may have been terminated. In conjunction with your inquiry, I believe that one of the grounds for denial appearing in §87(2)(e) may remain effective. Specifically, §87(2)(e)(iii) provides that an agency may withhold records compiled for law enforcement purposes, when disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation." In my view, if a witness has come forward as a confidential source or has disclosed information relative to a criminal investigation, records which could if disclosed identify that person may continue to be withheld even though the investigation has been closed.

Further, §87(2)(f) provides that an agency may withhold any records, not only those records compiled for law enforcement purposes, which "if disclosed would endanger the life or safety of any person." It is important to emphasize that §87(2)(f) was in my opinion included in the New York Freedom of Information Law to avoid problems that continue to arise under the federal Freedom of Information Act (5 U.S.C. §552). The latter Act has been criticized, for federal agencies are permitted to withhold records compiled for law enforcement purposes for several reasons, one of which involves disclosures that would endanger the life and safety of "law enforcement personnel". In drafting the amendments to the New York Free-

dom of Information Law, I believe that the State Legislature recognized the deficiency in the federal Act and attempted to correct it by permitting an agency to withhold any information the disclosure of which would "endanger the life or safety of any person."

With respect to criminal records sought in conjunction with a civil proceeding, I believe that the principles offered in the preceding paragraphs would be applicable. It is reemphasized that the exceptions to rights of access are in my view based upon the effects of disclosure and are intended to prevent injury to governmental processes or persons.

Therefore, if, for example, a record is sought for use in a civil proceeding, disclosure still might identify a confidential source or endanger the life or safety of a person identified in the records or result in an unwarranted invasion of personal privacy. Stated differently, the effects of disclosure would likely be the same regardless of the circumstances under which a request is made.

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-1337

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

December 18, 1979

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

Thank you for your letter of November 26 and your kind words. Your inquiry pertains to my earlier letter of November 21 and the Freedom of Information Law generally.

First, I would like to point out that I have spoken with Mr. Foster of the Suffolk County Attorney's Office. I believe that he is fully familiar with the rights granted by the Law and the duties of government under the Law.

Second, I agree that an agency decision maker, such as an appeals person or body, should have the capacity to review records sought to determine the propriety of an initial finding that records should be withheld. In a similar vein, you have questioned the capacity of this office to advise when the Committee has no authority to review records sought by the public. In this regard, all that I can state is that neither myself nor the Committee has any greater right to inspect or copy records than any member of the public. If the Committee had the capacity to do so, it would become a quasi-judicial body. Perhaps steps will be taken in the future by means of legislation to provide the Committee with such a function. At this juncture, however, it is in my view unlikely that the Committee will replace the courts for the purpose of determining rights of access.

You also stated that, without the capacity to review, the Law, and presumably the Committee, might be considered "an expensive farce." I would like to think that your characterization is inaccurate. While you may have had difficulty in obtaining information, I believe that the efforts of the

Committee on behalf of others have helped to avoid litigation, thereby decreasing the expenditure of taxpayers' money used to defend denials of access. The entire budget for the Committee is slightly over $50,000 per year; my belief is that the efforts of the Committee save more money than is spent on its operation.

With regard to the comments concerning the constitutionality of the Freedom of Information Law, I am no expert on constitutional law. However, there have been federal cases initiated based upon the contention that the first amendment grants a right to information. The courts, however, have held to the contrary and have found that rights of access are determined by statutory law. Again, since I am not a constitutional lawyer, it would be inappropriate to comment with respect to the other constitutional questions that you have raised.

Next, you have raised a point which apparently pertains to access to records that may be in possession of two agencies, a town and a county. In this regard, it is clear that any records in possession of an agency, whether the agency is the primary or the secondary custodian of records, are subject to rights of access granted by the Law. As you are aware, the Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency. Therefore, if, for example, records are in possession of both a town and a county, rights of access to the records are equal at both levels of government.

As requested, enclosed are copies of the Open Meetings Law as amended, a memorandum explaining the changes in the Law, and a new pamphlet that describes both the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1338

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

December 18, 1979

Peter J. Mutino, Esq.
Smith, Ranscht, Pollock,
Manos & Connors, P.C.
235 Main Street
White Plains, New York 10601

Dear Mr. Mutino:

Please accept my apologies for the delay in response to your letter. I am embarrassed to admit that your correspondence was misplaced and surfaced only recently.

The question raised in your earlier letter to Robert Stone, Counsel to the Education Department, is whether a school district has the ability to divulge "any information concerning the charges" against a named teacher.

In my opinion, the name, charges and similar records regarding a teacher may be disclosed, and in fact may be required to be made available under the Freedom of Information Law.

First, it is emphasized that the Freedom of Information Law is permissive. Although §87(2) of the Law lists eight categories of deniable records, the introductory language of the cited provision states that an agency "may" withhold such records; there is no requirement in the Law that an agency must withhold records, except under one circumstance. That circumstance would involve §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute". Stated differently, there are numerous statutes which preclude an agency from disclosing particular records. For example, in the context of school district records, the Family Educational Rights and Privacy Act [20 USC §1232(g)] precludes an educational agency or institution from disclosing education records identifiable to a particular student without the consent of the parents of the student.

With respect to the identity, charges and other records pertaining to a teacher, the most relevant exception to rights of access found in the Freedom of Information Law is §87(2)(b), which provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Nevertheless, I believe that disclosure of the identity or charges, for example, would result in a permissible as opposed to an unwarranted invasion of personal privacy and, therefore, that such records should be made available.

Both the Freedom of Information Law and the interpretation of the Law by the courts indicate that public employees enjoy a lesser right to privacy than the public generally. Moreover, this Committee has advised and the courts have upheld the notion that records that are relevant to or have a bearing upon the manner in which a public employee performs his or her duties are available, for disclosure of such records would result in a permissible, as opposed to an unwarranted invasion of personal privacy [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); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978)]. Conversely, if a record or portion thereof identifying a public employee has no relevance to the manner in which he or she performs his or her official duteis, that record or portion thereof may justifiably be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Under the circumstances, both the identity of the teacher who has been charged and the charges made against him are in my opinion relevant to the performance of his official duties. Consequently, such information is in my opinion available, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

This contention is in my view bolstered by means of an analogy. When a person is charged with a crime, the indictment is generally made available. The fact that an indictment has been made does not indicate a person is guilty or innocent, but rather that there is probable cause to go further. In the case of a charge made against a public employee, again, the charge does not indicate "guilt" or "innocence". On the contrary, I believe that the issuance of charges merely indicates that there is probably cause to go further.

With regard to other records that may have been compiled in relation to the charges, without greater knowledge of their contents, it would be inappropriate to conjecture as to rights of access. However, I believe that the principles expressed above would likely be applicable.

In addition, there may be another ground for denial which could properly be raised concerning records prepared prior to issuance of the charges. Section 87(2)(g) of the Law 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..."

The provision quoted above contains what in effect is a double negative. 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 final agency policy or determinations found within such records. Consequently, inter-agency or intra-agency materials consisting of advice, opinion or impression, for instance, may in my view be withheld.

Lastly, perhaps the charges were made based upon the disclosure of information by members of the public or students. In this regard, it is possible that the identities of such individuals would result in an unwarranted invasion of personal privacy. If that is the case, the names or other identifying details concerning such persons may in my opinion be deleted from records prior to disclosure of the remainder.

Once again, please accept my apologies for the lateness of my 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/kk

cc: Mark Stern

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1339

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

December 19, 1979

Ms. Dorothy Gallagher
[redacted]

Dear Ms. Gallagher:

I have received your letter of November 21. Please accept my apologies for the tardiness of my response, which I am pleased to report was due to the birth of my son.

Your inquiry concerns a denial of access to records regarding an investigation of a murder committed in 1943. Despite the substantial lapse of time between the event and your request, both the New York City Police Department and the Office of the District Attorney contend that the case is still under active investigation and have denied access on that basis.

You have also indicated in your letter that your request was not made out of mere curiosity, but rather that you are under contract with a publisher to write a biography regarding one Carlo Tresca.

In all honesty, there is little that I can do other than to recite and provide advice with respect to the interpretation of the Freedom of Information Law. Nevertheless, for reasons that will be described more fully, I believe that it would be difficult for either the District Attorney or the Police Department to sustain their burden of proof regarding the records sought in their entirety should you challenge the denial judicially.

From my perspective, there may be three grounds for denial that could conceivably be asserted by the agencies to which your requests have been directed.

First, §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."

If its true that disclosure would interfere with an investigation, a denial would be justified. Similarly, if disclosure of records would identify a confidential source, such information may also be withheld. However, it is important to note that the focal point of the Law, §87(2), states that an agency may withhold "records or portions thereof..." that fall within the grounds for denial that ensue. Consequently, I believe that the Legislature recognized that there may be situations in which records are both accessible and deniable in part. Therefore, the agencies in receipt of your request in my view are obliged to review the records sought in their entirety to determine which portions, if any, may be withheld with justification. For example, even if an investigation is ongoing, the agencies should release those records or portions thereof which, if disclosed, would have no effect upon the investigation.

Second, §87(2)(f) states that an agency may withhold records or portions thereof when disclosure would "endanger the life or safety of any person." Again, if disclosure of information would place a person in jeopardy, that portion of the record may be withheld. Nevertheless, if the substance of a record can be made available after having deleted identifying details, I believe that the agency in possession of the record is obliged to do so.

Third, §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 provision quoted above contains what in effect is a double negative. While 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 final agency policy or determinations found within such records. Under the circumstances, the factual data found within the records in which you are interested should be made available, unless another exception to rights of access can appropriately be cited as a basis for withholding.

Lastly, it is emphasized that §89(4)(b) of the Freedom of Information Law places the burden of proof on government in a judicial proceeding. Stated differently, the agency must prove that the records sought fall within the scope of §87(2)(a) through (h). Moreover, the Court of Appeals has held that an agency cannot merely assert grounds for denial and prevail; on the contrary, it must prove that the harmful effects of disclosure described in the grounds for denial would indeed arise [see e.g., Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979); and Doolan v. BOCES, 2nd Supervisory District of Suffolk Cty., 407 NYS 2d 538, 64 AD 2d 702 (1978)].

From my perspective, it may be difficult for a law enforcement agency to prove that a case initiated in 1943 is ongoing in 1979. Therefore, it may be equally difficult for an agency to meet its burden of proof under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ellen Fleysher, Deputy Commissioner
New York City Police Department

District Attorney, New York County

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1340

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

December 19, 1979

Mr. Russell Betters
[redacted]

Dear Mr. Betters:

As you are aware, I have received correspondence from both you and the Town of Oakfield regarding your request for a tape recording of a meeting. The tape was denied for reasons expressed in a letter sent to you by the Town Supervisor, Wilbur M. Bartholf.

Although I am unsure of the action that you may take if you obtain the tape and am equally unsure of whether the tape continues to exist, I feel obliged to inform you and the Town of my contentions regarding the denial of access.

The letter sent to you by the Town Supervisor indicates that the tape recorder and the tape were not purchased with public funds, but rather were purchased and used by the Town Clerk, Marcy Marble, "for her personal use in preparing the written minutes of the meetings". As such, the Town Supervisor has contended that they are private property and are neither subject to control by the Town, nor subject to rights of access granted by the Freedom of Information Law.

In my view, it is possible that a court may view the situation differently.

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..." While the tape and the tape recorder may be private property, and may have been used by the Town Clerk as an aid in preparing minutes, one question must be asked: Would

Ms. Marble use a tape recorder if she were not the Town Clerk? Similarly, would Ms. Marble prepare a tape recording if she were not doing so in the performance of her official duties as the Town Clerk? In short, it appears that the Town Clerk used her tape recorder and prepared the tapes in the performance of her official duties as Town Clerk. Therefore, I contend that the tape recording was produced for the Town and is a "record" subject to the Freedom of Information Law.

I believe that this contention is bolstered by two judicial decisions. In Zaleski v. Hicksville Union Free School District Board of Education (Sup. Ct., Nassau Cty., NYLJ December 27, 1978), it was held that tape recordings of a school board meeting constitute "records" that are available under the Freedom of Information Law. However, the decision did not make clear whether the tape recording was made through public funding or otherwise. Further, however, a similar argument was made in Warder v. Board of Regents of the State of New York [410 NYS 2d 742 (1987)]. In Warder, the Secretary to the Board of Regents contended that personal notes taken at meetings, which were also used as an aid in compiling minutes, were the personal property of the Secretary. The Court found that the notes were not personal property, but rather were "records" prepared in the course of official duties that were available after having made an in camera inspection to determine rights of access.

Based upon the foregoing, if it could be demonstrated that the clerk created and used the tape recordings in the performance of her official duties, I believe that it could be concluded that the tape recordings are indeed "records" subject to rights of access granted by the Law.

It is important to point out, however, that the tape recording need not in my view be preserved for posterity. In this regard, §65-b of the Public Officers Law prohibits a municipality from destroying records without the consent of the Commissioner of Education. In conjunction with §65-b, the Department of Education has developed schedules for the retention and disposal of records. Based upon conversations with representatives of the Education Department, I believe that a tape recording may be destroyed or erased, for example, shortly after its creation and when it has no further utility. Consequently, it is possible that the tape recording might no longer exist.

Lastly, if the tape recorded discussions held at an open meeting and any person could have been present to hear the deliberations that were recorded, including yourself, it is difficult from my perspective to understand why the tape recording should 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/kk

cc: Wilbur M. Bartholf

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1341

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

December 19, 1979

Mr. Robert J. Whalen
[redacted]

Dear Mr. Whalen:

I have received your letter of November 19. Please accept my apologies for the tardiness of my response, which I am pleased to report was due to the birth of my son.

Your inquiry raises questions regarding the legality of a policy (No. 8361.1) adopted by resolution by the Brentwood Board of Education under the Freedom of Information Law.

In my opinion, several aspects of the policy should be amended, for they fail to comply with the Freedom of Information Law.

The first subdivision of the resolution indicates that requests for tape recordings must be made on a Freedom of Information form. In this regard, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for a denial of access. On the contrary, any request made in writing that reasonably describes the records sought should suffice, for §89(3) of the Law merely requires that a request be made in writing reasonably describing the records in which the applicant is interested.

Subdivision (4) provides that an individual "shall be billed on the basis of $5.00 for any part of the first hour and $2.50 for any part of each additional half hour for the time necessary to play the tape for the person requesting same." In my view, the provision concerning fees fails to comply with the Freedom of Information Law. Specifically, §87(1)(b)(iii) of the Law states that an agency may charge no more than twenty-five cents per photocopy, or the actual cost of reproducing any other records,

such as those that are not subject to conventional photocopying means, i.e., tape recordings. Further, §1401.8(a) of the regulations promulgated by the Committee (see attached), which have the force and effect of law, provides that an agency may not charge for inspection of records or a search for records. In addition, it is important to note that a judicial decision held that a tape recording of an open meeting is available and that an agency may assess a fee based only on the cost of reproducing a tape recording (see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, December 27, 1978). Although it was argued in Zaleski that it would be burdensome and costly to reproduce tape recordings, the court stated that:

> "[T]here is no exemption provided in Public Officers Law, Section 87(2) for requests which may be burdensome and 21 NYCRR Section 1401.8(c)(3) specifically provides that the agency may not include personnel salaries in assessing reproduction costs. Accordingly, the court finds no merit to respondent's objections and directs that the records be produced within twenty days after the entry of the order herein."

In view of the foregoing, I believe that the School District has two options. If an individual seeks to listen to a tape recording, I believe that such a service should be provided at no cost, for such activity essentially involves "inspecting" a record. On the other hand, if an individual seeks a copy of a tape recording, the District may charge on the basis of the actual cost of reproduction i.e., the cost of a new cassette.

With respect to the designation of a records access officer, §1401.2 of the Committee's regulations requires that the governing body of a public corporation, such as a school board, designate one or more persons as records access officer by name or job title. If the District has not done so, such steps should in my opinion be taken.

Lastly, you have contended that a legal notice must be placed annually regarding the means by which an agency publicizes its responsibilities under the Freedom of Information Law. That is not entirely true, for §1401.9 of the Committee's regulations requires that:

> "[E]ach agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation:
>
> (a) The location where records shall be made available for inspection and copying.
>
> (b) The name, title, business address and business telephone number ofthe designated records access officer.
>
> (c) The right to appeal by any person denied access to a record and the name and business address of the person or body to whom an appeal is to be directed."

Based upon the quoted provision, an agency has the option of posting a notice "and/or" placing a legal notice in a local newspaper of general circulation.

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

Enc.

cc: Brentwood School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1342

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

December 20, 1979

Mr. David Greenberg
Greenberg & Wanderman
35 North Madison Avenue
Spring Valley, New York 10977

Dear Mr. Greenberg:

As you are aware, I have received your letter of December 3 concerning the propriety of disclosure of student records to a school district attorney under the Family Educational Rights and Privacy Act (FERPA).

Since our conversation regarding your letter, I have contaced the FERPA office in Washington and have obtained a copy of a model policy that may be adopted by school districts under FERPA. A copy of the model policy has been attaced for your review and possible use.

The model policy is based upon the regulations promulgated by the Departmentoof Health, Education and Welfare pursuant to the FERPA. Relevant to your inquiry is §99.31 of the regulations, which states in relevant part that:

> "(a) An education agency or institutions may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is -
>
> (1) To other school officials, including teachers, within the education institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests..."

According to the FERPA official with whom I discussed your inquiry, a school district attorney may obtain educational records without prior consent of the parents if the attorney has been designated a "school official" pursuant to a policy adopted by a school district.

I direct your attention to the model policy which on page 8 describes criteria to determine which persons may be considered school officials for the purpose of disclosure without prior consent. The fifth criterion, which appears at the tope of page 9, includes:

> "[A] person employed by or under contract to the school board to perform a special task such as a secretary, a clerk, the school board attorney or auditor for the period of his or her performance as an employee or contractor."

Based upon the foregoing, I believe that the school districts that you represent may adopt a policy which facilitates your capacity to perform your official duties as their attorney.

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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1343

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

December 20, 1979

Mr. Irving Silver
[redacted]

Dear Mr. Silver:

I have received your letter of December 11 which raises questions concerning access to Welfare Records and automobile registration records in the possession of the Department of Motor Vehicles.

First, with respect to welfare records, the Social Services Law, §136, specifically 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..." Therefore, the Social Services Law precludes a social service department or agency from disclosing information that could identify a recipient of public assistance. The Freedom of Information Law does not affect §136 of the Social Services Law, for §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". Consequently, I believe that the denial was likely proper.

Second, you have stated that you are interested in learning the name and address of automobile owners by inspecting registrations. However, you have apparently been informed that such records are on tape in Albany and that a fee would be required in order to gain access to the information. You have stated, however, that you do not want to pay a fee, but rather would prefer to inspect the registrations in which you are interested.

As a general rule, the Freedom of Information Law does not enable an agency to assess a fee for searching records and restricts agencies from charging fees in excess of twenty-five cents per photocopy. These standards remain effective, "except when a different fee is otherwise prescribed by law" [see Freedom of Information Law, §87(1)(b)(iii)]. Under the circumstances, there are search fees and higher copying fees permitted by §202 of the Vehicle and Traffic Law. Specifically, the cited provision states in relevant part that:

> "2. Fees for searches. The fee for a search shall be two dollars except, that a fee of one dollar shall be charged if the request for information is submitted in a form and manner which shall permit the request to be machine processed rather than manually processed by personnel of the department, and receipt and distribution costs are borne by the requester. The commissioner shall prescribe the form and procedure to be used in order for a request to be eligible to be processed for such one dollar fee. If certification of a search is requested, there shall be an additional fee of fifty cents.
>
> 3. a. Fees for copies of records and documents. The fees for copies of records and documents, other than accident reports, shall be one dollar per page. A page shall consist of either a single or double side of any document. The fee for a copy of an accident report shall be three dollars and fifty cents. If certification of a copy of a record or document is requested, there shall be an additional fee of fifty cents. The fee for a copy of any such record or document shall be in addition to any fee for the search or searches required to be made in conjunction with such request."

In view of the foregoing, it is clear that the State Department of Motor Vehicles may assess fees for searching records as well as fees in excess of twenty-five cents for copies. Further, as subdivision (2) indicates, it may be less expensive to gain access to a record produced by the computer than if produced based upon a manual 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/kk

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 423
FOIL-AO- 1344

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

December 20, 1979

Mrs. Gail D. Bradley
Village Clerk
Village of Macedon
Macedon, New York 14502

Dear Mrs. Bradley:

Thank you for your letter of December 12 and your interest in complying with the Open Meetings Law.

You have asked a series of questions regarding the Zoning Board of Appeals of the Village if Macedon in conjunction with the Open Meetings Law.

First, it is important to note at the outset that the deliberations of a zoning board of appeals may be considered "quasi-judicial" in nature. In this regard, §103(1) of the Open Meetings Law states that quasi-judicial proceedings are exempt from the Open Meetings Law. Stated differently, the Open Meetings Law does not apply to those aspects of a public body's duties that may be considered "quasi-judicial".

Nevertheless, even though a village zoning board of appeals may engage in quasi-judicial proceedings, the exemption in the Open Meetings Law concerning such proceedings is in my view of no effect with respect to a village zoning board of appeals.

Section 105(2) of the Law provides that any other provision of law less restrictive than the Open Meetings Law remains in effect. One such provision is §7-712 of the Village Law, which has long required that "[A]ll meetings of such board shall be open to the public". Due to the direction provided by §7-712 of the Village Law, it has been consistently advised that village zoning boards of appeals must conduct their meetings open to the public.

It is noted that litigation is pending concerning the same issue relative to a town zoning board of appeals. In this regard, §267(1) of the Town Law provides virtually the same language as §7-712 of the Village Law and directs that all meetings of town zoning boards of appeals must be open to the public (see Matter of Katz, Sup. Ct., Westchester Cty., NYLJ, June 25, 1979). To further explain the legal issues involved, I have enclosed an earlier advisory opinion on the subject as well as a copy of the decision rendered in Katz.

Assuming that the Katz decision is correct, meetings of a zoning board of appeals should be preceded by notice given in accordance with §99 of the Open Meetings Law.

Further, in the Orange County case cited in my earlier opinion, the Appellate Division held that the portion of a meeting which involves the making of a decision and the taking of votes is not quasi-judicial and must be conducted in public [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Specifically the court stated that:

> "[W]e agree with Special Term that there is a distinction between that portion of a meeting of the zoning board wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly nonjudicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" (id. at 418).

Finally, secret ballot voting is prohibited. Section 87(3)(a) of the Freedom of Information Law, which concerns access to records, requires that each agency maintain "a record of the final vote of each member in every agency proceeding in which the member votes". Therefore, in each instance in which the zoning board of appeals votes, a record must be compiled which identifies each member and how that person voted.

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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1345

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

December 20, 1979

Mr. John C. Baumgarten
Executive Director
Delaware Opportunities, Inc.
129 Main Street
Delhi, New York 13753

Dear Mr. Baumgarten:

I have received your letter of December 6, which concerns a request directed to Mr. Hodges, Director of the New York State Department of Labor CETA Operations. You have indicated further that Mr. Hodges did not provide any of the records in which you were interested, but rather cited a particular provision of the CETA rules and regulations.

The section of the regulations sent to you requires that:

> "[E]ach recipient shall establish and maintain a procedure fore resolving any complaint alleging a violation of the act, regulations, grant or other agreements under the act, including any complaint arising in connection with the CETA programs operated by its subrecipients procedures must meet the requirements of this section."

With respect to the foregoing, I would agree that the procedure that you requested is apparently required to be established pursuant to the portion of the regulations sent to you by Mr. Hodges.

Further, assuming that such a procedure has been established, it is clearly available under the Freedom of Information Law, for agencies are required to make available "final agency policy or determinations" [see attached, Freedom of Information Law, §87(2)(g)(iii)]. Conversely, if the agency represented by Mr. Hodges has not developed such a policy, it would appear that it is required to do so in order to comply with federal 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/kk

cc: Mr. Hodges

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1346

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

December 26, 1979

Mr. Robert F. Reninger

[redacted]

Dear Mr. Reninger:

I have received your letter of December 21 regarding an apparent denial of access to a subject matter list regarding student records by the Greenburgh Central School District. You have asked for the legal basis for the creation of a subject matter list or a "finders list", as you have characterized it.

In general, the Freedom of Information Law does not require that records be compiled in response to a request [see attached Freedom of Information Law, §89(3)]. However, §87(3) of the Law does require an agency to compile and maintain three types of documents. Relevant to your inquiry is §87(3)(c), which states that each agency must 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 foregoing, a school district must in my view maintain a subject matter list in reasonable detail pertaining to all of its records, whether or not they are available.

With regard to student records, it is important to note that the Family Educational Rights and Privacy Act (20 U.S.C. 1232g) provides that an educational agency or institution is prohibited from disclosing education records identifiable to particular students without the consent of the parents of the students. However, as §87(3)(c) states, the subject matter list must make reference by category to all records, even those which may be deniable.

Another helpful tool related to your inquiry might be the retention and disposal schedules developed by the Education Department. These schedules are created under §65(b) of the Public Officers Law, which in brief states that a school district or other public corporation cannot destroy records without the consent of the Commissioner of Education. In order to regularize the disposal of records, the Education Department has developed a series of schedules for the retention and disposal of particular records. In many instances, the schedules are more detailed than a subject matter list must be.

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

Enc.

cc: Greenburgh Central School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1347

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

December 26, 1979

Harold Davis, Esq.
Davis & Davis
116 John Street
New York, New York 10038

Dear Mr. Davis:

As you are aware, I have received your package of materials regarding requests for records made by your client, Mrs. Linda D. Cirino. The Board of Education of the City of New York has also sent materials regarding the requests made by Mrs. Cirino.

It is emphasized at the outset that the ensuing paragraphs have been prepared in the spirit of conciliation and mediation. While I can understand the reasons for a request made by a scholar such as Mrs. Cirino, I can also understand the recalcitrance on the part of the Board of Education to disclose some of the information sought. I am hopeful, however, that an accommodation can be reached and that litigation, which is both costly and time consuming to your client, the Board of Education, and, therefore, the taxpayer, can be avoided.

I would like to view the situation from three perspectives: first, the purpose of an archives; second, rights of access granted by the Freedom of Information Law; and third, a possible means of reaching a satisfactory agreement for both your client and the Board of Education.

By way of background, the records in question were compiled in conjunction with the enforcement of the so-called "Feinberg Law", which as you indicated, was found unconstitutional by the U.S. Supreme Court [Keyisian v. Board of Regents, 385 U.S. 589 (1967)]. In addition, thirty teachers who had been ousted or forced to leave the school system under the Feinberg Law were reinstated following the Keyisian decision. In order to maintain an

historical record of the treatment of and evidence developed regarding the Feinberg Law, many boxes of records have been preserved and identified by the Columbia Teachers College and its archivist. The records may now be considered part of an archives according to the information submitted.

In my view, the purpose of an archives is to maintain and preserve records that no longer have ongoing value or utility to the agency that once maintained them, but which may have historical value. In this regard, one question must of necessity be raised: why would records be kept in an archives unless they are to be used and reviewed for historical research purposes? Under the circumstances, it would appear that if the records in question are to be maintained, they are being maintained for reference purposes, for scholarly research, and for their historical value. In fact, as stated in the preface to the index to the boxes of records, "[T]he purpose of this list is to offer assistance to researchers seeking primary source material on public education in New York City." The point here is that it is apparently inconsistent on the one hand to seal the records developed in relation to the Feinberg Law while concurrently preserving them due to their historical or research value.

Additionally, I have obtained from the State Archivist information which tends to bolster the contention that the records transferred from the Board of Education to the Teachers College at Columbia University were intended to be made available. Specifically, a letter of "understanding" (see attached letter dated February 21, 1975), sent to Harold Siegel, Secretary of the Board of Education, by Diane Ravitch, a professor at the Teachers College, stated in relevant part that:

> "[T]eachers College, as befits its national and international reputation as a center for the study of the history of education, will assure public access to the Archival Collection, with due regard for the security of the materials."

As such, there appears to have been an agreement, if not an intent, that the Board's records of historical value deposited at the archives at Columbia should be open for research purposes. There is no stipulation of which I am

aware that could be cited as precedent for the Chancellor's direction that records be sealed until the year 2000.

With respect to the Freedom of Information Law, first, §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."

Although the records may be in the physical custody of the Teachers College, the response to your requests indicates that they continue to be in the legal custody of the New York City Board of Education. In fact, the letter of agreement to which reference was made earlier specifically states that Teachers College acts "as the repository for these materials, which remain the sole possession of the Board of Education." Therefore, it appears fair to conclude that all of the materials sought constitute "records" subject to rights of access granted by the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. In brief, §87(2) of the Law states that all records are available, except those records or portions thereof that fall within one or more enumerated grounds for denial appearing in paragraphs (a) through (h) of the cited provision. It is noted at this juncture that the Freedom of Information Law is permissive. Although an agency may withhold certain records or portions of records falling within one or more of the grounds for denial listed in the Law, it need not. If, for example, it would be in the public interest to disclose records that might otherwise be considered deniable, there is nothing in the Law that would preclude an agency from so doing.

In Chancellor Macchiarola's letter to you of November 7, §87(2)(a), (b), (e) and (g) of the Freedom of Information Law were cited as grounds for denial. I would like to deal with each ground for denial offered.

The initial ground is §87(2)(a), which states that an agency may withhold records or portions of records that are "specifically exempted from disclosure by state or federal statute." Records may be exempted from disclosure by statute only in situations in which an act passed by the State Legislature or by Congress specifically prohibits an agency from disclosing particular records. This exception is in my view limited to two situations relative to the records sought. It is possible that some records were prepared pursuant to an attorney-client relationship. To the extent that the attorney-client privilege is applicable, the records may in my view be justifiably withheld, for the CPLR, §4503, makes communications between an attorney and his or her client confidential. Based on a review of the "checklist", the other instance in which a record might be considered confidential would pertain to attorney work product or material prepared for litigation under certain circumstances [see CPLR, §3101(c) and (d)]. Having reviewed the checklist prepared by the archivist, it is unclear how much of the documentation would be "exempt from disclosure by statute"; however, it would appear that the circumstances under which the exemptions could be cited would be minimal. Further, if documentation that could otherwise be considered exempt had at some point been disclosed to a third party, the privilege would in my opinion have been waived. In addition, it is possible that some of the records may have been submitted into evidence or served upon a court, thereby making them public.

The second ground for denial is §87(2)(b), which states that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". In addition, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy. In my view, the examples represent merely five illustrations among conceivable dozens of unwarranted invasions of personal privacy. Further, it is important to point out that subjective judgments must often be made under

the privacy provisions in order to reach a conclusion. It may often be difficult to reach what might be considered a "fair" conclusion, for one reasonable person might argue that disclosure of particular records would result in an "unwarranted" invasion of personal privacy, while an equally reasonable person might argue that disclosure of the same records would result in a permissible invasion of personal privacy.

Nevertheless, several points should be made with regard to the privacy provisions. First, it is possible that some of the individuals to which reference is made in the records may be living. In those situations, certainly there would appear to be serious privacy considerations. With respect to those individuals who may be dead, I question whether the privacy provisions could be successfully asserted. Although New York courts have not dealt with the issue of privacy of the deceased under the New York Freedom of Information Law, I believe that the federal courts have held that the analogous exception in the federal Freedom of Information Act (5 U.S. §552) cannot be appropriately asserted to withhold records identifiable to a person who has died.

Further, §89(2)(c) provides 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."

In this regard, you have written that several of those identified in the records have produced signed and notarized waivers regarding records identifiable to them. In my opinion, the waivers are applicable only in situations in which the sole ground for denial that may be cited concerns the protection of privacy under §87(2)(b). As stated in the introductory language of §89(2)(c), a waiver may be effective, "unless" a different ground for denial may appropriately be asserted. Therefore, if, for example, a person who has issued a waiver is identified in a record that is confidential under the attorney-client privilege, that person has nothing to waive. If, on the other hand, a factual memorandum was prepared concerning a particular individual and the only ground for denial is §87(2)(b), a waiver by a person cited in the record would in my opinion effectively remove the capacity to deny on the part of the Board of Education.

The third ground for denial cited by the Chancellor 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;
>
> 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 provision quoted above is based largely upon the effects of disclosure. Presumably, there is no investigation at the present time regarding any of those identified in the records. Similarly, no one would apparently be deprived of a right to a fair trial or impartial adjudication due to disclosure. The next ground in §87(2)(e) concerns the identification of a confidential source relating to a criminal investigation, and the fourth concerns non-routine criminal investigative techniques or procedures.

In my view, the key word in the last two grounds for denial appearing in §87(2)(e) is "criminal". In this regard, the courts under both the original Freedom of Information Law and as amended have held that the "law enforcement purposes" exception can be asserted only by a criminal law enforcement agency [see e.g., Young v. Town of Huntington, 388 NYS 2d 978 (1976); Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)]. Since neither the Board of Regents, the State Education Department, nor the City Board of Education could be considered "criminal" law enforcement agencies, I do not believe that §87(2)(e) can be properly asserted as a ground for denial. Even if §87(2)(e) could be asserted, it would appear that the only aspect of the provision that would continue to be effective concerns confidential informants. Assuming that records do identify a confidential source or informant, that portion of the record could be deleted while providing access to the remainder.

The last ground for denial cited by the Chancellor is §87(2)(g), which 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, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records. Under the circumstances, many of the records to which reference was made in the checklist might be characterized as "intra-agency materials". Nevertheless, to the extent that they contain statistical or factual data, instructions to staff that affect the public, or agency policy or determinations, they are available. In

addition, the Court of Appeals recently held that statistical or factual data found within inter-agency or intra-agency materials are independently available, whether or not such data was or will ever be used in the formulation of decisions or policy [Doolan v. BOCES, 2nd Supervisory District of Suffolk County, 64 AD 2d 702 (1978), revised November 27, 1979, _____NY 2d_____, NYLJ, p. 1, Dec. 19, 1979].

With respect to each of the potential grounds for denial discussed in the preceding paragraphs, it is important to point out that the Law enables an agency to withhold records "or portions thereof" that fall within one or more of the grounds for denial listed in the Law. In my opinion, the language concerning "records or portions thereof" is reflective of a recognition on the part of the Legislature that there may be instances in which a record may be accessible or deniable in part. Consequently, I believe that when an agency receives a request, it is obliged to review the records sought in their entirety to determine which portions, if any, may justifiably be withheld. Moreover, the Court of Appeals has held that an agency cannot merely assert grounds for denial and prevail. On the contrary, the Court held that the agency must prove that records withheld fall within one or more of the grounds for denial, which, as stated earlier, are based largely upon the effects of disclosure [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979); Doolan, supra].

From my vantage point in Albany and without having seen the records in question, the foregoing merely represents thoughts and direction regarding the interpretation of the Freedom of Information Law relative to the controversy. Unless some middle path can be found, it is possible that litigation might ensue. As noted earlier, litigation would be costly and time consuming and would likely require substantial in camera inspection by a court. Perhaps, however, an agreement can be reached.

First, having reviewed the checklist, it is clear that some of the documentation stored at the archives had in the past been made public. For example, news clippings, transcripts of public hearings and similar documents should in my opinion be made accessible, for they have been and may be in possession of many individuals and available from various other sources. Also, it appears

that information may have been obtained from voter registration lists, which are public, and various other sources of public information. In this situation, the advantage to a scholar is that virtually all of the information on a particular subject has been stored at a single location, thereby obviating the difficulty of tracking down various "sources" of information.

Second, and perhaps most important is the issue of privacy. Although you have indicated that your client has obtained signed waivers from several persons named in the records, it is not clear whether she has attempted to gain waivers from others who have refused. In this regard, as noted earlier, often subjective judgments must be made regarding whether disclosure would result in a permissible or an unwarranted invasion of personal privacy. From my perspective, the best judge of the effects of disclosure may be the subject of the records. If a person has granted a waiver, presumably that person believes that disclosure would not be harmful or result in an unwarranted invasion of personal privacy. Others, however, might feel otherwise and wish to prevent old memories or events from arising again. Therefore, it is suggested that if particular individuals have refused to grant waivers, such refusals should be given weight in determining whether disclosure would result in an unwarranted invasion of personal privacy.

Third, to avoid litigation, perhaps your client and the Board could agree to select an impartial reviewer of the records to determine which records or portions thereof may justifiably be withheld under the Freedom of Information Law. Although such a step might result in some delay, certainly it would be less costly and time consuming than judicial review of a denial of access that could reach the state's highest court.

And fourth, I have had numerous dealings with the State Archivist, Dr. Edward Weldon, regarding similar situations. In such cases, the equivalent of contractual agreements have been created which set forth the ground rules for the disclosure and use of information. Such a solution is far from perfect, for some might argue that it essentially results in censorship. Nevertheless, in many instances a good faith researcher may be more interested in historical trends and findings than particular

individuals identified in the records. Perhaps such an agreement could be reached among your client, the Board of Education and the archivist at Teachers College. If such an agreement is feasible, I would be most pleased to contact the State Archivist for the purpose of obtaining copies of what may be considered model agreements between the Archives and researchers.

In sum, I would like to reiterate that my intent in preparing this opinion has been to present an interpretation of the Freedom of Information Law which is solely advisory in nature and to provide what may be a catalyst for the settlement of a dispute in order to avoid litigation. While the contents of many of the records may be sensitive, I do not believe that all of the records can justifiably be "sealed" for the next two decades. On the contrary, I would hope that good faith efforts can be made by your client, your firm and by the Board of Education to reach an understanding.

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/kk

cc: Dr. Amelia Ashe
Linda D. Cirino
Jane P. Franck
Frank J. Macchiarola
Miguel O. Martinez
Harold Siegel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1348

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

December 27, 1979

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, enclosed are four pamphlets entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", which may be useful to you and the new members of the Town Board.

Your question is whether town law books are considered "records" subject to rights of access under the Freedom of Information Law. Although the definition of "record" appearing in §86(4) of the Law is broad, I do not believe that the Freedom of Information Law was intended to enable members of the public to use a government office as a library.

Furthermore, I believe that the Copyright Act would preclude furnishing copies of law books on the same basis as records generally in possession of government.

For example, the Freedom of Information Law is Article 6 of the Public Officers Law. The Public Officers Law is a volume published by a particular publishing house, which copyrights its volumes. In the past, when individuals have requested copies of the Public Officers Law in its entirety, I have recommended that they write to the publishing company to request a copy from the company. The reason for so doing is based upon the Copyright Act, which prohibits duplication of copyrighted materials, except in the case of a "fair use". Under the "fair use doctrine", portions of copyrighted materials may be duplicated under certain circumstances. For instance, while I would violate the Copyright Act by reproducing the Public Officers Law in its entirety, it would constitute a "fair use" to copy only Article 6.

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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1349

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

COMMITTEE MEMBERS
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BASIL A. PATERSON
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GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 31, 1979

Ms. Rita J. DeGlopper
Town Clerk
The Town of Grand Island
2255 Baseline Road
Grand Island, New York 14072

Dear Ms. DeGlopper:

Thank you for your interest in complying with the Freedom of Information Law. Your question concerns the status of tape recordings under the Freedom of Information Law.

In my opinion, although tape recordings are available, I do not believe that they must be retained for any particular period of time.

First, a tape recording is a "record" subject to rights of access granted by the Law. Section 86(4) of the Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency. Since as Town Clerk, you employ a tape recorder and use a tape recording in the performance of your official duties, I believe that a tape recording is clearly a "record".

Second, case law has held that tape recordings of open meetings are available [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978] and that notes taken at a meeting and later used as an aid in compiling minutes are also available [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. Consequently, if a tape recording exists, I believe that it is available for either listening or reproduction.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1350

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

December 31, 1979

Mr. KAJ Gottlieb
[redacted]

Dear Mr. Gottlieb:

I have received your letter of December 14, which concerns your unsuccessful attempts to gain access to records contained in your personnel file from your employer, the Department of Correctional Services. According to your letter, officials of the Department maintain that they are willing to provide you with only those records they consider to be necessary for you to defend yourself "against wrong doing by the department".

Without knowing more about the nature of the controversy in which you are involved, it is all but impossible to provide specific advice. Nevertheless, if the statements made in your letter are accurate, I believe that the basis for withholding records is misplaced.

One of the cornerstones of the Freedom of Information Law is that accessible records should be made 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]. Consequently, the only question that an agency may ask when it receives a request for records is the extent, if any, to which the records fall within one or more grounds for denial listed in the Law. Therefore, the necessity of your obtaining records or their materiality to your dispute are irrelevant; the only question is whether or not they are available.

Second, the Freedom of Information Law is based upon a presumption of access. In brief, §87(2) states that all records in possession of government are available, except those records or portions thereof that fall within one or more grounds for denial described in paragraphs (a) through (h) of the cited provision.

Third, since the records in which you are interested are apparently contained in a personnel file or something like it, the most relevant exception to rights of access is likely §87(2)(g), which 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 provision quoted above contains what in effect is a double negative. 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 final agency policy or determinations found within such materials.

Under the circumstances, memoranda or correspondence, for example, transmitted among or between officials of the Department of Correctional Services could be characterized as "intra-agency" materials. Nevertheless, again, to the extent that they contain statistical or factual data, instructions to staff that affect the public or final agency policy or determinations, such records should be made available.

Further, it is possible that the file contains records which if disclosed would result in "an unwarranted invasion of personal privacy", which may be denied on that basis [see Freedom of Information Law, §87(2)(b)]. 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."

Stated differently, records pertaining to you should be made available if other grounds for denial cannot be properly asserted, if identifying details concerning others can be deleted, and if you present reasonable proof of your identity relative to a request for records pertaining to yourself.

Enclosed for your consideration is an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" which may be useful to you. In addition, a copy of this response will be transmitted to the records access officer of the Department of Correctional Services in Albany.

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/kk

cc: Robert Gaffigan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1351

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

December 31, 1979

Ms. Blanche Block
[redacted]

Dear Ms. Block:

I have received your letter of December 12, which concerns your unsuccessful attempts to gain access to census records from 1892 from the Office of the County Clerk in Kings County.

I believe that the census records are available, but I am not sure that you can "see" the records. It is possible that you may be required to pay a fee for a search for records requested which may later be copied.

In my opinion, census records in possession of a 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 records or portions of records 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 in my view accessible, except to the extent that they contain the confidential information previously discussed.

It is noted that §87(2)(b) of the Law permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". Nevertheless, I do not believe that the privacy provisions could appropriately be cited in this instance, for the information in question is of an historical nature.

Finally, with respect to fees, §87(1)(b)(iii) of the Freedom of Information Law states that a maximum of twenty-five cents per photocopy may be assessed, "except when a different fee is otherwise prescribed by law". In this case, there is a different fee prescribed by law. Specifically, §8021(d) of the Civil Practice Law and Rules, which relates to fees that may be charged by county clerks, states that:

> "[F]or certifying to a search of any records, other than those in an action or relating to real property, in the counties within the city of New York, for a consecutive two-year period or fraction thereof, for each name so searched, five dollars, and in all other counties for a consecutive five-year period or fraction thereof, for each name so searched, one dollar; except that in the counties within the city of New York, when the records so searched are the census records of the state of New York, the charge shall be one dollar for a consecutive two-year period or fraction thereof."

In view of the foregoing, it is clear that the County Clerk has the legal authority to charge for a search, whether or not the search results in locating the information sought. Further, the fact that there is specific reference to census records in §8021(d) of the Civil Practice Law and Rules infers that there is an intent in the Law to provide access to the census information in which you are interested.

It is suggested that you discuss the provision quoted above with the County Clerk prior to renewal of your request in order to insure that you will not be charged a fee unless there is an intent to make the records sought available, if they exist.

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/kk

Enc.

cc: Seymour Bisunder
Anthony N. Durso