STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1352

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

January 2, 1980

Mr. Thomas J. O'Brien
Director
Fulton County Substance
Abuse Council
29 Fay Street
Gloversville, New York 12078

Dear Mr. O'Brien:

I have received your letter and apologize for the delay in response.

You have indicated that you have attempted to obtain a yearly report for 1978 from the Fulton County Probation Department without success. In addition, according to your letter, you were informed by the County Department that its request for permission to gain access to similar information from the State Division of Probation was denied.

I have contacted the State Division of Probation on your behalf and believe that you will soon receive the information in which you are interested.

Generally speaking, county probation departments do prepare annual reports. However, the State Division of Probation prepares the equivalent of annual reports for three counties, Fulton, Warren and Montgomery. Consequently, the Fulton County Division of Probation does not prepare an annual report.

Nevertheless, having discussed the matter with the Counsel to the Division of Probation, I was informed that its annual report contains much of the information in which you are interested. Further, it was agreed that the statistics that you are seeking are available, for the Freedom of Information Law grants access to "statistical or factual tabulations or data" found within inter-agency or intra-agency materials [see attached Freedom of Information Law, §87(2)(g)].

A copy of your letter will be sent to Margot Thomas, Counsel to the Division of Probation, who will send you a copy of the Division's Annual Report, which includes statistics relative to Fulton 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

Enc.

cc: Margot Thomas

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1353

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 2, 1980

Edward G. McCabe, Esq.
County Attorney
County of Nassau
Nassau County Executive Building
Mineola, New York 11501

Attention: Louis Schultz

Dear Mr. McCabe:

Thank you for sending materials regarding Klein v. Rozzi. Although I concur with most of your findings, I disagree with one aspect of the denial of access.

Specifically, in a letter addressed to Mr. Klein dated November 29, 1979, access to payroll information concerning employees of the Nassau County Police Department was withheld on the ground that the records are exempted from disclosure pursuant to §50-a of the Civil Rights Law, and therefore, deniable under §87(2)(a) of the Freedom of Information Law.

I disagree with the denial based upon the following contentions.

First, as you are aware, §87(3)(b) of the Freedom of Information Law requires that each agency maintain a payroll record which identifies every employee of an agency by name, title, public office address and salary. In my opinion, the only exception to rights of access appearing in §87(2)(a) through (h) of the Freedom of Information Law that could appropriately be cited with respect to payroll information is §87(2)(f). The cited provision states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person". In my view, disclosure of the identities of police officers would not in most instances endanger their life or safety. In the rare circumstance in which a law enforcement agency has engaged employees in undercover positions, for example, §87(2)(f) could likely be cited with justification as a

basis for deleting those portions of a payroll record which identify such individuals.

Second, I do not believe that §50-a of the Civil Rights Law can properly be cited as a basis for withholding. Most relevant under the circumstances is subdivision (1) of §50-a, which states that:

> "[A]ll personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law shall be considered confidential and not subject to inspection or review without the express written consent of such police officer except as may be mandated by lawful court order."

From my perspective, the focal point in the provision quoted above is the idea that personnel records of police officers "used to evaluate performance toward continued employment or promotion" may be withheld. A payroll record is maintained in the ordinary course of business. It is merely a record of who is employed, what a person's title might be, and the salary received. I cannot understand how a payroll record could be "used to evaluate performance toward continued employment or promotion".

Consequently, in my opinion, the only basis for withholding payroll information would be under §87(2)(f) of the Freedom of Information Law, which, as mentioned earlier, could likely be cited with justification only in rare instances.

I hope that 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-1354

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

January 3, 1980

William T. Stevens, Esq.
71 North Main Street
Freeport, New York 11520

Dear Mr. Stevens:

I have received your letter of December 19, which describes an unusual situation in which your client had been placed in custody of sheriff's deputies based upon a warrant that identified your client by name, but which obviously described a different person with the same name. You have also indicated that a similar situation arose several years earlier.

Your question is whether the Freedom of Information Law provides access to records in possession of the sheriff pertinent to the description of the person intended for the arrest.

Relevant to your inquiry are provisions of both the Criminal Procedure Law and the Freedom of Information Law.

First, §120.80(2) of the Criminal Procedure Law states in part that:

> "[U]pon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible."

Consequently, your client and presumably you, as his attorney, had the right to review the contents of the warrant at the time of the arrest.

Second, subdivision (2) of §120.10 of the Criminal Procedure Law describes the "form and content" of a warrant arrest. The cited provision states that:

> "[A] warrant of arrest must be subscribed by the issuing judge and must state or contain (a) the name of the issuing court, and (b) the date of issuance of the warrant and (c) the name or title of an offense charged in the underlying accusatory instrument, and (d) the name of the defendant to be arrested, or if such be unknown, any name or description by which he can be identified with reasonable certainty, and (e) the police officer or officers to whom the warrant is addressed and (f) a direction that such police officer arrest the defendant and bring him before the issuing court."

In view of the foregoing, a warrant of arrest "must state or contain....any name or description by which he [a defendant] can be identified with reasonable certainty."

Third, the Freedom of Information Law is based upon a presumption of access. Specifically, 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 grounds for denial enumerated in paragraphs (a) through (h) of §87(2). As a general rule, the grounds for denial are based upon the effects of disclosure.

It would appear that two of the grounds might have a bearing upon rights of access to records developed by the sheriff prior to the arrest.

Section 87(2)(e) provides that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which is 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 the person intended to be arrested was indeed arrested, it is likely that the investigation has been terminated. Therefore, it is unlikely that disclosure would interfere with an investigation, for example. If the records identify a confidential source, those portions of the record may be deleted. If there was an indictment and a trial, it is possible that the harmful effects of disclosure described in §87(2)(e) may have disappeared, thereby making the records available. In addition, it is possible that court records might contain the information that you are seeking.

The other ground for denial that may be relevant 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." The capacity to cite §87(2)(b) as an appropriate ground for denial would depend largely upon the contents of the records. For instance, if there may have been witness statements providing descriptions of the intended defendant, the portions of records indicating their identities could be deleted from the records to protect privacy, while the remainder of the records could be made available.

Lastly, the provisions of §160.50 of the Criminal Procedure Law may be important in terms of rights of access to records and to your client. In brief, that provision states that "upon the termination of a criminal action or proceeding against a person in favor of such person", records of an arrest, including photographs, fingerprints, and other records an papers, may be sealed. Therefore, if your client was photographed and fingerprinted, those items may be sealed in conjunction with the provisions of §160.50 of the Criminal Procedure Law. Similarly, if the actual defendant intended to be arrested was indeed arrested, but the criminal action or proceeding against that person was terminated in his favor, those records may have been sealed.

In sum, I feel that the most that I can do is provide you with direction, for both the factual circumstances surrounding the event and rights of access are questionable. Enclosed for your consideration is an explanatory pamphlet 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1355

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

January 8, 1980

Mr. Frederick J. Carpenter
[redacted]

Dear Mr. Carpenter:

I have received your letter concerning your unsuccessful attempts to gain access to accident reports from your employer, the Kings Park Psychiatric Center. Based upon your letter, it appears that the accident reports concern employees, rather than patients at the facility. This is an important point for reasons that will be discussed later. In addition, you have indicated that an employee involved in an accident completes a portion of a form, while the remainder is completed by his or her supervisor, which includes questions regarding the cause of the accident, the possibility of negligence on the part of the employee, factors that may have contributed to the accident and similar questions.

Without having seen the accident form, I can provide only general advice. Further, I have contacted the Office of Counsel at the Department of Mental Hygiene in Albany, but that office was unable to provide specific direction. Nevertheless, I can offer you the following.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. In brief, 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 §87(2)(a) through (h) of the Law. In my view, three of the grounds for denial could potentially affect rights of access.

The first ground for denial that may be relevant is §87(2)(a), which states that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute." In other words, if the State Legislature or Congress has passed a law which prohibits an agency from disclosing, §87(2)(a) is applicable. With regard to your inquiry, §33.13 of the Mental Hygiene Law provides that records identifiable to patients at facilities under the aegis of the Department of Mental Hygiene are confidential. Therefore, if, for example, an accident report identifies a patient, that portion of the report must in my view be deleted in order to comply with the provisions of §33.13 of the Mental Hygiene Law.

A second possible ground for denial may be similar in its application. Specifically, §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." It is possible that other employees might be identified in an accident report. In such a case, if it is determined that disclosure of their names or other identifying details would result in an unwarranted invasion of personal privacy, such information may be deleted from the report.

The last and likely the most important ground for denial with respect 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 important to note 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.

In the context of the facts presented, the accident report could be characterized as an "intra-agency" document. However, to the extent that it consists of statistical or factual data, for example, I believe that is it accessible to you. Contrarily, if portions of the report consist of advice or opinion, for example, expressed by a supervisor, they would in my view deniable.

Enclosed for your consideration is a pamphlet that may be helpful to you in which the Freedom of Information Law is explained more fully and which includes sample request and appeal letters. In addition, it is suggested that you review your collective bargaining agreement, for it might provide rights of access to records in excess of 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:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1356

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

January 9, 1980

Mr. M. A. Aziz
70-A-0099
Drawer B
Stormville, New York 12582

Dear Mr. Aziz:

I have received your letter of December 31 in which you requested information regarding the proper procedure for obtaining documents from both state and federal government.

In this regard, it is noted that there are two applicable provisions of law. Access to records in possession of New York State government is determined by the provisions of the New York Freedom of Information Law. This Committee is responsible for overseeing the implementation of that Law and, as such, I have enclosed copies of the New York Freedom of Information Law, regulations that govern the procedural aspects of the Law, and an explanatory pamphlet that may be helpful to you.

Access to records in possession of federal agencies is governed by the federal Freedom of Information Act, a copy of which has also been attached. The federal Act includes reference to the basic procedural steps that should be followed.

I hope that I have been 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-1357

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

January 9, 1980

David Greenberg, Esq.
Greenberg & Wanderman
35 North Madison Avenue
Spring Valley, New York 10977

Dear Mr. Greenberg:

I have received your letter of December 31 regarding a situation in which the Division for Youth has refused to transmit to the school district that you represent psychological reports concerning students who transfer from facilities of the Division for Youth to the district.

Having discussed the matter with representatives of the Division for Youth and the Department of Health, Education and Welfare, I believe that the refusal to transmit the records is consistent with applicable provisions of law.

First and perhaps most importantly, §372 of the Social Services Law appears to preclude the Division for Youth from disclosing the records in which you are interested. Specifically, subdivision (4) of the cited provision states that:

> "[A]ll such records relating to such children shall be open to the inspection of the board and the department at any reasonable time, and the information called for under this section and such other data as may be required by the department shall be reported to the department, in accordance with the regulations of the department. Such records kept by the department 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."

Although the provision quoted above makes reference to a social services department, subdivision (6) of §372 states that:

> "[T]he provisions of this section as to records and reports to the department shall apply also to the placing out, adoption or boarding out of a child and the acceptance of guardianship or of surrender of a child."

Since the Division for Youth is involved in the "placing out" and the "boarding out" of children while working in conjunction with family courts and departments of social services, it appears that records in its possession concerning children are confidential.

In addition, 9 NYCRR §168.7 provides for the confidentiality of records identifiable to children "who are or have been under the care or supervision of the Division for Youth", except in circumstances specified in those regulations. Although the regulations provide that some educational records may be disclosed to a school to which a child may be sent, the nature of records that may be transmitted does not, according to the regulations, include psychological or similar reports or evaluations.

Lastly, it is possible that the Division for Youth might be considered an "educational agency or institution" subject to the Family Educational Rights and Privacy Act. However, even if the Division for Youth is subject to the requirements imposed by that Act, it would not be required to transfer education records, such as psychological reports, to a school district. While the regulations promulgated by the Department of Health, Education and Welfare under the Family Educational Rights and Privacy Act permit an educational agency or institution to disclose some records without the written consent of parents of a student or an eligible student, there is nothing in either the statute or the regulations that requires the disclosure of those records.

Therefore, even if the provisions of law cited earlier (§372 of the Social Services Law and 9 NYCRR §168.7) did not exist, the Family Education Rights and Privacy Act, if applicable, would not require the Division to transmit the records in question to a school district.

It is emphasized in closing that the officials of the Division with whom I discussed your inquiry expressed an appreciation of the concerns of the District, but concurrently believe that disclosure would violate extant provisions of law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Beverly Tobin, Esq.
Division for Youth

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1358

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

January 9, 1980

Ms. Myrna Slepian
District Clerk
Greenburgh Central School
District
475 West Hartsdale Avenue
Hartsdale, New York 10530

Dear Ms. Slepian:

Thank you for your letter of January 4, which in my view indicates that you and the Greenburgh Central School District have complied with the Freedom of Information Law in full with respect to requests made by Robert Reninger.

To be sure, I would like you to know that my letter of December 26 to Mr. Reninger was intended merely to give advice concerning particular areas of law relative to student records. Having reviewed that earlier letter, it was advised that the Freedom of Information Law does not require that records be compiled by the District, except in circumstances identified in §87(3) of the Freedom of Information Law, and specific note was made of the prohibition from disclosure required by the Family Educational Rights and Privacy Act.

Again, your interest and efforts in complying with the Freedom of Information Law are appreciated. If I can be of assistance to you in the future, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Robert Reninger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1359

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

January 9, 1980

Mrs. Thomas B. Hilston
[redacted]

Dear Mrs. Hilston:

As you are aware, your letter addressed to Attorney General Abrams has been transmitted to the Committee on Public Access to Records, which is responsible for giving advice with respect to the Freedom of Information Law. In addition, I have received a copy of a letter addressed to you by Charles F. Little, Jr., an Associate Attorney for the New York State Department of Health.

In his letter of January 8, Mr. Little advised that the record in which you are interested, an autopsy report concerning your late husband, is available to you under §677(3) of the County Law. I concur completely with Mr. Little's response to you.

However, in order to provide an additional explanation of your rights of access to government records, it is important to point out that there are two basic "freedom of information" provisions. New York has enacted its Freedom of Information Law, which governs rights of access to records in possession of state and local government in New York. There is also a federal Freedom of Information Act, which governs rights of access to records in possession of federal agencies. Therefore, as a general rule, requests for records in possession of government in New York should be made under the New York Freedom of Information Law.

In this instance, an additional provision of law, §677 of the County Law, provides specific direction regarding both access to and the confidentiality of autopsy reports. While the public generally cannot inspect or

copy autopsy reports, rights of access to such reports are granted to the "spouse or next of kin" of the deceased.

Enclosed for your consideration is an explanatory pamphlet concerning the Freedom of Information Law which may be useful to you 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Department of Law
Charles F. Little, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1360

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

January 10, 1980

Ms. Elaine Baxter
[redacted]

Dear Ms. Baxter:

I have received your letter of December 26 which concerns your unsuccessful efforts to gain access to information from the Tompkins County Support Collection Unit.

In all honesty, I am unsure of the nature of the records in which you are interested. However, I can provide you with the following advice.

First, I would conjecture that some of the records that you are seeking concern or have been involved in proceedings in the Family Court. Consequently, I would suggest that you attempt to discuss the issues with either a Family Court clerk or a Family Court judge in Tompkins County.

With respect to records in possession of the Family Court, §166 of the Family Court Act states in part that:

> "[T]he records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records".

Therefore, although the Family Court is not required to provide access to records, it may do so.

With respect to records in possession of a Department of Social Services, both §136 and §372 of the Social Services Law concern the confidentiality of welfare records. As a general matter, both of the cited provisions state that any records identifiable to either a recipient of or an applicant for public assistance are confidential.

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

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

In view of the foregoing, it is suggested that you seek to review records pertaining to you in possession of the Tompkins County Department of Social Services.

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-1361

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

January 10, 1980

Mr. Leo Chancer
[redacted]

Dear Mr. Chancer:

I recently received your letter of December 22 and the correspondence appended to it.

Based upon the materials, you have requested information from the Lakeland School District which has been denied on the ground that no records exist that are reflective of the information sought. In this regard, the Freedom of Information Law provides access to numerous existing records. However, §89(3) of the Law specifically provides that an agency need not create a record in response to a request, except in the case of records required to be maintained pursuant to §87(3).

Both the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, provide that an applicant may request a certification from an agency to the effect that records sought do not exist or cannot be located after having made a diligent search. If you continue to question the veracity of school district officials, it is suggested that you seek a certification, which must be made in conjunction with §89(3) of the Freedom of Information Law and §1401.2(b)(6) of the regulations.

Enclosed are copies of the Law, the regulations, and an explanatory pamphlet 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

Robert J. Freeman
Executive Director

RJF/kk
Encs.
cc: William McPhee,
Superintendent of Schools

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1362

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

January 10, 1980

Mr. Joseph P. Mangine
[redacted]

Dear Mr. Mangine:

I have received your letter of January 2 which again concerns information relative to the Albany Housing Authority.

Specifically, you have asked whether you may gain access to records that indicate the amount of rent paid to the Housing Authority regarding a particular unit in Westview Homes.

In this regard, my response must be based upon the manner in which the information in question is maintained.

First, §89(3) of the Freedom of Information Law provides that an agency need not create a record in response to a request. Therefore, if no record exists that is reflective of the information in which you are interested, the Housing Authority is under no obligation to create such a record in response to your request.

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." From my perspective, records indicative of the rent paid with respect to a particular unit could be withheld on the basis of the privacy provisions if the records could identify a particular individual or individuals.

Lastly, in the alternative, if the Housing Authority or Westview Homes has published a rent schedule concerning its facilities generally, which would be available, you might have the capacity to gain access to the information in which you are interested without the necessity of identifying any particular tenant.

I hope that 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-1363

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

January 10, 1980

Mr. Martin E. Clearo
[redacted]

Dear Mr. Clearo:

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

Your inquiry concerns an apparent refusal by the Lewis County General Hospital to provide you direct access to medical records concerning yourself.

In all honesty, rights of access concerning medical records by the individuals to whom the records pertain are somewhat unclear. Nevertheless, it appears that the response offered to you by the Lewis County General Hospital was consistent with existing provisions of law.

Most relevant under the circumstances is §17 of the Public Health Law, which states 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. Either the physician or hospital incurring the expense of providing copies of x-rays, medical records and test records including all laboratory tests pursuant to the provisions of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expenses."

Based upon the quoted provision, it appears that the subject of medical records has no direct rights of access to the records pertaining to him or her. However, many medical records may be obtained indirectly by means of a request made by a physician or hospital of your choice.

In addition, the rules and regulations promulgated by the New York State Department of Health include a section entitled "Patients' rights". I have enclosed a copy of the appropriate provisions for your consideration.

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: Joseph Cooper

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1364

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

January 11, 1980

Mrs. Donna Snyder
Correspondent
Buffalo Courier-Express
P.O. Box 253
Salamanca, New York 14779

Dear Mrs. Snyder:

I have received your letter of January 4 as well as the resolution adopted by the Cattaraugus County Planning Board at its meeting held on December 13. The resolution prohibits members of the news media from receiving "certain documents/and/or papers mailed to board members with agendas for upcoming meetings." Your question is whether the resolution is proper and consistent with the Freedom of Information Law.

In my opinion, the resolution is inappropriate in several respects and fails to give effect to the Freedom of Information Law.

First, the resolution is apparently directed only at members of the news media. In this regard, although representatives of the news media may make substantial utility of the Freedom of Information Law, they have no greater or lesser rights under the Law than any member of the public. From my perspective, to distinguish between the news media and the public is inconsistent with the thrust of the Law and its judicial interpretation. Specifically, this Committee has advised since 1974 and the courts have upheld the notion that accessible records 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].

Second, the Freedom of Information Law is based upon a presumption of access. In brief, the Law provides that all records are available, except those records or portions thereof that fall within one or more enumerated grounds for denial appearing in §87(2)(a) through (h). It is emphasized that those grounds for denial represent the only bases for withholding records under the Law.

According to your letter, the rationale for the resolution in question is founded upon a contention that "the board members may read in the newspaper what they will be discussing before they receive their own agendas in the mail and have had a chance to look at them". In my view, the stated basis for withholding the agendas and other explanatory materials is inconsistent with any of the grounds for denial appearing in §87(2)(a) through (h) of the Law. Further, I question the logic of the resolution as well as the effect of disclosure of the records in question. If the details of an upcoming meeting are published prior to the meeting, or even prior to their receipt by members of the Board, I cannot see how disclosure would result in adverse effects in the majority of circumstances. Whether the public is aware of the information or not, it remains the same; the contents of the materials do not change when the public or the news media is aware of their nature.

Third, arguments have been made in the past that records can be withheld until they have been reviewed and digested by persons intended to receive the records. From the Committee's perspective, such a contention lacks merit. Section 86(4) of the Law defines "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..." In view of the foregoing, it is clear that the receipt of records by particular public officials transmitted by other officials has minimal bearing upon rights of access. On the contrary, as soon as a "record" exists, it is subject to rights of access.

Lastly, it is important to note that while I believe that the resolution is inappropriate and overbroad, there may be situations in which records or portions of records transmitted to the Board might be deniable. Certainly, in those instances, records or portions thereof may be withheld in conjunction with one or more of the eight grounds for denial listed in 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: Cattaraugus County Planning Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1365

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

January 14, 1980

Mr. Francis G. Adee
79-C-152 9-2/K-1
354 Hunter Street
Ossining, New York 10562

Dear Mr. Adee:

I have received your most recent letter, which concerns a request for records in possession of the Broome County Probation Department.

First, you asked whether the Probation Department is considered an "agency" subject to the Freedom of Information Law, or part of a court which is not subject to the Law.

In my opinion, the County Probation Department clearly falls within the definition of "agency" appearing in §86(3) of the Freedom of Information Law. The exception in the Freedom of Information Law regarding the "judiciary" is in my view applicable only to courts and court records. However, as you are aware, in many instances departments of probation carry out their duties at the request of a court. For example, §243 of the Executive Law, entitled "Supervision of Administration of Local Probation", makes reference to rules regarding "probation investigations ordered by the court in designated felony act cases."

Second, with respect to the information that you requested, the name of the person who interviewed you at the Broome County Jail, the date of the interview and a copy of a signed release, I am unaware of any provision of law that would preclude you from gaining access to that minimal amount of information under the Freedom of Information Law. As I understand your request, you are not seeking any of the details of the interview, but rather only the name of the inter-

viewer, the date of the interview and a copy of a release. If the information that you are seeking is contained within records that are otherwise deniable, the agency in possession of the record may delete such information from the records while providing access to the remainder.

I hope that 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: Broome County
Department of Probation

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1366

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

January 14, 1980

Mr. Irving Silver
[redacted]

Dear Mr. Silver:

I have received your letter of January 5, which raises questions concerning the contents of my letter to you of December 20 concerning access to welfare records and fees for records in possession of the Department of Motor Vehicles.

Specifically, you have contended in your latest letter that §136 of the Social Services Law appears not to apply to applicants for public assistance and that it is applicable only to recipients of public assistance. In this regard, for the purpose of responding to your earlier inquiry, I quoted only a portion of the Social Services Law. Nevertheless, the first sentence of §136 of the Social Services Law clearly indicates an intent to preclude disclosure of the identities of persons applying for public assistance, as well as those who have received assistance:

> "[T]he names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper or reported at any public meeting except meetings of the county boards of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town; nor shall such names and addresses and the amount received by or expended for such persons be disclosed except to the commissioner of social

> services or his authorized representative, such county, city or town board or body or its authorized representative, any other body or official required to have such information properly to discharge its or his duties, or, by authority of such county, city or town appropriating board or body or of the social services official or the county, city or town, to a person or agency considered entitled to such information..."

In view of the foregoing, I believe that information concerning applicants for as well as recipients of public assistance must be withheld.

Further, even if §136 of the Social Services Law was not applicable as a basis for withholding, I believe that the Freedom of Information Law would permit the withholding of such information under its privacy provisions. Specifically, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy".

With respect to a search for motor vehicle records, I can only direct your attention once again to §202 of the Vehicle and Traffic Law, which was quoted in relevant part in my earlier letter. Under the circumstances, if you continue to want the information from the Department of Motor Vehicles, I believe that you must pay the requisite fees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1367

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

January 14, 1980

Mr. Donald R. Young
[redacted]

Dear Mr. Young:

I recently received your letter of December 27 which pertains to a request for records in possession of the Veterans Administration Hospital in Albany. According to your letter, a request was made on November 27 and acknowledged on December 7 with no determination of your request.

It is important to note at the outset that this office, the Committee on Public Access to Records, is responsible for giving advice with respect to the New York Freedom of Information Law. That law is applicable to records in possession of state and local government in New York. Since the records in which you are interested are in custody of a federal agency, the New York Freedom of Information Law has no application.

However, I believe that you do have rights of access with respect to at least some of the information sought under the federal Freedom of Information Act and the federal Privacy Act. Inasmuch as you are seeking records pertaining to you, I believe that the Privacy Act would likely be of greatest utility.

The Privacy Act requires that federal agencies develop procedures concerning the means by which requests should be made and contesting the contents of records pertaining to individuals.

It is suggested that you contact the officer designated to respond to requests made under the Privacy Act. Perhaps that person can expedite a response to your inquiry.

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

OML-AO- 428
FOIL-AO - 1368

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

January 14, 1980

Maurice Levenbron, Esq.
474 New York Avenue
Huntington, New York 11743

Dear Mr. Levenbron:

I have received your letter of January 9 concerning the unsuccessful attempts of your client, the Board of Fire Commissioners of the Huntington Manor Fire District to gain access to minutes of meetings of fire companies situated within the District.

In my view, the minutes are in great measure available under the Freedom of Information Law, and the meetings upon which the minutes are based are required to be open pursuant to the Open Meetings Law.

The status of volunteer fire companies represents a problem which has been both perplexing and continuous. In brief, the problem involves drawing a line of demarcation between companies' governmental functions and their other functions, such as social or athletic activities. However, I believe that such a line can be drawn with respect to the application of both the Freedom of Information Law and the Open Meetings Law.

Most relevant to your inquiry relative to access to records is the definition of "agency" in the Freedom of Information Law. The definition, which appears in §86(3) of the Law, includes any "...governmental entity performing a governmental...function for...one or more municipalities..." The question, therefore, is whether volunteer fire companies are governmental entities that perform a governmental function. To date, there is but one decision of which I am aware that deals even tangentially with the issue. In Everett v. Riverside Hose Company [261 F. Supp. 463 (1966)] a federal court held that a volunteer fireman is "in the public service" and is therefore a public servant,

even though no salary is paid. The rationale for the holding involved a finding that a volunteer fire company performs what traditionally has been deemed a governmental function. On that basis, the decision inferred that a volunteer fire company is a governmental entity, notwithstanding its status as a not-for-profit corporation. But for the Everett decision, perhaps it could be contended that a volunteer fire company is not a "governmental entity" and therefore outside the scope of the Freedom of Information Law. Nevertheless, it is the only decision that deals with the status of such companies in relation to statutes that ordinarily apply only to entities of government.

In view of Everett, the Committee has consistently advised that volunteer fire companies are subject to the Freedom of Information Law to the extent that their records pertain to their official duties as firefighters. Stated differently, records in possession of a volunteer fire company that relate to or have a bearing upon the performance of a company's official duties are in my opinion subject to rights of access granted by the Freedom of Information Law.

Based upon the foregoing, minutes of meetings of volunteer fire companies are in my opinion clearly available, for §87(2)(g) of the Freedom of Information Law grants access to final agency policy or determinations.

Coverage of volunteer fire companies under the Open Meetings Law is in my opinion easier to justify.

Section 97(2) of the Law defines "public body" to include:

> "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."

It is important to emphasize the definitional distinction between "agency" in the Freedom of Information Law and the definition quoted above from the Open Meetings Law. The Freedom of Information Law specifies that its coverage includes "governmental" entities performing a governmental function. The Open Meetings Law, however, includes within the definition of "public body" "...any entity...performing a governmental function..." Again, if it can be assumed under the Everett case that a volunteer fire company performs a governmental function, such a company is a public body subject to the Open Meetings Law.

Viewing the definition of "public body" in terms of its elements, a volunteer fire company is an entity for which a quorum is required (see Not-for-Profit Corporation Law, §608), it conducts public business according to Everett, and it performs a governmental function, also according to Everett, for one or more public corporations.

In the case of the Open Meetings Law, the line of demarcation between governmental and nongovernmental activity may be drawn based upon the definition of "meeting" [§97(1)]. "Meeting" is defined as "...the official convening of a public body for the purpose of conducting public business." Since there is a statement of purpose in the definition, it would appear that the Open Meetings Law applies only to the extent that a company engages in the conducting of public business. Other portions of meetings in which nongovernmental activities are discussed would not fall within the statement of purpose and, therefore, are outside the definition of "meeting" prescribed by the Law.

With regard to minutes, as you are aware, §101 of the Open Meetings Law prescribes that minutes of meetings, including open meetings and executive sessions, must be compiled and made available within the time limits specified in §101(3).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1369

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

January 16, 1980

Ms. Jean Yanarella
The Cornwall Local
35 Hasbrouck Avenue
Cornwall, New York 12518

Dear Ms. Yanarella:

I have received your letter of January 11 concerning access to police incident reports. You have indicated that you are particularly interested in access to records in situations when the incident is rape.

In all honesty, I doubt that I can provide any rule of thumb that would be applicable to all situations. As you are aware, the Freedom of Information Law is based upon a presumption of access. 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 grounds for denial enumerated in §87(2)(a) through (h) of the Law. In most instances, the grounds for denial are based upon and written in terms of harmful effects of disclosure.

The most relevant ground for denial regarding your inquiry 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."

Based upon the quoted provision, it is clear that the grounds for denial may properly be cited as a basis for withholding when, for example, disclosure would interfere with an investigation.

In some instances, there may be no harmful effects of disclosing an incident report. In others, it may be accurate that disclosure would interfere with an investigation.

It is important to note, however, that police blotters, according to case law, are available. "Police blotter" is a term derived from custom and usage; it is not defined in any provision of law or regulations. Nevertheless, in Sheehan v. City of Binghamton, [59 AD 2d 808 (1977)], it was held that a police blotter is a log or diary in which any event reported by or to a police department is recorded. The Court in Sheehan also held that a police blotter contains no investigative information and is available under the Freedom of Information Law. It is possible that the so-called "incident reports" in which you are interested are analogous to police blotters.

Lastly, I would like to point out that a statute recently went into effect concerning the right of privacy of victims of sex offenses. Specifically, §50-b(1) of the Civil Rights Law states that:

> "[T]he identity of any victim of a sex offense, as defined in article one hundred thirty of the penal law, who was under the age of eighteen at the time of the alleged commission of such offense, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

Based upon the provision quoted above, records that may identify victims of sex offenses who are under the age of eighteen when the offenses were allegedly committed are confidential. In such cases, those records would also be deniable under the Freedom of Information Law which in §87(2)(a) provides that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal 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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1320

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 16, 1980

Arthur M. Gensior, D.D.S.
180 Wisner Avenue
Middletown, New York 10940

Dear Dr. Gensior:

I recently received your letter of December 26 concerning your unsuccessful attempts to gain access to records in possession of the State Education Department and its Division of Professional Conduct.

In all honesty, after having reviewed the correspondence appended to your letter, the nature of the records in which you are interested is not entirely clear to me. Nevertheless, I can provide you with the following advice.

First, the Freedom of Information Law is based upon a presumption of access. In brief, 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 grounds for denial appearing in §87(2)(a) through (h) [see attached].

It is possible that one or more of the grounds for denial may appropriately be asserted to withhold the information that you are seeking. Nevertheless, it is emphasized 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 eight grounds for denial. Therefore, when an agency receives a request for records, the records sought must be reviewed in their entirety to determine which portions, if any, may justifiably be withheld.

Second, one of the items of correspondence, a letter of November 20, 1979, addressed to you by Robert S. Asher of the Division of Professional Conduct, states that "as a matter of policy" information that you requested would not be supplied because it was compiled in the course of an investigation. From my perspective, an agency may establish

policy or adopt regulations only to the extent that such policies or regulations are consistent with legislation. In this instance, I do not believe that the Division of Professional Conduct can unilaterally establish a "policy" which may contradict or abridge rights of access granted by the Freedom of Information Law. In a related sense, an agency cannot characterize records as "confidential" unless there is a specific basis for so doing. In my view, records may be considered "confidential" in but two instances. The first would pertain to situations in which the State Legislature or Congress has passed a statute which specifically prohibits disclosure of particular records. In such cases, records would be outside the scope of the Freedom of Information Law, which in §87(2)(a) provides that agencies may withhold records that are "specifically exempted from disclosure by state or federal statute." The only other instance in which records may be considered confidential would involve a situation in which a court determines that disclosure of certain 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)]. Further, to the best of my knowledge, the only records that may be characterized as confidential with respect to a proceeding concerning professional misconduct is an "administrative warning" (see Education Law, §6510).

Third, reference was made in the correspondence to complaints. In this regard, the Committee has consistently advised and the courts have upheld the notion that a complaint submitted by a member of the public to an agency is available, except to the extent that disclosure of the identity of a complainant would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b); also Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979)]. Often the substance of a complaint can be made available after having deleted the identifying details regarding a complainant.

Fourth, §87(2)(e) of the Freedom of Information Law provides that an agency may withhold records compiled for law enforcement purposes under specified circumstances. It appears that the Education Department might contend that its records may be withheld on the basis of the cited provision. Nevertheless, the courts have held that the "law enforcement purposes" exception to rights of access may appropriately be asserted only by a criminal law enforcement agency [see Broughton v. Lewis, Sup. Ct., Albany Cty. (1978); Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. Although the Education Department may engage in investigations, I do not believe that it is a criminal law enforcement agency.

Fifth, perhaps the exception to rights of access that is most 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..."

The provision quoted above contains what in effect is a double negative. While 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. As such, an agency is required to provide access to portions of inter-agency or intra-agency materials consisting, for example, of statistical or factual data. Concurrently, it may delete or otherwise withhold portions of records consisting of advice, impression, or opinion.

Sixth, it also appears that the procedural requirements of the Freedom of Information Law may not have been followed. In this regard, I have enclosed a copy of the Committee's regulations, which have the force and effect of law. Each agency in the state is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee.

In terms of time limits for responses to request §89(3) of the Law and §1401.5 of the regulations require that an agency must respond to a request within five business days of its receipt of a request. Within the five business day period, the agency may grant access, deny access in writing with the reasons stated, or acknowledge receipt of a request if a determination to grant or deny access cannot be made within five business days. When a request is acknowledged in writing, the agency then has ten additional business days to respond. If an agency fails to respond in any manner within five business days, or if no response is given within ten days of the acknowledgment of receipt of a request, the request is considered constructively denied and may be appealed to

the head of the agency [see regulations, §1401.7(c)]. Whether a denial is made in writing or is constructively due to a failure to respond within the requisite time limits, an appeal may be taken. The person or body designated to determine appeals has seven business days from the receipt of an appeal to "fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the records sought" [see Freedom of Information Law, §89(4)(a)]. In addition, each agency is required to transmit to the Committee copy of appeals and the determinations that ensue.

Lastly, is is emphasized that in the case of a judicial challenge to a denial of access to records under the Freedom of Information Law, the agency has the burden of proving that the records sought fall within one or more of the grounds for denial appearing in §87(2). Moreover, the state's highest court has 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 indeed arise [see Church of Scientology, supra.; Doolan v. BOCES, 2nd Supervisory District of Suffolk County, 64 AD 2d 702, reversed __ NY 2d __, Nov. 27, 1979].

In addition to the Freedom of Information Law and the regulations, I have enclosed an explanatory pamphlet 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Robert S. Asher

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1371

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

January 21, 1980

Mr. Sol Axelrod
[redacted]

Dear Mr. Axelrod:

I have received your letter of December 26 and apologize for the delay in response. Your inquiry concerns a denial of access by the New York City Department of Personnel with respect to questions and answers relative to Exam No. 8510 for promotion to Supervising Fire Alarm Dispatcher.

As you are aware, the Freedom of Information Law is based upon a presumption of access. In brief, the Law states that all records in possession of an agency, such as the Department of Personnel, are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

In my view, only one of the grounds for denial is relevant to your request. Specifically, §87(2)(h) of the Freedom of Information Law provides that an agency may 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 propriety of asserting §87(2)(h) as a basis for withholding in my view represents a question of fact. I believe that the intent of the cited provision is clear in that it seeks to protect against the disclosure of examination questions or answers that are sought before the questions are finally administered.

I have discussed your inquiry at length with Arthur D. Friedman, Deputy Counsel to the Department of Personnel. Based upon the factors that he described to me, it would appear that the denial of access was proper for the following reasons.

According to Mr. Friedman, who made several inquiries on my behalf after I contacted him, the examination in question may essentially be divided into two parts. One category of questions deals with general supervisory and administrative duties of a supervising fire alarm dispatcher. He informed me that it is highly likely that those questions, which are of a general nature, will be repeated in one or more examinations. Further, Mr. Friedman informed that such questions and answers may be relevant not only to the examination in which you are interested, but to others as well.

The second category of questions, as you indicated, concerns technology. Mr. Friedman agreed with you contnetion that there have been substantial recent advances in technology. However, at the present time, each borough has a central dispatching office, but only Brooklyn and Manhattan operate with a computerized system. The three other boroughs have not yet switched over to computers. Mr. Friedman informed me that it is likely that the questions concerning technology will likely be used in the future and that questions concerning the manual operation of a dispatch system will likely be repeated, for all dispatchers will be required to be familiar with a manual system, whether or not computers are used in each of the five boroughs.

In good faith, based upon the information provided to me by Mr. Friedman, I cannot advise that the examination in which you are interested is available as of right. As you are aware, notwithstanding this opinion or the denial by the Department of Personnel, you may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

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; Arthur D. Friedman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1372

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

January 21, 1980

Mr. James Menzer
[redacted]

Dear Mr. Menzer:

I recently received your letter concerning access to records of a grand jury proceeding in which you were involved in 1971.

It is important to make two points at the outset. First, the Freedom of Information Law does not apply to court records [see attached Freedom of Information Law, §86(1), definition of "judiciary" and §86(3), definition of "agency"].

Second, as a rule, grand jury proceedings and the records involved from such proceedings are secret. As a matter of fact, §215.70 of the Penal Law generally prohibits persons involved in grand jury proceedings from disclosing the nature or substance of any grand jury testimony.

However, §190.25(4) of the Criminal Procedure Law states that records developed during grand jury proceedings may be disclosed "upon written order of the court". Therefore, it is suggested that you go before the court in which the grand jury proceeding took place and seek disclosure by means of a court order.

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-1323

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

January 21, 1980

Ms. Judith Kullberg
Clerk, Board of Education/
Records Access Officer
Corning-Painted Post Area
School District
291 East First Street
Corning, New York 14830

Dear Ms. Kullberg:

I have received your letter of January 15 and thank you for your interest in complying with the Freedom of Information Law.

As requested, enclosed is a copy of the pamphlet entitled "The Freedom of Information and Open Meetings Laws... Opening the Door".

With respect to your question, you have asked for a clarification regarding "the issue of requests for records which would have to be created or compiled in order to comply". In this regard, the Freedom of Information Law does not generally require an agency to create a record in response to a request. Specifically, the last sentence of §89(3) of the Law states that:

> "[N]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eight-seven and subdivision three of section eighty-eight."

Section 87(3) is applicable to agencies, such as school districts.

The three types of records required to be compiled pursuant to §87(3) are respectively a voting record which identifies each member of a public body and how that person voted in each instance in which a vote is taken, a payroll record which includes the name, public office address, title and salary of every officer or employee of an agency, and a reasonably detailed list by subject matter of all records in possession of the agency. Those three types of records represent the only situations in which an agency is obliged to create records that might not otherwise 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
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1374

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

January 24, 1980

Mr. Joseph Schuster
[redacted]

Dear Mr. Schuster:

Your letter addressed to Secretary of State Paterson 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.

Your question deals indirectly with rights of access, for it concerns whether the Department of Law maintains records indicating the names and addresses of its former employees.

I have contacted the Department of Law on your behalf and have been informed that the names and last known addresses for former employees of the Department are maintained "forever".

As a general rule, §186 of the State Finance Law prohibits a state agency from destroying its records unless it follows the conditions outlined in that provision and the rules and regulations promulgated by the Office of General Services.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1375

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

January 24, 1980

Ms. Frances Zamnik
[redacted]

Dear Ms. Zamnik:

I have received your latest correspondence.

Enclosed is a copy of my response to your letter of October 1, which was received by this office on October 12 and concerned information in possession of the New York State Identification and Intelligence System.

In addition, I have contacted the Commission on the Quality of Care for the Mentally Disabled on your behalf and have been informed that Paul Stavis is the employee of the Commission to whom requests made under the Freedom of Information Law should be directed.

I was also informed that your letter of January 18, a copy of which was sent to this office, has not yet been received by the Commission. Relative to that letter, I have reviewed its content and would like to offer you the following. While I have no knowledge as to whether the Commission can appropriately respond to the questions raised, it is important to emphasize that the Freedom of Information Law provides access to existing records. The Law specifically states in §89(3) that an agency is not required to create a record in response to a request. As such, it is clear that the Freedom of Information Law may be used as a vehicle for gaining access to information that exists in the form of records; it is not a vehicle for cross-examining public officials.

It is possible that your inquiry may be readily answered by means of existing records. Nevertheless, I merely want to point out that the responsibilities of agencies subject to the Freedom of Information Law involve providing access to records rather than creating records in response to 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
Executive Director

RJF/kk

Enc.

bcc: Gary Masline

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1326

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

January 25, 1980

Mrs. William R. Foster
[redacted]

Dear Mrs. Foster:

I have received your letter of January 18 concerning requests directed to the Town of Willing.

According to your letter and our conversation, several taxpayers have requested to inspect the books of account, ledgers and similar records concerning the expenditures of the Town.

In my opinion, the records sought are clearly available.

The Freedom of Information Law is based upon a presumption of access. Specifically, the Law provides that all records are available, except those records or portions thereof that fall within one or more grounds for denial enumerated in §87(2)(a) through (h).

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..."

It is important to emphasize that the provision quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records must be made available. Under the circumstances, it would appear that virtually all of the information sought consists of statistical or factual data. Consequently, I believe that the records are accessible.

Further §89(5) of the Freedom of Information Law provides that nothing in the Law shall be construed to limit or abridge rights of access earlier granted by other provisions of law or by means of judicial determination. In this regard, §51 of the General Municipal Law has for decades granted access to the information in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1377

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

January 25, 1980

Mr. Richard Schumate
[redacted]

Dear Mr. Schumate:

I have received your letter of January 21 concerning a request directed to the Bronx County District Attorney.

Apparently several individuals that you identified were interviewed by the District Attorney prior to testifying as witnesses in a criminal matter, and you have requested records concerning those interviews. In response, the District Attorney's Office replied that there is "no indication of any interviews being recorded with any of the individuals you list in your letter of January 9, 1980." Notwithstanding the response from the District Attorney's Office, you have contended that "the documents are, or should be in the files of the District Attorney."

It is noted first that the Freedom of Information Law provides access to certain existing records, and that §89(3) of the Law specifically states that an agency need not create records in response to a request. In addition, the Freedom of Information Law does not require that records must be maintained for any particular period of time. In short, if the information in which you are interested does not exist in the form of a record or records, there is nothing to be provided by the District Attorney.

Both the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, permit an applicant to seek a certification regarding the existence of records. Section 1401.2(b)(6) of the regulations requires that an agency:

> "[U]pon 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 custodial cannot be found after diligent search."

You might want to request such a certification from the Office of the District Attorney.

Second, you stated in your letter to the District Attorney on December 27 that "no exemptions for records of terminated investigations exist" under the Freedom of Information Law. I am not in complete agreement with your conclusion. Section 87(2)(e) of the Freedom of Information 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."

While the provision quoted above removes the ability to withhold information in some circumstances, I believe that grounds for denial remain in others even though an investigation may have been terminated. For example, §87(2)(e)(iii) states 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." Since I have not seen the records, I could not conjecture as to their con-

tents. Nevertheless, it is possible that disclosure would identify a confidential source. It is also possible that nonroutine criminal techniques and procedures may be revealed. Again, I do not know whether any of the grounds for denial could be asserted, but there is such a potential. Further, the foregoing is based upon the notion that records may exist, which may not be the case.

Lastly, you asked whether a petitioner may seek an in camera inspection to determine rights of access. In this regard, there have been several instances in which courts have conducted in camera inspections to determine rights of access. It is important to note, however, that neither the Freedom of Information Law nor its judicial interpretation require the creation of a "Vaughn type list" analogous to the list that must be created under the federal 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1378

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
MARIO M. CUOMO
WALTER W. GRUNFELD
MARCELLA MAXWELL
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

January 25, 1980

Ms. Wilma Frye
[redacted]

Dear Ms. Frye:

I have received your letter of January 17 in which you requested information concerning school examinations and records as well as the steps that may be taken when there is a negative comment contained in a student's school record.

It is important to point out at the outset that your question does not deal with the New York Freedom of Information Law, but rather with the federal Family Educational Rights and Privacy Act [20 USC §1232(g)] which is commonly known as the "Buckley Amendment".

In a nutshell, the Buckley Amendment applies to any educational agency or institution that receives funding directly or indirectly through the United State Commission of Education. As such, practically all public school districts are subject to the Act. In addition, the regulations promulgated by the United States Department of Health, Education and Welfare define "education record" broadly to include nearly all records in possession of an educational agency identifiable to a particular student, and provide that such records are confidential with respect to all but the parents of students under the age of 18 years. A student acquires the rights of his or her parents when he or she reaches the age of eighteen.

Consequently, I believe that you have the right to inspect many records identifiable to your children, including examinations.

It is emphasized that the term "education record" does not include records of instructional staff, such as teachers, which:

> "(i) are in the sole possession of the maker thereof, and
>
> (ii) are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a 'substitute' means an individual who performs on a temporary basis the duties of the individual who made the record and does not refer to an individual who permanently succeeds the maker of the record in his or her position."

With respect to the amendment of education records, §99.20 of the regulations mentioned earlier provides that a parent of a student may request that a record be amended if the parent believes that the contents are inaccurate or misleading. Further, if you request that a record be amended and the educational agency refuses to permit such an amendment, an opportunity for a hearing must be provided in order to challenge the content of the records.

I have enclosed for your consideration a copy of the rules and regulations adopted by the Department of Health Education and Welfare and marked the provisions which define "education record" and specify the procedures regarding a request to amend such records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1379

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

January 25, 1980

Mr. Martin E. Clearo
[redacted]

Dear Mr. Clearo:

I have received your letter of January 11. Having reviewed its contents I tend to agree with many of your contentions. Nevertheless, I would like to make several points.

First, while I am not a constitutional lawyer or an expert in constitutional law, I would conjecture that a suit brought in federal court concerning privacy with respect to the deficiencies of New York Law relative to medical records would be unsuccessful. The fact is that there is some protection of privacy in New York regarding medical records. As I mentioned in my earlier letter, §17 of the Public Health Law permits access to medical records only under certain circumstances. In addition, §4504(a) of the Civil Practice Law and Rules states that:

> "[U]nless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law,

> a professional service corporation organized under article fifteen of the business corporation law to practice medicine, and the patients to whom they respectively render professional medical services."

Second, I have attempted to perform some research on your behalf and have found provisions in the regulations promulgated by the Board of Regents concerning unprofessional conduct of licensed professionals which state that:

> "[U]nprofessional conduct in the practice of any professional licensed or certified pursuant to title 8 of the education law shall include...
>
> (7) failing to make available to a patient or client, upon request, copies of documents in the possession or under the control of the licensee which have been prepared for and paid for by the patient or client;
>
> (8) revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law..." [8 NYCRR §29.1]

Third, I can understand why it may be upsetting to be unable to gain access to your medical records while others may gain access by means of a waiver signed by you, the subject of the records. However, the fact that a waiver is signed would likely remove any arguments that your privacy has been invaded in an unwarranted fashion.

Lastly, the Committee has long studied the problem of privacy. However, its studies have concentrated largely upon records in possession of government, because its authority concerns the Freedom of Information Law, which pertains only to government. I know that the Legislature has been studying the problem of access to medical records for several years. As yet, however, the problem has not been solved. I would like to point out also that the experience in New York is not unique and that several states have had difficulty in determining rights of access to medical records. In this regard,

I have enclosed a copy of a report on the subject published by the Freedom of Information Center at Columbia, Missouri.

I hope that 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- 1380

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

January 28, 1980

Mr. William J. Kilfoil
Secretary
Port Washington Police
Benevolent Association, Inc.
P.O. Box 14
Port Washington, New York 11050

Dear Mr. Kilfoil:

Your letter addressed to Attorney General Abrams has been transmitted to the Committee on Public Access to Records, which is responsible for providing advice with respect to the Freedom of Information Law. Although your letter is dated January 1, it was received by this office today.

Your inquiry concerns requests for records relative to candidates for the position of police commissioner of the Port Washington Police District that were made available. Your question is whether the records were made available in accordance with the provisions of the Freedom of Information Law.

The specific records provided included copies of Blue Cross/Blue Shields records of commissioners and the Blue Cross/Blue Shield quarterly print-out for the entire Police Department. The print-out includes the name of officers, their dates of birth and social security numbers, and the names of officers wives and the wives dates of birth and their social security numbers. You have also indicated that a list was provided which stated the names of the members of the Police Department and the towns in which they live.

In my opinion, although much of the information provided could justifiably be withheld, it is unlikely that a violation of law was committed.

The Freedom of Information Law is based upon a presumption of access. In brief, the Law states that 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 categories of deniable information enumerated in §87(2)(a) through (h) of the Law. It is emphasized, however, that the Law is permissive. While an agency may withhold records falling within one or more of the categories of deniable information, there is nothing in the Law that requires an agency to do so. Consequently, even though records might be deniable, there is no obligation on the part of an agency to withhold.

With respect to the records that were made available, I believe that many could have been withheld under the provisions of the Freedom of Information Law. Most relevant under the circumstances 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". In addition, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy, at least two of which may in my view be cited as a basis for withholding some of the information. For example, one illustration of an unwarranted invasion of personal privacy includes "disclosure of employment, medical or credit histories or personal references of applicants for employment." Another concerns "disclosure of items involving the medical or personal records of a client or patient in a medical facility."

Moreover, in construing the privacy provisions of the Freedom of Information Law with respect to public employees, 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 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 2d 664 (Court of Claims, 1978)]. Conversely, it has been held that 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 e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

From my perspective, neither the date of birth nor the social security number of a police officer is relevant to the manner in which he performs his official duties. Similarly, the name of a police officer's wife, her date of birth and social security number are in my opinion irrelevant to the performance of official duties. Consequently, I believe that those items could have been withheld under the privacy provisions of the Freedom of Information Law.

As you may be aware, §87(3)(b) of the Freedom of Information Law requires each agency to compile a payroll record consisting of the name, public office address, title and salary of all officers or employees of an agency. Therefore, it is clear that police officers' names and public office addresses are available. However, it has generally been advised that the home addresses of public employees may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. In this instance, if only the town in which police officers reside was provided, it is questionable whether such information would result in a permissible or unwarranted invasion of personal privacy. However, such a list would not be required to be created 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1381

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

January 30, 1980

Ms. Angela Castania
[redacted]

Dear Ms. Castania:

As you know, I have received your correspondence, which concerns access to information.

In all honesty, after having reviewed the materials, I am still not exactly sure of the nature of the information in which you are interested. Nevertheless, I offer you the following observations.

First, 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 are available, except those records or portions thereof that fall within one or more grounds for denial listed in the Law (see attached).

It is noted, however, that the Law provides access to existing records and §89(3) specifically states that an agency need not create a record in response to a request. Therefore, for example, in cases in which you have requested lists, the agency in receipt of the request would have no obligation to create the lists in response to your request if none exists.

In addition, it is emphasized that the Freedom of Information Law does not apply to records in possession of courts or to offices outside of government. I direct your attention to §86(3) of the Law, which defines "agency" and specifically excludes the judiciary. "Judiciary" is defined in §86(1) to include the courts of the state. Therefore, it is clear that the Freedom of Information Law does not apply to records in possession of a Surrogate's Court, for example. Similarly, rights of access do not extend to banks or offices of attorneys.

Nevertheless, there are various court acts which provide substantial rights of access. For instance, if you are interested in records concerning wills, Article 25 of the Surrogate's Court Procedure Act determines which records are to be kept by the court, by its clerk, what must be recorded, and the limits of rights of access. I have enclosed copies of the sections of the Surrogate's Court Procedure Act that may be helpful to you. I believe that particular attention should be paid to §§2501 and 2502, which deal with records kept respectively by the Surrogate's Court and its clerk.

I would also like to point out that the fee for records made available under the Freedom of Information Law is generally limited to twenty-five cents per photocopy. However, there are numerous provisions in court acts and the Civil Practice Law and Rules which enable a court or its clerk to assess substantially higher fees for photocopying and certification. Therefore, although a court may assess a fee in excess of twenty-five cents per photocopy, it has the statutory authority to do so, for the Freedom of Information Law is not applicable.

Based upon the correspondence that you sent, it would appear that the Freedom of Information Law would be of minimal utility, for most of the records in which you are interested pertain to wills and similar documents. If that is the case, the Surrogate's Court Procedure Act is likely the best vehicle that you can use.

I have contacted Constance James, Records Access Officer for the City of Rochester, on your behalf. Having discussed your application of November 28 and Ms. James' response of December 14, it appears that the City of Rochester has complied with your request to the extent possible. Based upon my conversation with Ms. James, an opportunity to listen to tape recordings has been offered. It is noted that City officials must maintain both legal and physical custody over the tape recordings. As stated in Ms, James' letter of December 14, relinquishing physical custody of the tape recordings could result in accidential erasure or damage to irreplaceable records. Further, with respect to your request for a list of all speakers at all City Council meetings from October 1973 to 1978, it is reiterated that the City is not required to compile such a list if none exists. However, it is likely that the tape recordings provide essentially the same information.

Lastly, you mentioned records in possession of the Federal Court in Buffalo. All that I can suggest is that you contact the clerk of the court that possesses the records in which you are interested.

I regret that I cannot be of greater assistance at this juncture. Again, if you could provide a brief list of the records in possession of the City of Rochester in which you are interested, I would be pleased to attempt to provide you with additional assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Enc.

bcc: Constance James

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-433
FOIL-AO-1382

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

January 31, 1980

Ms. Celia A. Murray
[redacted]

Dear Ms. Murray:

I have received your letter of January 29 and the materials appended to it. Your inquiry concerns a denial of access to records in possession of the Urban Renewal Agency of the City of Troy. Further, the denial on your application for the records indicates that the Urban Renewal Agency "met in executive session" and voted not to disclose the records sought.

The specific record that you requested is characterized as the "Appraisal report on urban properties done by Mr. Brennan, including disposition recommended".

In my opinion, rights of access to the appraisal report are questionable, and it is possible that the report may have properly been denied.

As you may be aware, 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, such as the City of Troy, are accessible, except to the extent that records or portions thereof fall within one or more among eight enumerated categories of deniable information [see attached, Freedom of Information Law, §87(2)(a) through (h)]. In general, those categories provide the only bases for withholding.

There is but one exception to rights of access appearing in §87(2) that might in my view be cited to deny access to the appraisal report. Specifically, §87(2)(c) states that an agency may withhold records or portions thereof that:

"if disclosed would impair present or imminent contract awards or collective bargaining negotiations."

In my opinion, it is arguable whether the quoted ground for denial may properly be cited as a basis for withholding, for collective bargaining negotiations are not involved and it is doubtful in my view that the transaction to which the record relates could be characterized as a "contract award".

Nevertheless, as I explained to you in one of our telephone conversations, case law indicates that appraisals related an incomplete or "inchoate" transaction concerning an urban renewal agency may be withheld until the transactions are consummated. Specifically, in Sorley v. Village of Rockville Centre, 30 AD 2d 822 (1968), it was held that evaluations, appraisals and similar data relating to an upcoming urban renewal transaction could be withheld, for premature disclosure would in the opinion of the court result in detriment to the public interest. The idea of detriment to the public interest is based upon the notion that if the appraisals are disclosed in advance of the receipt of bids, no potential purchaser would submit a bid higher than the amount stated in the appraisal. Consequently, an urban renewal agency might not receive as high a bid as it might otherwise receive if the amount of the appraisal remains unknown.

As mentioned earlier, in general, the only grounds for denial that may be raised are those appearing in §87(2) of the Freedom of Information Law. Nevertheless, the state's highest court has held that the "governmental privilege", which is based upon a finding of detriment to the public interest, remains in effect notwithstanding the enactment of the Freedom of Information Law [see Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)]. As such, there exists an exception to rights of access based upon case law in addition to those appearing in the Freedom of Information Law.

It is emphasized that the Court of Appeals held that an agency asserting the governmental privilege has the burden of proving that disclosure on balance would indeed result in detriment to the public interest. All that I can offer under the circumstances is that the Urban Renewal Agency may withhold the appraisals if it can demonstrate that disclosure would result in detriment to the public interest in accordance with the Sorley and Cirale cases cited earlier.

You also asked whether "the standard reasons for denial printed on the attached form to request access all satisfy the requirements of the law". In my opinion, the application form is likely based upon the Freedom of Information Law as originally enacted in 1974. That statute provided a list of accessible records to the exclusion of all others and stated four grounds for denial. The amendments to the Law that went into effect in 1978 reversed the presumption of the original statute by stating that all records are available except those falling within one or more of the eight grounds for denial. As such, I do not believe that the form is reflective of the changes in the Law. In addition, this Committee has consistently advised that any request made in writing that "reasonably describes" records should suffice [see §89(3)], and that a failure to complete a prescribed form cannot alone justify a denial.

Further, as you indicated, §89(4)(a) of the Law requires agencies to transmit copies of appeals to the Committee when the appeals are taken as well as the determinations that ensue.

Lastly, the denial indicates that the Urban Renewal Agency met in executive session in order to determine whether or not to grant access to the records sought. In this regard, I believe that the Board of an Urban Renewal Agency is a "public body" subject to the Open Meetings Law. If the Board met to consider your appeal, its meeting should have been convened as an open meeting and preceded by notice given in accordance with §99 of the Open Meetings Law. Section 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. Moreover, §100(1) of the Open Meetings Law states that in order to enter into executive session, a motion must be made during an open meeting which identifies in general terms the subject intended for discussion in executive session and which must be carried by a majority vote of the total membership of a public body. In addition, paragraphs (a) through (h) of §100(1) specify and limit the subject matter that may appropriately be discussed in executive session. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof, and that a public body cannot enter into executive session to discuss the subject of its choice.

Based upon the facts provided, it is possible that a violation of the Open Meetings Law may have been committed.

I hope that 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: Troy Urban Renewal Agency
Donald Bowes, Corporation Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 432
FOIL-AO- 1383

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

January 31, 1980

Honorable Eugene Levy
Member of Assembly
Legislative Office Building
Room 450
Albany, New York 12248

Dear Assemblyman Levy:

I have received your letter of January 28 and appreciate your interest in compliance with the Freedom of Information and Open Meetings Laws.

Your letter indicates that you believe that an industrial development agency is subject to both the Freedom of Information Law and the Open Meetings Law.

I concur with your contention based upon the following rationale.

Section 86(3) of the Freedom of Information Law (Article 6, Public Officers Law) defines "agency" to include:

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

Since an industrial development agency is a "governmental entity" performing a governmental function for a municipality, it is in my view clearly an "agency" subject to rights of access granted by the Freedom of Information Law.

It is also 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 are accessible, except those records or portions thereof that fall within one or more of the grounds for denial that appear in the ensuing paragraphs (a) through (h).

I believe that an industrial development agency is also subject to the Open Meetings Law (Article 7, Public Officers Law).

Section 97(2) of the Open Meetings 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.

I hope that 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-1384

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

February 1, 1980

Mr. Neil Fabricant
Publisher
Empire State Report
17 Lexington Avenue
New York, NY 10010

ATT: Grace Cummings

Dear Mr. Fabricant:

As you know, I have received your letter of January 28 concerning the staff of the Committee.

The names of the employees, their salaries and titles are as follows:

Robert J. Freeman, Executive Director	$29,269
Janet Mercer, Senior Stenographer	$10,105
Kim Kohinke, Stenographer	$ 8,400

The mailing address for the Committee is the Department of State, 162 Washington Avenue, Albany, New York, 12231. However, the staff of the Committee is physically housed on the fourth floor, 99 Washington Avenue, Albany, New York.

In order to assist you, I would like to reiterate some of the comments made during our conversation this morning.

First, I believe that it would have been clearer to request the payroll record required to be compiled under §87(3)(b) of the Freedom of Information Law, which states that an agency "shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." As I mentioned to you earlier, at least one state agency information officer is confused regarding the specific information that you are seeking.

Second, it is possible that virtually all of the information in which you are interested might be obtained from the Department of Audit and Control. If you can obtain the information from Audit and Control, the results might be less costly and time consuming.

Third, this Committee is housed in the Department of State, and there are several other similar bodies housed in this Department. In this regard, the Department of State's payroll list includes reference to all employees of the Department, including employees of its components. Consequently, if Audit and Control cannot furnish the information that you are seeking, you could probably cut down on the number of requests by directing them to the "umbrella" agencies, such as the Department of State.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-434
FOIL-AO-1385

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

February 1, 1980

Mr. Steven G. LeVeille
News Director
WCSS Radio
Midline Road
Amsterdam, New York 12010

Dear Mr. LeVeille:

I recently received your letter of January 15, which concerns the creation of and the procedures implemented by the City of Amsterdam with respect to its Citizens Review Board. You have asked whether the Citizens Review Board is "required to issue a news release once a private resolution of a complaint occurs", whether the private resolution of a "public complaint" is legal and whether specific aspects of the Board's procedure are appropriate.

It is noted at the outset that I am aware of no law which requires any public officer or board to issue a news release when a particular event occurs. Similarly, there is no law of which I am aware that requires a board to notify the news media or the public with regard to recommendations that might be made.

However, due to the absence of any such requirements, the Legislature has enacted several statutes to insure that the public has the right to become familiar with the operation of government. In this instance, the two statutes over which the Committee has responsibility, the Freedom of Information and Open Meetings Laws, are relevant to your inquiry.

In my opinion, the Citizens Review Board may be considered a "public body" subject to 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 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".

In my opinion, by breaking the definition into its elements, one can conclude that the board in question is a public body.

First, the Board is an entity which consists of more than two members.

Second, the Board is required to operate by means of a quorum. In this regard, I direct your attention to §41 of the General Construction Law, which defines "quorum" 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 and exercise such power, authority or duty..."

In my view, the quoted provision requires that three or more persons charged with a public duty to be performed or exercised by them jointly are bound to conduct their duties by means of a quorum, a majority of the total membership.

Third, the description of duties of the Board in my opinion indicates that it conducts public business for the City of Amsterdam, which is a public corporation.

Lastly, I believe that its charge is reflective of a governmental function performed for the City of Amsterdam.

Based upon the foregoing, each of the conditions precedent that must be established in order to fall within the framework of the Open Meetings Law is in my view met by the Board.

In addition, while it might be contended that the Board performs duties that are solely of an advisory nature, that factor does not in my opinion remove it from the scope of the Open Meetings Law. Advisory committees have in the past been determined to be public bodies subject to the Open Meetings Law [see e.g., MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977); Pissare v. City of Glens Falls, Sup. Ct., Warren Cty., (1976)]. Further, according to the memorandum in support of the legislation to amend the Open Meetings Law, which was sponsored by the Committee on Rules in both houses, the redefinition of "public body" was intended to ensure that committees, subcommittees and similar groups are subject to the Open Meetings Law, whether or not such groups have the capacity to take final action.

Moreover, §97(1) of the Open Meetings Law defines "meeting" to include the convening of a quorum of a public body for the purpose of conducting public business. All meetings of public bodies must be convened open to the public and preceded by notice given in accordance with §99 of the Law. Consequently, I believe that the Board is required to convene each of its meetings open to the public.

In some instances, the Board might appropriately enter into a closed or "executive" session. However, the grounds for entry into executive session are limited to those described in §100(1)(a) through (h) of the Open Meetings Law.

Finally, §101 of the Law requires all public bodies to compile minutes of both open meetings and executive sessions. Subdivision (1) of §101 concerns minutes of open meetings, which must make reference to "all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon". If action is taken in executive session, minutes of the executive session must include reference to final determinations made behind closed doors. Minutes of open meetings must be compiled and made available within two weeks of such meetings, and minutes of an executive session must be made available within one week of an executive session.

Lastly, and perhaps most relevant, minutes of meetings are available "in accordance with the provisions of the Freedom of Information Law." In this regard, as you are aware, 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 those records or portions thereof that fall within one or more of the grounds for denial enumerated in paragraphs (a) through (h) of the cited provision.

In this regard, it is possible that minutes of executive sessions might if disclosed result in an "unwarranted invasion of personal privacy", for example. If that is the case, the identifying details may be deleted from the minutes while providing access to the remainder. There may also be other grounds for denial, depending upon the nature of their contents.

I hope that I have been 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. Office of the Mayor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1386

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

February 4, 1980

Harold G. Trabold, Esq.
Dranitzke, Lechtrecker
& Lechtrecker
P.O. Box 510
73 North Ocean Avenue
Patchogue, New York 11772

Dear Mr. Trabold:

Thank you for your letter of January 21 and your interest in complying with the Freedom of Information Law. Your inquiry concerns a request for information relative to "certain individual named teachers."

I agree with several of the contentions made in your letter, but I disagree with others.

As you are aware, the Freedom of Information Law since its enactment in 1974 has required that a payroll record be compiled to identify all officers or employees of an agency, such as a school district, and to include their titles and salaries. Consequently, I agree that the District is required to release payroll lists and related records that identify particular employees.

I also generally agree that the Freedom of Information Law does not require an agency to create a record in response to a request [see §89(3)]. Therefore, if information sought does not exist in the form of a record or records, the District is not obliged to create records on behalf of an applicant.

You wrote that you have "informed the Board that they are not required to compile specific responses to the questions presented and further, they are not permitted to allow examination of the individual personnel files of the named individual teachers." In this regard, I disagree with your statement that the School Board is not permitted to disclose information in the personnel files of particular teachers. From my perspective, there is nothing sacrosanct about personnel records; while some aspects of personnel

records may be deniable, others may be accessible.

Most relevant to your inquiry is §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." In my view, if there may be "unwarranted" invasions of personal privacy, there may also be "permissible" invasions of personal privacy.

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 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 2d 664 (Court of Claims, 1978)]. Conversely, it has been advised that records that are irrelevant to the performance of a public employee's official duties are deniable, for disclosure in such cases would indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

For example, it was mentioned earlier that the Freedom of Information Law specifically requires that a payroll record by compiled and made available. Clearly the names, titles and salaries of public employees when disclosed result in an invasion of privacy, but the invasion is not so severe that the records should remain closed. On the contrary, the records are relevant to the performance of public employees' official duties and therefore are available. On the other hand, if a request is made for the social security numbers or the deductions claimed by particular public employees, for example, such information has no relevance to the manner in which they perform their official duties and therefore may justifiably be withheld.

With respect to the request that is the subject of your inquiry, I believe that copies of "written approvals for courses", the names of courses and the number of credits, and records reflective of the verification of satisfactory completion of courses are available. If the capacity of teachers to increase their salaries is contingent upon taking particular courses, approval for taking the courses and a verification of the completion of the courses, such records are in my opinion relevant to the performance of the official duties of both the teachers involved and the person or body that authorizes the teachers to take the courses and later determines whether the courses have been satisfactorily completed.

Similarly, if there are extant procedures concerning the means by which teachers may receive approval for taking courses, and verification of completion of the courses, such procedures are in my opinion also available under §87(2)(g) of the Freedom of Information Law.

Lastly, the remaining exception to rights of access that may be relevant 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 inter-agency and 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 records are available.

For instance, from my perspective, written approval for a course would constitute a final determination that is available. Similarly, the verification of satisfactory completion of a course would constitute both factual data and a final determination.

In sum, I believe that a characterization of personnel files as deniable or confidential is inappropriate. In my opinion, personnel records when requested under the Freedom of Information Law should be reviewed in their entirety to determine which portions, if any, may justifiably be withheld under the provisions of §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
Executive Director

RJF/kk

cc: Leo Davis

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1387

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

February 4, 1980

Mayor John Dashney
Village of Lyons
Village Hall
72 William Street
Lyons, New York 14489

Dear Mayor Dashney:

Thank you for sending a copy of the determination on appeal rendered on January 30 with respect to a request for a record made by D. C. Hadley, Managing Editor of the Finger Lakes Times.

The records requested pertain to the "final determination of the Robert Wykle arbitration hearing". Your determination indicates that the appeal was denied on the basis of §87(2)(b), (c) and (g) of the Freedom of Information Law.

In my opinion, a record reflective of the final determination of an arbitration hearing concerning a public employee is available.

First, as you are aware, §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". In this regard, 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 accessible, for disclosure in such instance 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, it has been advised that records that are irrelevant to the performance of a public employee's official duties are deniable,

for disclosure in such cases would indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

From my perspective, when a determination is made following an arbitration hearing, disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy, for the determination is relevant to the manner in which a named public employee performs his official duties. This contention is bolstered by the decisions cited above, at least one of which dealt with an invasion of privacy of a potentially more serious or embarrassing nature. For example, in Farrell, supra, it was held that reprimands of named public employees were available, for the reprimands are relevant to the performance of the official duties of the public employees involved and because the reprimands essentially constituted "final determinations" that are available.

One of the other grounds for denial to which you made reference 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 emphasize 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.

Under the circumstances, the determination rendered following the arbitration hearing might be considered "intra-agency" material. Nevertheless, I believe it may also be characterized as a "final determination" that is required to be made available.

The last ground for denial that you cited is §87(2)(c), which states that an agency may withhold records or portions thereof which if disclosed would "impair present or imminet contract awards or collective bargaining negotiations". While the arbitration process may be part and parcel of a collective bargaining agreement, I do not feel that the exception to rights of access found in §87(2)(c) was intended to protect against disclosure of the records in question. On the contrary, §87(2)(c) is in my view intended to avoid placing government at a disadvantage at the bargaining table. In this situation, I cannot envision how disclosure of an arbitration determination would impair "present or imminent" collective bargaining negotiations.

Further, it is noted that §89(4)(b) of the Freedom of Information Law requires that, in a judicial proceeding, an agency must demonstrate that records withheld fall within one or more of the grounds for denial listed in §87(2). In addition, the state's highest court has held on two occasions that an agency cannot merely assert grounds for denial and prevail; on the contrary, the agency must prove that the harmful effeets of disclosure described in the exceptions to rights of access appearing in §87(2) would indeed arise by means of disclosure [see Church of Scientology. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979); Doolan v. BOCES, 2nd Supervisory District of Suffolk County, ____ NY 2d ____ (1979)]. Based upon the direction given by case law, I believe that it would be all but impossible to prevail in a judicial proceeding based upon the contentions that you have offered in support of the 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
Executive Director

RJF/kk

cc: D. C. Hadley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1388

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

February 4, 1980

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

Dear Mr. McPheeters:

As you are aware, I have received a request for an advisory opinion from James Carbone, who requested that I transmit the opinion to you.

According to Mr. Carbone's letter, he is interested in obtaining records reflective of "the amount of revenue four cable television companies gave to the Cable Television Commission in the 1978 fiscal year". Mr. Carbone has contended that "the public has a right to know how much money a state agency received from a private company that is regulated by the agency", and that the amount of money the state receives from cable TV companies should not be regarded as a "trade secret".

George Cincotta, Chairman of the Commission on Cable TV denied Mr. Carbone's request on appeal for a number of reasons. In order to gain further background information, I have had several discussions with representatives of staff of the Cable TV Commission with regard to your request.

In all honesty, it is possible that the denial may be appropriate. However, it might also be possible that the Cable TV Commission cannot meet its burden of proof under the Freedom of Information Law should a judicial proceeding be initiated.

The focal point of the controversy is §87(2)(d) of the Freedom of Information Law, which states 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..."

Therefore, the questions are whether the records requested constitute a "trade secret" and whether disclosure would indeed result in "substantial injury to the competitive position" of the subjects of the records, four cable TV companies.

In this regard, I would like to offer the following observations, many of which relate to the letter of denial written by Chairman Cincotta.

First, the Freedom of Information Law is flexible, for it is based largely upon the effects of disclosure. In some instances, today's trade secrets are tomorrow's common knowledge. Further, it is possible that disclosure of information regarding one company might cause substantial injury to its competitive position, but disclosure of analogous information regarding a second company may have no harmful effects.

Second, in his determination to deny access, Chairman Cincotta continually made reference to annual financial reports and their contents. However, it is clear that your request does not concern the reports in toto, but rather only a specific portion thereof -- the amount received by the Cable TV Commission from four companies.

Third, reference is made in the denial to §552(b)(4) of Title 5 of the United States Code, which is also known as the "Freedom of Information Act". The cited provision enables a federal agency to withhold "commercial or financial information obtained from a person and privileged or confidential". It is important to note at this juncture that the federal Freedom of Information Act is applicable only to records in possession of a federal agency as defined by 5 USC §551. It is inapplicable to records in possession of government in New York. The operative statute in New York is the Freedom of Information Law, Article 6 of the Public Officers Law. In addition, the quoted federal exception to rights of access is vague and has been the subject of hundreds of lawsuits. From my perspective, the standard in the New York Freedom of Information Law, which is based upon the effects of disclosure, is clearer than the federal Act and provides a basis upon which a balancing test can be made.

Fourth, Chairman Cincotta made reference to promises of confidentiality that have been given since 1973 to cable TV operators. In my opinion, a promise of confidentiality may be all but meaningless. 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 seal of confidentiality or privilege regarding records submitted to government by third parties is largely irrelevant. "[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)], and 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. As such, I believe that a promise of confidentiality can be effectively made only if an agency can demonstrate that disclosure would, on balance, result in detriment to the public interest (see Cirale, supra), or if records are specifically exempted from disclosure by a statute other than the Freedom of Information Law.

It is possible that disclosure of some of the information submitted the the Cable TV Commission by cable TV companies would result in detriment to the public interest. Nevertheless, to sustain a claim of privilege, an agency must prove to a court that disclosure would indeed result in detriment to the public interest.

Fifth, in his denial, Chairman Cincotta referred to a decision rendered under the federal Freedom of Information Act in which it was held that income tax return information is prohibited from disclosure. I would agree with such a holding, for both federal statutes and numerous statutes found within the New York State Tax Law prohibit the disclosure of the particulars of income tax returns and similar information submitted to the appropriate agencies. Nevertheless, as I understand the situation, the information requested may have little connection with income tax. To the best of my knowledge, the Cable TV Commission receives a percentage of the gross receipts of a cable TV company that operates within New York. However, based upon my conversations with representatives of the COmmission, some companies operate not only within New York, but also within a number of other states. If a cable TV company operates or has franchises within a number of states, records reflective of gross receipts in New York might indicate little about the gross receipts of the company nationwide. On the other hand, if the subject of records requested is a small cable TV company which

has a single franchise, for example, a percentage of its gross receipts would effectively indicate its total receipts. In the former circumstance described, in which a company operates in several states, I do not believe that income tax information could be considered to be divulged. However, in a situation in which a small company operates only in New York, the record might justifiably be withheld, for it might constitute a trade secret which if disclosed could cause substantial injury to the competitive position of the subject corporation.

It is also noted that there may be a distinction in scope between the effect of financial information disclosed at the federal agency level and the New York State agency level. I would assume that cable TV companies submit financial information to the Federal Communications Commission with respect to all of its franchises. To disclose that information would enable a competitor to gain insight regarding the financial status of a corporation in general. However, if the state receives only a fraction of the financial information that is submitted to the federal government, the effects of disclosure of a national corporation would in my opinion likely be less severe or damaging with respect to its competitive position.

From my perspective, the most valid contention expressed by representatives of the Commission concerns disclosure of the information sought not once, but consecutively over a period of years. It was argued that if records reflective of the gross receipts of a cable TV company, whether national or local in scope, could be used to gain insight regarding the strength or weakness of a particular corporation within an extremely competitive industry, those records might constitute a trade secret which if disclosed could cause substantial injury to a corporation's competitive position. In my opinion, if it could be demonstrated that disclosure of the information in question over a period of years would in combination constitute a trade secret which if disclosed would cause substantial injury to the competitive position of a particular corporation, the records may justifiably be withheld.

Lastly, it is emphasized that §89(4)(b) of the Freedom of Information Law places the burden of proof on an agency in a judicial proceeding. The Law requires that the agency demonstrate that the records sought fall within one or more of the grounds for denial appearing in §87(2)(a) through (h). Further, the Court of Appeals has held on two occasions that an agency cannot merely assert grounds for denial and prevail; on the contrary, the agency must prove

that the harmful effects of disclosure described in the exceptions to rights of access would indeed arise [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979); Doolan v. BOCES, 2nd Supervisory District of Suffolk County, ____NY 2d____(1979)].

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

cc: George A. Cincotta
William F. Huff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1389

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

February 6, 1980

David J. Gilmartin, Esq.
Office of the Town Attorney
Town of Southampton
Town Hall
Hampton Road
Southampton, New York 11968

Dear Mr. Gilmartin:

Thank you for your letter of January 9, which concerns access to marriage records.

Rather than reiterating comments that have been made in the past, I have enclosed several advisory opinions that have been written with respect to access to vital records -- records of marriage, birth and death.

My major point is that the Domestics Relations Law, §§19 and 20, concerning marriage records, and §§4173 and 4174 of the Public Health Law, concerning access to birth and death records, provide analogous language that makes access contingent upon the showing of a "proper purpose". From my perspective, the focal point of the problem pertains to the manner in which the "proper purpose" standard should be construed. If those statutes envision "proper purposes", I believe that the direction provided by the Bureau of Vital Records at the State Health Department is overly narrow. In my opinion, the Health Department has essentially advised that there is no proper purpose, unless an individual seeks a record pertaining to himself or herself. If the statutes cited above were intended to provide access only to the subjects of the records, I would agree that only a request by the subject of the records or a request made for a judicial purpose would constitute a "proper purpose". While the language is open-ended and subject to conflicting interpretations, I feel that the "proper purpose" standard is broader than that suggested by the Health Department.

In addition, I feel that the direction that local registrars transmit requests for genealogical searches to the State Health Department is inappropriate. While the Commissioner of Health has the capacity to adopt regulations to carry out the purposes of the Public Health Law and other provisions of law, I feel that implicit in the grant of the authority to promulgate regulations is the notion that regulations must be reasonable. In my view, it is unreasonable to direct local registrars to refuse to make genealogical searches if such searches can be performed. Further, vital records are no more and no less available whether they are in possession of the State Health Department or a local registrar.

It is noted that §19 of the Domestic Relations Law concerning marriage records appears to contain an internal conflict; at the least, its language is confusing. Specifically, the fifth sentence in subdivision (1) of §19 states that:

> "[A]ll such affidavits, statements, and consents, immediately upon the taking or receiving of the same by the town or city clerk, shall be recorded and indexed as provided herein and shall be public records and open to public inspection whenever the same may be necessary or required for judicial or other proper purposes..."

On the one hand, reference is made to the documents as "public records", but on the other, the same records are apparently open only upon a showing of "judicial or other proper purposes".

In my opinion, it would be appropriate for the Legislature to amend the Domestic Relations Law and the analogous provisions regarding birth and death records in the Public Health Law to provide specific standards concerning access. Only then will the confusion concerning access be removed.

If possible, I would like to have your thoughts on the matter.

I hope that 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-1390

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

February 6, 1980

The Honorable Norman J. Levy
Member of the Senate
Legislative Office Building
Albany, New York 12247

Dear Senator Levy:

Thank you for your letter of January 23 and your continued interest in the Freedom of Information Law. You have asked for my views regarding correspondence sent to you regarding the creation of dossiers on individuals by police departments.

It is noted that I received the same letter some time ago. However, the author did not provide his name or address, so the questions raised remained unanswered. At this juncture, I would like to offer the following observations.

First, several of the questions raised were considered in a report dated September, 1977, entitled State Police Surveillance, authored by the Assembly Special Task Force on State Police Non-Criminal Files. The Task Force was chaired by Assemblyman Mark Siegel. I have enclosed the "Executive Summary" of the Task Force report, which indicates that:

> "[F]or many years the New York State Police maintained files on persons and organizations involved in non-criminal activities. In 1975, the new Superintendent, William G. Connelie, ordered that this activity be halted and ordered these materials purged from the files."

The goal of the Task Force was to determine the nature and scope of the collection of information and to recommend remedial legislation to limit the creation or collection of such information in the future.

To the best of my knowledge, no legislation has been enacted on the subject. Further, I believe that the files were required to be preserved by means of a court order. At this time, the records are being evaluated to determine which should be destroyed, and which should be preserved due to their historical value.

With regard to the questions raised by the correspondent, first, he asked whether private citizens can "expunge" records analogous to those he described. Currently, there are few statutes which permit an individual to attempt to expunge records. One instance in which records may be disposed of concerns a situation in which a person is arrested and the charges are later dismissed [see Criminal Procedure Law, §160.50]. Further, it is noted that the Committee has in its two reports to the Governor and the Legislature on the Freedom of Information Law recommended that a provision be enacted as an amendment to the Freedom of Information Law which enables a person to seek amendment of a record pertaining to him or her if the contents are inaccurate, misleading or archaic, for example. That issue is discussed in the sections concerning the protection of privacy in both reports.

Second, the correspondent asked how a citizen can find out what information is being filed on him by the police. Again, according to the report of the Task Force to which reference was made earlier, non-criminal intelligence files are no longer being maintained. However, as a general matter, the Freedom of Information Law provides broad rights of access and an individual could request records pertaining to him or her in possession of any agency in New York, including a police department.

Lastly, if you have the name and address of the person who wrote the letter to you, I would be pleased to send him a copy of this response and the Committee's reports if you could provide his identity.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AD-1391

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

February 8, 1980

The Honorable Joseph L. Bruno
Member of the Senate
Legislative Office Building
Room 814
Albany, New York 12223

Dear Senator Bruno:

Thank you for your letter of January 25, which concerns an inquiry raised by one of your constituents relative to access to genealogical records.

It is emphasized at the outset that rights of access to genealogical records, such as records of birth, death and marriage, are governed not by the Freedom of Information Law, but rather by the Public Health Law, Article 41. Further, the Commissioner of Health has the authority to promulgate rules and regulations to carry out extant statutory provisions regarding vital records.

The crux of the problem as I see it involves the interpretation of §§4173 and 4174 of the Public Health Law. In brief, the cited provisions state that the State Health Department, as well as the local registrars who maintain duplicate copies of vital records, shall not make such records available except upon a showing of a "proper purpose". The problem is that the phrase "proper purpose" is undefined.

A secondary problem is that the rules and regulations promulgated by the Health Department and the direction given by its Bureau of Vital Records to local registrars are in my view overly restrictive. As you are aware, an agency's regulations must be consistent with the grant of statutory authority upon which the regulations are based. In addition, the rules must be reasonable. In my view, the restrictions upon access contained in the regulations promulgated by the Health Department fail to effectively recognize the "proper purpose" standard. It

appears in many instances that the Health Department has considered the issue and determined that no request is reflective of a proper purpose, unless it is made in conjunction with a judicial order or proceeding, or if the person to whom a record pertains seeks disclosure of a record identifiable to him or her.

While it is understood that there is often a need to protect personal privacy, concurrently, I believe that it is unnecessary to protect the privacy of those who may have died years ago. Similarly, in the case of a request for a genealogical search, an applicant generally seeks to trace his or her family history. In such instances, it would in my opinion be difficult to justify a denial based upon the notion that privacy should be protected. In accordance with that rationale, I reiterate my contention that the direction provided by the Health Department may be unduly restrictive.

Moreover, I agree with your finding that there is no statutory provision of which I am aware that authorizes the Health Department to refuse to release genealogical information until it has been on file for 75 years, including death records until they have been on file for 50 years.

There are numerous other problems concerning the implementation of the vital records provisions by the Health Department. Rather than reciting them, I have enclosed a copy of an advisory opinion requested some time ago by Assemblyman Peter Sullivan. From my perspective, the problems described here and in the letter addressed to Mr. Sullivan can be remedied only by appropriate legislation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1392

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

February 8, 1980

Mr. Rich Steck
Vice President
Public Communications, Inc.
1000 Brickell Avenue
Miami, Florida 33131

Dear Mr. Steck:

As you are aware, 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 New York Freedom of Information Law.

Your inquiry concerns the existence or status of laws in New York concerning the release of commercial information to the public.

In this regard, it is noted initially that the Freedom of Information Law is applicable only to records in possession of government in New York. Therefore, if a corporation, for example, maintains a relationship (e.g., contractual) with state or local government, the records relative to that relationship that come into the possession of government are subject to rights of access under the Freedom of Information Law. As a general matter, the public has no rights of access to records in possession of the private sector.

Second, the Freedom of Information Law provides eight grounds for denial of access, some of which may be applicable to records in possession of government concerning private enterprise. For example, §§87(2)(c) and (d) of the Freedom of Information Law respectively provide that an agency may withhold records or portions thereof that:

> "(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
>
> (d) 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..."

Third, §165.07 of the Penal Law concerns the unlawful use of secret scientific material and states that:

> "[A] person is guilty of unlawful use of secret scientific material when, with intent to appropriate to himself or another the use of secret scientific material, and having no right to do so and no reasonable ground to believe that he has such right, he makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientifica material.
>
> Unlawful use of secret scientific material is a class E felony."

I have enclosed for your consideration a copy of the Freedom of Information Law and an explantory 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.

bcc: Joseph Cooper

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 436
FOIL-AO- 1393

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

February 8, 1980

Mr. Robert Algmin
[redacted]

Dear Mr. Algmin:

I have received your letter of January 28 concerning your exclusion from a meeting held at the Spring Valley Village Hall on January 25. In addition, Lieutenant Governor Cuomo, who is a member of the Committee, has transmitted your letter addressed to him dated January 31. I will attempt to respond to both.

It is noted at the outset that there appears to have been some confusion on the part of Village officials regarding the distinction between and the scope of the Freedom of Information law and the Open Meetings Law. The former pertains to rights of access of records in possession of government and the latter concerns meetings of public bodies.

According to your letter of January 28, there was a radio announcement to the effect that a meeting would be held in the Spring Valley Village Hall on January 25. After driving from your home to Spring Valley, you were barred from attending the meeting, and you have indicated that no reason was given for your exclusion. The application for records that you submitted regarding minutes of the meeting, notice and a list of participants was denied. The response on the application indicates that the reason for the denial is based upon what is characterized as "confidential disclosure". The comment on the application form stated that the meeting was "not final determination nor public meeting - private conference".

Without more information regarding the nature of the meeting, it is all but impossible to give you specific direction or to conclude that a violation of law was committed. Nevertheless, I would like to offer the following observations.

First, as you may be aware, the Open Meetings Law was recently amended. One of the amendments concerns the definition of "meeting" [see Open Meetings Law,§97(1)]. The new definition makes clear that the convening of a quorum of a public body for the purpose of conducting public business falls within the framework of the Law. The amendment is in my opinion based upon a decision rendered by the Court of Appeals, the state's highest court, which held that the definition of "meeting" is applicable even if there is no 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]. Therefore, if a quorum of a public body, such as the Village Board of Trustees, convened on January 25 for the purpose of conducting public business, the gathering was a "meeting" that should have been convened open to the public.

Second, while a public body may enter into an executive session and exclude the public, a public body may not close its doors to discuss the subject of its choice. In this regard, §97(3) of the Open Meetings Law defines "executive session" as a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law provides that, in order to enter into executive session, a motion to do so must be made during an open meeting, the motion must identify in general terms the subject intended to be discussed, and the motion must be carried by a majority vote of the total membership of a public body. Additionally, paragraphs (a) through(h) of §100(1) specify and limit the areas of discussion that may appropriately be considered in executive session.

If the gathering in question was a "meeting", minutes were required to have been compiled under §101 of the Law. Even if the subject under discussion was appropriate for executive session, minutes would have to include reference to a motion to go into executive session. Further, if action was taken during the executive session, minutes reflective of the nature of such a determination would be required to be compiled.

With respect to your request for records, one of the boxes marked on your application for public records concerns a "confidential disclosure". From my perspective, the term "confidential" is much overused. In my opinion, records can be considered confidential in but two instances. First, records are confidential if a statute passed by either the State Legislature or Congress specifically precludes an agency from disclosing particular records. In such instances, those records would be deniable under §87(2)(a) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". The only other instance in which records may be deemed confidential would involve a situation in which a court has determined that disclosure would, on balance, result in detriment to the public interest [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)].

With regard to your request for a list of participants at the meeting on January 25, again, assuming that the gathering was a "meeting" subject to the Open Meetings Law, presumably minutes would make reference to the participants. If the gathering fell outside the scope of the Open Meetings Law and there is no record in existence that identifies those who attended, the agency is not required to compile such a list on your behalf [see Freedom of Information Law, §89(3)].

Again, if the gathering was indeed a "meeting", it should have been preceded by notice given in accordance with §99 of the Open Meetings Law. In brief, the cited provision requires that notice be given to the news media and posted in one or more designated, conspicuous public locations prior to all meetings. However, while it might be appropriate to maintain a record indicating that notice was given, there is no requirement that such a record be kept. For example, if a meeting is called on short notice, it is possible that notice might be given to the news media by means of telephone calls. Similarly, although notice of a meeting must be posted, there may be no record indicating that posting was accomplished. For instance, the Committee posts notice of its meetings on a bulletin board which uses movable type, so there is no "paper" that demonstrates that notice was actually posted.

With regard to your letter to Lieutenant Governor Cuomo, I believe that you have stated essentially that the attitudes of public officials often result in personal challenges on your part relative to your rights under the Open Meetings Law. In my opinion, the Law, by means of the amendments, has been substantially strengthened and clarified. Nevertheless, in some instances, it takes time to relay the message to some in government that the Open Meetings Law and the Freedom of Information Law require that the public be given an opportunity to learn more about the manner in which government operates. I believe that the amendments to both laws have enhanced the people's right to know. Despite those statutory changes, it sometimes takes longer to change attitudes than to change laws.

You may be aware that the Lieutenant Governor has recommended that the Committee be given the authority to enforce the Freedom of Information and Open Meetings Laws. While I feel that such steps are inevitable, until the authority of the Committee is augmented, I will do my best to convey the message to government that past practices should be altered to comply with new requirements.

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

cc: Lieutenant Governor Cuomo
Rockland County Board of Health
Mayor Rosenthal

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1394

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 11, 1980

Bernard T. Callan, Esq.
P.O. Box 222-P
144 Fourth Avenue
Bay Shore, New York 11706

Dear Mr. Callan:

Thank you for your letter of January 7, which concerns the contents of an opinion addressed to Mr. Robert Whalen.

In conjunction with your comments, I would like to offer the following.

First, you have stated that there is no indication in the Committee's regulations that a form prescribed by an agency should or should not be used when requesting records. In this regard, it is true that neither the Freedom of Information Law nor the regulations promulgated thereunder by the Committee make reference to a form. However, §89(3) of the Freedom of Information Law simply makes reference to "a written request for a record reasonably described". No mention is made of the manner in which a written request must be submitted. Similarly, §1401.5(a) of the regulations provides that "[A]n agency may require that a request made in writing or may make records available upon oral request." The rationale for the Committee's advice is based upon the idea that requests for records are often made by individuals who reside far from the location of the records. For example, if you requested records from this office, which is located that the Department of State in Albany, why should I send a form to you to fill out and return to me? In short, requirements of that nature would in the Committee's view be unnecessarily time consuming. To facilitate rather than hinder the production of records, the Committee has indeed consistently advised that any written request that reasonably describes records sought should suffice. To be sure, there is nothing in the Law that precludes an agency from developing a form upon which

requests may be made; however, the form should not be the exclusive means by which records can be requested.

With regard to your second question concerning fees, and particularly fees relative to the ability to listen to a tape recording, I appreciate the point that you have made, but I do not believe that the alternative suggested by the District for listening to tape recordings ($5.00 for any part of the first hour and $2.50 for any part of each additional half hour) is appropriate. The Committee has on several occasions discussed the possible assessment of search fees in addition to fees for copying. In each instance, it was determined that the assessment of search fees would be in appropriate, for the ability to assess fees and encourage inefficiency might result in constructive denials of access. The Committee's regulations in fact specifically provide that "[T]here shall be no fee charged for...(1) inspection of records; (2) search for records..." [see §1401.8].

As you are aware, §87(1)(b)(iii) of the Law states that the maximum for photocopying is twenty-five cents per photocopy up to nine by fourteen inches, and that the fees for reproducing other records, such as those that are not subject to conventional photocopying, shall be based upon the actual cost of reproduction. When someone listens to a tape recording perhaps it could be argued that the sound is being reproduced. If that argument can be made, I would contend, however, that the only fee that may be assessed would be based upon the cost of electricity and whatever the cost of using a machine might be. How those figures can be properly determined is open to question. In addition, as I noted in my earlier letter to Mr. Whalen, the direction provided by the Zaleski decision appears to indicate that personnel salaries should not be a factor in arriving at the cost of reproducing a record. In a similar vein, I do not think that personnel salaries should form the basis for fees assessed for listening to a tape recording. Based upon the Board's resolution, it would appear that it might cost more to listen to a tape recording than to request that a copy be made by purchasing a new cassette.

In sum, while I am not sure that the Committee envisioned a situation in which tape recordings would be involved, I believe that the assessment of the fees prescribed in the Board's resolution conflict with the general direction provided in both the Freedom of Information Law and the Committee's regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1395

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

February 11, 1980

Ms. Barbara L. Shulman
AFL-CIO Local 32B-32J
Service Employees Center
1 East 35th Street
New York, New York 10016

Dear Ms. Shulman:

I have received your letter of January 28 which concerns attempts by AFL-CIO Local 32B-32J "to organize Home Attendants that are employed by the Human Resources Administration of the City of New York".

Specifically, you wrote that you are interested in obtaining information "regarding either the names and addresses, or just the addresses of the patients that are serviced by the Human Resources Administration for the City of New York and receive Home Attendant care".

In my opinion, it is unlikely that you have a right to gain access to the information in which you are interested under the Freedom of Information Law.

First, §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". In this regard, §136 of the Social Services Law in relevant part states that:

> "1. The names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper or reported at any public meeting except meetings of the county boards of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town; nor shall such names and addresses and the amount

> received by or expended for such persons be disclosed except to the commissioner of social services or his authorized representative, such county, city or town board or body or its authorized representative, any other body or official required to have such information properly to discharged its or his duties, or, by authority of such county, city or town appropriating board or body or of the social services official of the county, city or town, to a person or agency considered entitled to such information...
>
> 2. All communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his work shall be considered confidential and, except as otherwise provided in this section, shall be disclosed only to the commissioner of social services, or his authorized representative, the county board of supervisors, city council, town board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town or its authorized representative, or by authority of the county, city or town social services official, to a person or agency considered entitled to such information."

In view of the foregoing, it appears that the intent of the provision quoted above involves a desire on the part of the Legislature to preclude disclosure of any information in possession of a Social Services agency that identifies either an applicant for or a recipient of social services, except under specified circumstances.

Second, notwithstanding the provisions of §136 of the Social Services Law, §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records or portions of records when disclosure would result in an "unwarranted invasion of personal privacy". Since the information sought concerns a group of individuals who have a particular status,

in my opinion it is likely that the information sought could be withheld based upon the privacy provisions.

And third, §89(3) of the Freedom of Information Law states that an agency generally need not create a record in response to a request. Therefore, if, for example, there is no list of the names and addresses of the persons serviced by the home attendants, the Human Resources Administration would have no obligation to create such a list 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
Executive Director

RJF/kk

bcc: Stanley Brezenoff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1396

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

February 11, 1980

Mr. Irving Silver
[redacted]

Dear Mr. Silver:

I have received both of your letters of January 20, which again concern access to records relative to public assistance and records of the Department of Motor Vehicles.

First, it is important to note that whatever my contentions might be, neither myself nor any member of the Committee has the capacity to "authorize" you to examine records in possession of an agency of state or local government. The authority of the Committee is solely advisory. Consequently, the Committee and its staff have no power to compel an agency to produce or withhold records.

Second, I disagree with your interpretation of §136 of the Social Services Law. From my perspective, the intent of the cited provision is to make confidential records concerning recipients of or applicants for public assistance. To the best of my knowledge, even applicants for or recipients of public assistance do not have a right to inspect and/or copy records pertaining to them in possession of a social services department. Specifically, regulations promulgated by the New York State Social Services Department give discretion to social services agencies to disclose, for §357.3(c) of the regulations states that:

> "(1) The case record shall not ordinarily be made available for examination by the applicant or recipient, since it contains information secured from outside sources. However, particular extracts shall be furnished to him, or furnished to a person whom he designates, when the provision

> of such information would be beneficial to him. The case record, or any part of it, admitted as evidence in the hearing on an appeal shall be open to him and his representative.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

In view of the foregoing, I believe that social services officials have the capacity to determine who is an "authorized person" for the purpose of reviewing welfare records.

Third, with regard to records of the Department of Motor Vehicles, you have stated that you are not interested in examining computer tapes, but rather the original documents upon which the tapes are based. I am not aware of any provision that precludes you from requesting or gaining access to such records. Assuming that the original records in which you are interested exist, I believe that they should be made available to you upon payment of the requisite fee.

I regret that I cannot be of reater 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-1397

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

February 13, 1980

Ms. Carole A. Rowland
[redacted]

Dear Ms. Rowland:

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

Your inquiry concerns unsuccessful attempts to gain access to a photocopy of a check sent by the State Insurance Fund to the Oswego City School District. You have indicated that you want a photocopy of the back of the check, but that the State Insurance Fund has to date declined to provide access to the same based upon its argument that "people might cash or attempt to cash such a copy". In opposition to the Fund's contention, you have stated that you "cannot imagine how anyone could attempt to cash a copy of the reverse side..." of a check.

I am in general agreement with your position, and I believe that the record in which you are interested, the check, is likely available for a number of reasons.

First, the Freedom of Information Law is based upon a presumption of access. In brief, 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 §87(2)(a) through (h) of the Law.

Second, both the Oswego City School District and the State Insurance Fund are "agencies" as defined by §86(3) of the Law and are subject to rights of access granted by the Freedom of Information Law. The School District is a public

corporation that is clearly subject to the Freedom of Information Law, and the State Insurance Fund, according to §76 of the Workers' Compensation Law, exists within the State Department of Labor and is a governmental entity performing a governmental function.

Third, one of the exceptions to rights of access in my view bolsters the conclusion that the check in which you are interested is available. Specifically, §87(2)(g) states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The quoted provision contains what in effect is a double negative. 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.

Since the check was transmitted from one agency to another, it may likely be considered "inter-agency" material. Nevertheless, its contents are reflective solely of "factual data", and, therefore, should be available.

The only remaining ground for denial in the Freedom of Information Law that may be applicable 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". If the payee is the Oswego City School District, I do not believe that the quoted language would be applicable. If, however, the payee is a present or former public employee, for example, it is possible that disclosure of that person's identity might

result in an unwarranted invasion of personal privacy. Without greater knowledge of the situation, I could not conjecture as to the effect of disclosure. However, in my opinion, the most that could be withheld would be the identity of the payee.

Lastly, if the check in which you are interested is in possession of the Oswego City School District, other provisions of law may be cited as a basis for disclosure. For instance, §2116 of the Education Law has for years stated that virtually all records in possession of a school district are available. In addition, §51 of the General Municipal Law has for nearly a century provided direction of a similar nature concerning access to records of municipal government.

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 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
Executive Director

RJF/kk

Encs.

cc: Oswego City School District
State Insurance Fund

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-440
FOIL-AO-1398

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

February 14, 1980

Ms. Gretchen L. Quackenbush
[redacted]

Dear Ms. Quackenbush:

As you know, I have received your letter of February 3, which raises questions concerning the implementation of the Freedom of Information Law and the Open Meetings Law by the Homer School District.

I will attempt to respond to each of the questions raised in your letter in the ensuing paragraphs.

The first area of inquiry pertains to information relative to the salaries of School District officials, as well as any contractual agreements that may exist between the District and particular officials. In response to your request, you were apparently provided with a computer printout that lists "everyone who receives a check from the District..." However, you also wrote that the printout identifies persons by social security number and that the identities of those to whom the social security numbers relate could not be discovered.

In this regard, I would like to make several points. As a general matter, the Freedom of Information Law provides access to existing records. Stated differently, if an individual requests information that does not exist in the form of a record or records, an agency, such as a school district, is under no obligation to create a record in response to a request. Nevertheless, there are three exceptions to that general rule [see Freedom of Information Law, §89(3)]. One exception is found in §87(3)(b), which requires each agency to maintain a "record setting forth the name, public office address, title and salary of every officer or employee of the agency. Consequently, each agency subject to the Freedom of Information Law must create and maintain

on an ongoing basis a payroll record that identifies each employee by name, public office address, title and salary. In my view, the payroll record required to be compiled under §87(3)(b) should be or should have been in existence and made available for the purpose of inspection or copying by any person.

It is also noted that the Freedom of Information Law provides in §87(2)(b) that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." With respect to the privacy of public employees, 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 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, records that have no relevance to the manner in which public employees perform their official duties are deniable, for disclosure would indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

This point is made in conjunction with the disclosure of social security numbers. It has been advised in the past that social security numbers of public employees are deniable, for they are irrelevant to the manner in which a public employee performs his or her duties. Moreover, the social security number has become something of a universal identifier which could be used in some cases to obtain personal information which if disclosed could cause substantial invasions of personal privacy. Therefore, I believe that the payroll record described earlier represents the best vehicle for disclosing information relative to public employment. I would like to emphasize, however, that disclosure of social security numbers by the District did not in my view represent any violation of law, for the Freedom of Information Law is permissive. While the Freedom of Information Law states that an agency may withhold certain records or portions of records, there is no requirement that an agency must withhold those records even if one or more grounds for denial may be applicable.

In a similar vein, you have asked for contracts relative to particular school district officials. In my opinion, to the extent that the contracts exist, they are clearly available. As stated earlier, although the contracts might identify specific individuals, the privacy provisions cited earlier could not in my view be cited to withhold, for the contracts are relevant to the manner in which the duties of both the School Board and the subjects of the contracts are performed. In addition, I believe that one of the grounds for denial in the Freedom of Information Law could be cited as a basis for disclosing contracts. Specifically, §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 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, while a contract might be considered an "intra-agency document", its contents consist of factual data and represent a final determination made by the Board of Education. Consequently, any extant contracts are in my opinion clearly available.

You have also asked "how precise" you must be when you request records. In addition, you provided an example of a request for the records in which you are interested. In my opinion, your request as you described it was certainly sufficient, for §89(3) of the Freedom of Information Law merely requires that a person submit "a written request for a record reasonably described." Stated differently, an applicant for records need not identify the records sought

in detail. Moreover, the Court of Appeals, the state's highest court, affirmed a lower court determination which held essentially that if agency officials can determine the nature of the records sought, the applicant has met his or her burden [see Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 Ad 2d 446, affirmed with no opinion, 43 NY 2d 754 (1977)].

Questions have been raised concerning the sufficiency of a "cover sheet" appended to the District's request form. Having reviewed the cover sheet, I would like to offer the following comments.

First, reference is made to a search fee of five dollars per hour if a record requested is not readily available. In this regard, both the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, preclude the assessment of a search fee. The only fee that may be charged involves the reproduction of records. As such, I believe that the search fee described in the application is invalid.

With respect to the time limits for response, it appears that they are based upon the Committee's regulations, specifically §1401.5 (see attached).

The cover sheet lists the grounds for denial, but in my opinion the grounds are not described as fully as they should be and may be misleading. For example, records compiled for law enforcement purposes are deniable only if certain circumstances described in §87(2)(e)(i) through (iv) are present. Similarly, inter-agency or intra-agency communications are deniable, but only to the extent prescribed in §87(2)(g)(i) through (iii) of the Freedom of Information Law.

On the application form itself, I do not believe that the statement in which an applicant certifies as to his or her purpose for a request is appropriate. As a general rule, the Committee has advised and the courts have upheld the principle 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, the purpose for which a request is made is largely irrelevant. The only instance in which the purpose of a request is relevant would concern a situation in which a list of names and addresses is sought [see Freedom of Information Law, §89(2)(b)(iii)], and disclosure could result in an unwarranted invasion of personal privacy.

I agree with your contention that the School District's regulations should make reference to the requirement that copies of appeals and the determinations that ensue must be transmitted to the Committee on Public Access to Records.

You have also written that the District has not posted or publicized the location where records are available or the identifying details regarding the records access and appeals officers. In this regard, I direct your attention to §1401.9 of the Committee's regulations, which states 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 of the 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."

With respect to your request for a subject matter list, you have indicated that you were given a book entitled "A Basic School Filing System" which is published by the New York State Education Department, but which is not apparently used by the District. Here I would like to point out that §87(3)(c) of the Freedom of Information Law states that each agency shall maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

Consequently, if no such list exists, it should be created by the District. Further, as I mentioned to you in one of our telephone conversations, the State Education Department, pursuant to §65-b of the Public Officers Law, has devised numerous schedules for the retention and disposal of school district records. In my view, it should be relatively easy for a school district to develop a subject matter list, for the retention schedules published by the Education Department are in many cases far more detailed than a subject matter list must be.

Your last question concerning the Freedom of Information Law pertains to a District requirement that one of its employees must be present when the public examines records. In my opinion, there is nothing inappropriate about such a provision, because the District is required to maintain both physical and legal custody of all District records. Although I am sure that you and the vast majority of those who seek to inspect records are trustworthy, it is the responsibility of the government officer to insure that records are not defaced or stolen, for example.

The next series of questions concerns the Open Meetings Law and its interpretation.

First, you have made reference to executive sessions held by the Board to discuss "personnel and negotiations." However, the motions to discuss those issues have not, according to your letter, specified the particular individuals or subjects to be discussed.

Several points should be made with regard to the situation that you described.

First, §100(1) of the Open Meetings 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 and 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, it is clear that a motion to entern into executive session must make reference to the "general area or areas of the subject or subjects to be considered." As such, I do not believe that a motion to enter into executive session must identify a particular person who may be the subject of a discussion intended for executive session.

It is important to note that one of the grounds for executive session that was amended recently is the so-called "personnel" exception. Under the provisions of the Open Meetings Law as originally enacted, a public body could under the former §100(1)(f) 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..."

Under the language quoted above, it was found that many public bodies discussed matters concerning personnel generally during executive sessions when the issues dealt essentially with policy. Further, the Committee had consistently advised that §100(1)(f) was intended to protect personal privacy, rather than to shield matters of policy under the guise of privacy. To remedy the deficiency in the Law and to provide clarification, an amendment was enacted which now permits a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

The amended language now permits the holding of an executive session when particular individuals are being discussed, as opposed to personnel in general. Nevertheless, I do not believe that a motion to enter into executive session must

identify the particular officer or employee who is the subject of the discussion. If there was such a requirement, the privacy of named individuals might be invaded in an unwarranted fashion, regardless of the outcome of the discussion.

With regard to "negotiations", §100(1)(e) of the Law provides that a public body may enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Stated differently, an executive session may be held to discuss collective bargaining negotiations held pursuant to the provisions of the Taylor Law, which is applicable to negotiations with public employee unions.

You have also raised questions concerning the sufficiency of minutes of open meetings and executive sessions. Section 101(1) of the Open Meetings Law is self-explanatory with respect to minutes of open meetings. Subdivision (2) of §101 pertains to minutes of executive session.

In general, a public body may vote during a properly convened executive session, except when the vote concerns the 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.

Lastly, you have written that on many occasions the Board of Education returns from executive session, votes on items discussed during the executive session and adjourns shortly thereafter. The problem, according to your letter, is that the resolutions passed during open meetings do not provide a sufficient amount of specificity to enable the public to know exactly what action was taken. Here, again

I would like to make reference to §101(1) of the Open Meetings Law concerning minutes. While the cited provision merely states that minutes shall consist of a record or summary of motions, proposals, resolutions and other matters voted upon, it does not specify the degree of detail that must be included. Nevertheless, I believe that §101, as well as all provisions of law, should be given a reasonable construction. While it is clear that minutes need not consist of a verbatim transcript of the discussion that transpired at a meeting, it is obvious that the intent of §101 is to enable the public to learn of the nature of action taken at a meeting. If action was taken with respect to the salaries of particular individuals, reference to those individuals and their salaries in the minutes would in my opinion be reasonable. Also, as indicated earlier, payroll information, contracts and similar documents concerning salaries are clearly available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: School Board
Mary Lou Dickinson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1399

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

February 14, 1980

Ms. Judy Grande
The Journal-News
Westchester Rockland
Newspapers, Inc.
Nyack, New York 10960

Dear Ms. Grande:

I have received your letter of February 6 in which you requested an opinion regarding rights of access to the names of grand jurors.

According to your letter, you have been denied access to a list of the members of the Special County Grand Jury that had been seated for approximately a year, and which was discharged in December of 1979. You have indicated that the denial by the County Commissioner of Jurors is based upon a 1975 opinion issued by the Attorney General.

I have reviewed the Attorney General's opinion, a copy of which is attached. While I agree with some of the points made in the opinion, I respectfully disagree with its conclusion.

The opinion of the Attorney General is based in part upon the requirement that grand jury proceedings must be secret and that §672 of the Judiciary Law concerning access to jury lists makes reference only to "trial jurors". In this regard, the Attorney General in his opinion wrote that:

> "[T]he Judiciary Law requires the selection of grand jurors to be done in the same manner as the selection of trial jurors and requires the minutes of the drawing to be kept, signed and filed in the same manner as the trial jurors. The statute does not

> require that copies of the list of grand jurors be made available in the same manner as for trial jurors. It is an axiom of statutory construction that expressio unius est exclusio alterius, that is, the specific mention of one person or thing implies the exclusion of other persons or things (People v. Dolan, 36 NY 59 [1867]). Thus, specific mention that a list of trial jurors be made available and the omission to require that a list of grand jurors be made available manifests a legislative intent that the list of prospective grand jurors not be made available.
>
> You also inquire as to the availability of the names and addresses of those persons who have served on a grand jury. Our research fails to disclose any statutory authority requiring the release of the names of grand jurors following completion of their service and their discharge."

The opinion stated further that the purpose of secrecy is "to protect the grand jurors from interference from those under investigation" and that the protection "is still necessary" after the members of a grand jury have been discharged.

In my opinion, the contentions offered by the Attorney General are inconsistent. On the one hand, the Attorney General's opinion stated that the Judiciary Law requires that the selection of grand jurors be accomplished in the same manner as the selection of trial jurors. On the other hand, a distinction is made between rights of access to lists of grand jurors and trial jurors. In this regard, I direct your attention to the introductory language of §671 of the Judiciary Law, entitled "[M]ode of drawing". Very simply, the cited provision states that "[A] drawing must be conducted publicly as follows..." If the Judiciary Law requires the selection of grand jurors to be accomplished in the same manner as trial

jurors, the "drawing must be conducted publicly". If that is the case, presumably any person present at the drawing could devise his or her own list of potential grand jurors. Therefore, although §672 of the Judiciary Law makes specific reference to access to lists of trial jurors, it is my contention that despite the absence of reference to lists of grand jurors, there is no prohibition from disclosure.

In fact, by implication, §671 appears to infer that the identities of grand jurors must be made public by means of the process of drawing their names.

Viewing rights of access from a different perspective, assuming that the County Commission of Jurors is a county agency, it is subject to rights of access granted by the Freedom of Information Law. If that is the case, none of the grounds for denial appearing in §87(2)(a) through (h) of the Law could in my opinion be cited as a basis for withholding.

While the Attorney General has contended that the list of grand jurors may by implication be withheld, such a list is clearly not "specifically exempted from disclosure" by statute under §87(2)(a) of the Freedom of Information Law. Further, although it might be argued that disclosure of the names of grand jurors would result in an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law, §671 of the Judiciary Law in my opinion indicates that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy.

If the lists are considered court records, the Freedom of Information Law would not be applicable. Nevertheless, §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."

In sum, I believe that the requirement that the names of grand jurors be publicly drawn indicates that a list of grand jurors should be made available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Rockland County Commissioner of Jurors

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1400

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

February 15, 1980

Mr. Donald A. Ventura Sr.
[redacted]

Dear Mr. Ventura:

I have received your letter of February 8 in which you made reference to a radio announcement concerning the availability of records. In conjunction with the broadcast, you have asked whether the Committee maintains any records concerning you.

In all likelihood, the radio broadcast made reference to a pamphlet published by the Committee,which explains rights of access to records in possession of government in New York, as well as the public's ability to attend meetings of governmental bodies. I have enclosed a copy of the pamphlet for your consideration.

Please be advised that the Committee does not maintain possession of records in general; on the contrary, the Committee's central function involves providing advice regarding rights of access granted by the Freedom of Information Law. Consequently, this office does not maintain records pertaining to you, but it is suggested that you read the pamphlet and direct your requests to the agencies that you believe might have records pertaining to you in their possession. As indicated in the pamphlet, your requests should be addressed to a "records access officer" of the agencies that might have records concerning you in their possession.

The pamphlet contains a sample letter of request 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
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1401

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

February 22, 1980

Ms. Annette La Belle
[redacted]

Dear Ms. La Belle:

I have received your latest letter in which you have contended that records discussed at open meetings of public bodies should be made available. In this regard, you have asked whether there is anything "stated or implied in the Law" which directs that the public is entitled to see records discussed at open meetings and whether the public is entitled to review a proposed budget.

I am in basic philosophical agreement with your point of view. In addition, it appears that the direction provided by both the Freedom of Information Law and the County Law tend to confirm your contention.

First, 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 county and its components, are available, except to the extent that records fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law. It is also important to note that the legislative declaration appearing in §84 of the Freedom of Information Law specifically states that "[T]he 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 most relevant provision that relates to your question 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 important to emphasize 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.

The budget materials in which you are interested clearly constitute "intra-agency" documents. However, it is likely that they contain a great deal of "statistical or factual tabulstions or data" which are in my view available. It is also important to point out that provisions in the County Law concerning the budget process indicate that a tentative budget must be distributed prior to the adoption of the final budget and must be the subject of a public hearing (see Article 7, County Law). Nevertheless, there is nothing in any law of which I am aware that requires a budget or a tentative budget to specify every potential expenditure that might arise. For example, although it is possible that a budget document might make reference to moneys to be used to implement the "smoking-clean indoor air act", I am unaware of any provision that directs that specific reference to any such appropriation be included or identifiable within a budget.

It is also noted that there is a conflict in case law concerning access to records developed in preparation of a budget. It is my belief that statistical or factual tabulations or data found within preliminary budget materials

are available based upon the holding in Dunlea v. Goldmark, which reached the state's highest court, the Court of Appeals [380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754 (1977)]. However, a different decision was reached by the Appellate Division in Delaney v. DelBello, [405 NYS 2d 276, 62 AD 2d 281]. In my view, the Delaney decision is inappropriate for several reasons that are expressed in an advisory opinion, a copy of which has been attached for your consideration.

Lastly, while it is possible that many records discussed at an open meeting may be accessible under the Freedom of Information Law, an agency need not provide copies of records immediately. Therefore, whenever possible, perhaps your requests should be made in advance of the meetings during which they will be discussed.

I hope that 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: County Legislature

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1402

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

February 22, 1980

John J. Sheehan
[redacted]

Dear Mr. Sheehan:

I have received your letter of February 6 in which you requested that I advise Assistant Chief DiNardo regarding the responsibilities imposed by the Freedom of Information Law. Consequently, a copy of my response to you will be transmitted to Chief DiNardo.

According to the reply written on your request, a copy of which is appended to your letter, your request for a copy of a particular complaint report was denied. In the alternative, you were furnished with a "complaint summary".

Without greater knowledge of the contents of the record in which you are interested, it would be inappropriate to conjecture as to rights of access. Nevertheless, as a general rule, the Freedom of Information Law provides 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 §87(2)(a) through (h) of the Law. Consequently, I believe that an agency is obliged to review a record that is the subject of a request in its entirety to determine which portions, if any, may justifiably be withheld. Further, the regulations promulgated by the Committee specify that reasons for a denial must be stated in writing [see regulations, §1401.7].

However, assuming that a complaint summary contains all of the accessible information found in the original report, except those portions that can justifiably be denied, perhaps the summary might be considered to represent a reasonable alternative to the deletion of deniable information, if the summary includes reference to the reasons for withholding portions of the original record from the summary.

I hope that 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: Chief DiNardo

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1403

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

February 25, 1980

David M. Dutko, Esq.
Assistant Corporation Counsel
City of Binghamton
Department of Law
City Hall
Binghamton, New York 13901

Dear Mr. Dutko:

Thank you for your letter of February 4 and your interest in complying with the Freedom of Information Law.

Your first question concerns access to casualty reports compiled by a police department that are completed when a police officer aids a citizen in distress. You have indicated that casualty reports may include reference to an ambulance response, for example. The second question is whether the Police Bureau may prepare a summary sheet containing available information transposed from an original report, or whether it should release a copy of the report itself with deniable information "blacked-out" or deleted. Lastly, you have asked questions concerning specific aspects of a casualty report.

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.

As stated in your letter, the most relevant exception to rights of access is found in §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". In addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. It is emphasized that the examples of unwarranted invasions of privacy are in my view merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy.

In my opinion, there may be several aspects of casualty reports which if disclosed might result in an unwarranted invasion of personal privacy. Since the Freedom of Information Law directs that all records are available, except those records or portions of records that fall within one or more of the grounds for denial, it would in my view be proper to review a record in its entirety and thereafter delete those portions that are deniable. While I have no personal objection to a compilation of a summary sheet that includes the accessible information, technically speaking, I believe that it would be preferable to delete the deniable portions of an existing record. I would also like to suggest that perhaps a form or guide could be created (with boxes appropriately cut out, for example) so that accessible portions of a record could be photocopied while leaving out the remainder that is deniable.

With regard to the particular items of a casualty report to which you made reference, I believe that the names, addresses and birth dates of victims may generally be withheld under the privacy provisions discussed earlier. Similarly, the names and addresses of witnesses may in my view be deleted based upon a similar rationale, i.e. that disclosure would result in an unwarranted invasion of personal privacy. Also, medical information concerning the status of a victim at the time of the report may likely be withheld. It is noted that two of the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) make reference to medical history and items involving the medical records of a client or patient in a medical facility.

Portions of a casualty report that identify responding police officers should in my opinion be available, for disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy. As a general rule, 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 [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)]. In this instance, records indicating the identities of responding police officers are relevant to the performance of their duties and therefore are in my opinion available.

Statements of witnesses are likely available except to the extent that they contain identifying details. In such cases, I believe that the names, addresses and similar identifying details relative to witnesses may justifiably be withheld.

Lastly, personal observations added to a report by responding police officers may be accessible or deniable in whole or in part, depending upon the nature of their comments. Here I direct your attention to §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..."

The quoted provision contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials are available. Although the written comments of police officers may be considered "intra-agency materials", they may contain comments of a factual nature that are available. Contrarily, if the written observations are reflective of opinion, impression or advice, for example, those aspects of the report may in my opinion 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: Alfred J. Libous
Assistant Police Chief Paul DiNardo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1404

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

February 25, 1980

Mr. William Randall
78-A-1777
Box R
Napanoch, New York 12458

Dear Mr. Randall:

I have received your letter of February 19. According to your correspondence, a request directed to the Commission of Correction was made recently, but was not answered. You have asked for advice with respect to the situation.

First, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee, which have the force and effect of law, and an explanatory pamphlet on the subject that may be useful to you.

Second, with respect to the time limits for response, §89(3) of the Freedom of Information 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. A response can take one of three forms. It can grant access to the records sought, deny access, and, if so, the reasons for the denial must be stated in writing. In the alternative, if, for example, the agency needs more than five business days to review a record and determine rights of access, it may acknowledge receipt of the request within the five business day period and thereafter take up to ten additional business days to grant or deny access [see regulations, §1401.5(d)].

It is also noted that a failure to respond to a request within five business days of the receipt of a request or within ten business days of the acknowledgement of the receipt of a request constitutes a "constructive" denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals [see regulations, §1401.7(c)].

Therefore, if more than five business days have transpired since the receipt of your request by the Commission of Correction, you have been constructively denied access and may appeal to the head of that agency.

It is also noted that an applicant must exhaust his or her administrative remedies prior to the initiation of 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: Commission of Correction

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 445
FOIL-AO-1405

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

February 25, 1980

Harold G. Trabold, Esq.
Dranitzke, Lechtrecker
& Lechtrecker
P.O. Box 510
73 North Ocean Avenue
Patchogue, New York 11772

Dear Mr. Trabold:

Thank you for your letter of February 6, which concerns my response to you dated February 4.

With respect to your comment that I "took the liberty of sending a copy" of my response to a third party, it is noted that the "third party", to the best of my knowledge, is the President of the School Board to which your inquiry was referenced. Since Mr. Davis had contacted me prior to the drafting of the letter addressed to you, I felt at the time that there was nothing improper about transmitting a copy to him. Further, as President of the Board, I believe that it was fair to assume that Mr. Davis would share the contents of my response with other board members.

You have cited Part 84 of the regulations promulgated by the Commissioner of Education (8 NYCRR), which deals with "[A]ccess to School Employee Personnel Records". Although the title of the provision does not so specify, it appears that Part 84 concerns only access to employee personnel records by members of Boards of Education. From my perspective, the validity of Part 84 is questionable. While I agree with your contention that members of the public may have fewer rights of access with regard to personnel records than members of a school board, it is not inconceivable that Part 84 conflicts with direction provided by two statutes, the Freedom of Information Law and the Open Meetings Law.

In my opinion, no state agency has the capacity to promulgate regulations that conflict with statutory requirements. In this instance, there are several aspects of Part 84 which in my view go beyond the authority of the Commissioner.

For example, §84.2 states that "[E]xamination of school employees personnel records by the Board of Education shall be conducted only at executive sessions of the board". The quoted provision makes no reference to the Open Meetings Law. As such, it might implicitly provide grounds for executive session that do not exist in the Open Meetings Law. It is emphasized that §105(1) of the Open Meetings Law states that:

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

Based upon the foregoing, to the extent that Part 84 of the Commissioner's Regulations is more restrictive than the Open Meetings Law, it is superseded by the Open Meetings Law.

Section 84.3 of the regulations describes the "purpose and use" of information by school board members that is obtained from employees' personnel records. While the Commissioner's regulations may have been adopted following the passage of both the Freedom of Information Law and the Open Meetings Law, §84(3) fails to recognize one of the cornerstones of the Freedom of Information Law. Specifically, one of the central principles of the 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, affirmed 51 AD 2d 673, 378 NYS 2d 165]. There may be instances in which a member of a board of education might request to inspect records as a taxpayer, and for none of the reasons described in §84.3. I realize that Part 84 enables board members to gain access to more information than the public generally when the information is sought in the performance of their official duties. Nevertheless, §84.3 in my opinion is overly restrictive. I believe that it is intended to provide school board members with greater access than the public at large, but only when the records are sought in the performance of the official duties of a board or one of its members.

You have indicated in your letter that you are "concerned with the obligation" that my position would impose on school boards and other municipalities regarding the compilation of information in response to requests. Having reviewed my earlier letter, it was specifically stated that "the Freedom of Information Law does not require an agency to create a record in response to a request".

Also, your letter appears to indicate that the payroll record required to be compiled by §87(3)(b) of the Freedom of Information Law is the only "personnel record" that must be made available. If that is your contention, I disagree. While the original Freedom of Information Law provided a list of accessible records to the exclusion of all others, the amended statute is based upon a presumption of access. In addition to the three types of records required to be compiled under §87(3), §87(2) provides that all records in possession of an agency are available, except those records or portions thereof that fall within one or more enumerated grounds for denial. In a similar vein, it is emphasized that §86(4) of the Freedom of Information Law defines "record" broadly to include any information "in any physical form whatsoever" in possession of an agency. Consequently, it is my view that an agency is obliged to review records requested in their entirety to determine which portions, if any, may justifiably be withheld.

It is also noted that in the discussion of privacy in relation to public employees in my earlier letter, each of the decisions cited dealt with records other than those required to be compiled under §87(3). Thus it is clear that the payroll record is not the only "personnel record" that is subject to rights of access granted by the Freedom of Information Law. On the contrary, all records are available, except to the extent that one or more of the grounds for denial appearing in §87(2) may justifiably be cited as a basis for withholding.

Lastly, if minutes of meetings constitute an efficient means by which information analogous to that requested by a member of the public can be provided, certainly it would be appropriate to suggest that the information sought may be obtained in that manner.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 448
FOIL-AO- 1406

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

February 27, 1980

Rev. Msgr. John R. Madden
Catholic Charities
1408 Genesee Street
Utica, New York 13502

Dear Monsignor Madden:

I have received your letter of February 11 regarding possible violations of both the Open Meetings Law and the Freedom of Information Law by the Village of New Hartford.

Your first area of inquiry concerns a situation in which the Board of Trustees of the Village of New Hartford held a meeting during which you were excluded. In brief, you have indicated that you and one other person were forbidden to attend a meeting of the Board in which approximately twenty-five other citizens were permitted to attend.

Specifically, you wrote that:

> "[I] knocked on the door to gain entrance and the Village Attorney opened to tell me abruptly that the Board was in 'Executive session' and I was not allowed. I protested that it could not be an executive session if the room was filled with about twenty-five citizens. The Attorney haplessly turned his back on me and said they would adjourn the meeting and have a 'private' meeting. He then turned back to me and said I could listen in from the hallway and locked the door in my face."

In my opinion, your exclusion from the gathering in question constituted a violation of the Open Meetings Law.

To provide you with an overview of the Open Meetings Law, it is noted at the outset that the Law defines "meeting" expansively. Section 97(1) of the Law defines "meeting" to include any convening of a quorum of a public body for the purpose of conducting public business. Further, the state's highest court has held that the Law is applicable 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]. Therefore, there was in my view no reasonable ground for characterizing the gathering in question as a "private" meeting as suggested by the Board's attorney.

It is also emphasized that the phrase "executive session" is defined in §97(3) of the Law as that portion of an open meeting during which the public may be excluded. Further, a public body cannot enter into executive session to discuss the subject of its choice. On the contrary, the procedure specified in the Law must be followed before a public body may enter into executive session, and the grounds for executive session are limited to those subjects enumerated in §100(1)(a) through (h) of the Law.

In terms of procedure, §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..."

One of the grounds for executive session includes discussion of "proposed, pending or current litigation". Under the circumstances, it would appear that the quoted ground for executive session may have been applicable. Nevertheless, in view of the fact that many members of the public were permitted to attend the so-called "private meeting", and you and one other person were the only

individuals excluded from that meeting, the provisions concerning executive session were not in my opinion applicable.

It is noted that §100(2) of the Law states that:

> "[A]ttendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

Therefore, as a general rule, a public body may permit a particular individual or individuals to attend an executive session. Nevertheless, the Open Meetings Law, like all provisions of law, must in my opinion be accorded a reasonable construction. In my view, it was unreasonable to permit entry to the vast majority of those present while excluding the remainder. In the same vein, while the topic discussed may have constituted an appropriate ground for executive session, the presence of some twenty-five members of the public in my opinion effectively prohibited the Board from excluding any member of the public who wanted to attend, such as yourself and the other person who was excluded.

Viewing the Law from a somewhat philosophical perspective, it is clear that it is based upon a presumption of openness and that the grounds for executive session are designed to enable the members of public bodies to deliberate behind closed doors when there is a need for private discussion among themselves. In this instance, the need for private discussion was obviously minimal if some twenty-five members of the public were permitted to be present. Further, it is obvious that when such a substantial number of the public may be present that a discussion could hardly be considered "private".

It might be argued that the presence of the Village Attorney indicated that an attorney-client relationship, which is privileged, had been initiated. However, the privilege is waived when disclosure is made to any person other than a client, i.e., a member of the Board of Trustees. In this instance, since members of the public were present, no argument concerning a privileged relationship could in my view be effectively or appropriately made.

In sum, while the Village Board may have engaged in a discussion appropriate for executive session, no executive session could in my opinion have been held or justified due to the presence of a substantial number of members of the public. As such, I believe that you and any other person forbidden to attend the meeting were improperly excluded.

It is also important to point out that any aggrieved person, such as yourself, may initiate a proceeding to challenge action taken under the Open Meetings Law (see §102). Moreover, the Law provides that a court may, upon good cause shown, make null and void any action taken in violation of law and award reasonable attorney fees to the successful party.

Your second question concerns a request for records in possession of the Village. Specifically, the correspondence appended to your letter indicates that you have requested without success "copies of any housing codes, safety regulations...or other municipal ordinances..." that are applicable to a community residence subject to the provisions of §41.34 of the Mental Hygiene Law.

In this regard, it is noted 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, such as a village, are available, except those records or portions thereof that fall within one or more enumerated grounds for denial.

In my opinion, no ground for denial could appropriately be asserted to withhold the records in which you are interested.

In fact, there is a contrary direction in the Law which in my view bolsters the contention that the records sought should be made available. 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..."

The provision quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records must be made available.

With respect to your request, codes, regulations, ordinances and similar documents are clearly reflective of a policy of an agency. Consequently, they are in my view available in their entirety.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Village Board of Trustees

bcc: Gil Smith

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1402

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

February 27, 1980

Ms. Carol Marcus
Parents Action Committee
for Education
73 New York Place
Staten Island, New York 10314

Dear Ms. Marcus:

I have received your letter of February 7, which again concerns a request for records directed initially to Community School District 31 by the Parents Action Committee for Education (P.A.C.E.).

According to your letter, numerous attempts have been made to gain access to various records of the District. To date, you have been unsuccessful despite the issuance of an advisory opinion written at the request of Loretta Prisco on November 26. Copies of the opinion were sent to Community School District 31 and the New York City Board of Education. At this juncture, the P.A.C.E. has appealed to this Committee to "overturn" the denial.

Although the Committee on Public Access to Records has the authority to provide advice with respect to the Freedom of Information Law and the Open Meetings Law, it has no authority to compel compliance with the Law. Consequently, I believe that you have two options. First, it might be appropriate to attempt to arrange a meeting with officials of the District or the New York City Board of Education in order to resolve the dispute. In the alternative, it appears that you have the capacity to initiate a proceeding under Article 78 of the Civil Practice Law and Rules to challenge the constructive denials of access by Community School District 31 and the Board of Education.

It may be important to review the procedural aspects of the Law with respect to time limits for response.

First, as you are aware, §89(3) of the Freedom of Information Law and 1401.5 of the Committee's regulations, which have the force of law, require that an agency respond to an initial request within five business days of the receipt of a request. Within that period, the agency may grant access, deny access in writing stating the reason for the denial, or it may acknowledge receipt of a request if no response can be given within five business days. If receipt of a request is acknowledged, the agency has ten additional business days in which to grant or deny access. If no response is given within five business days of the receipt of a request, the request is considered constructively denied and may be appealed to the head of the agency [see regulations, §1401.7(b)]. As a general rule, an applicant for records may appeal a denial within thirty days of the denial. Further, when the designated appeals person or body receives an appeal, a determination on appeal must be rendered within seven business days of the receipt of an appeal. In addition, copies of appeals and the determinations that ensue must be sent to this Committee [see Freedom of Information Law, §89(4)(a)].

Under the circumstances, it appears that you have been constructively denied access with regard to both your initial request and your appeal, neither of which has been answered. As such, I believe that your only courses of action are those described earlier, efforts to resolve the dispute or the initiation of a judicial proceeding.

It is noted that §89(4)(b) of the Freedom of Information Law places the burden of proof in a judicial proceeding upon the government. Stated differently, an agency must in a judicial proceeding prove that records withheld fall within one or more grounds for denial appearing in §87(2)(a) through(h) of the Law.

I regret that I cannot be of greater assistance. Copies of my response will be sent to Community School District 31 and the appropriate officials of the Board of Education.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Community School District 31
Dr. Macchiarola
Harold Siegel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1408

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

February 28, 1980

Albert C. Skaggs
Assistant Professor
Syracuse University
Newhouse School of Public
Communications
215 University Place
Syracuse, New York 13210

Dear Chad:

Thank you for your letter and your kind comments. I always enjoy presentations before students and your class was no exception.

Your inquiry concerns the status of records of criminal convictions. In my view, most of the records in which you are interested are clearly available, but there is dissension regarding access to so-called "rap sheet" information.

First, as a general rule, court records are available. The applicable statute in §255 of the Judiciary Law, which states that:

> "[A] clerk of a court must, upon request, and upon payment of, or offer to apy, 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, unless a sealing provision is applicable, a court clerk has the responsibility of searching and making available records in his or her possession.

As far as rap sheets are concerned, the approach that I have taken differs from that of the Division of Criminal Justice Services. That office is not a law enforcement agency per se, but rather is the repository of criminal history information. Its information is contained in computers and includes reference to arrests, convictions, the disposition of cases and similar information. The information is generally made available pursuant to the Division's regulations only to law enforcement agencies, agencies that engage in licensing and to the subjects of arrests and conviction who can obtain the information by means of a fingerprint check. My point of disagreement with the restrictions on access is based upon the idea that court records are generally available. If one can find records of convictions by searching court records, I see no reason why the Division of Criminal Justice Services should not grant access to the same information, which can be made available in a fraction of the time it takes to track down court records. My contentions are expressed more fully in an advisory opinion drafted at the request of the Division of Criminal Justice Services, a copy of which is attached.

It is also important to point out that §160.50 of the Criminal Procedure Law often results in the sealing of records pertaining to criminal actions that are terminated in favor of an accused. Consequently, if a person is arrested and the case is later dismissed, records pertaining to that arrest, including photographs, fingerprints, and other records may be sealed in any office in which those records are maintained. Again, however, if a person has been convicted, the entire case file is in most instances open for inspection by any person at the office of a court clerk.

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

Keep in touch.

Sincerely,

RJF/kk
Enc.

Robert J. Freeman
Executive Director

ERROR No

Opinion

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1410

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

February 28, 1980

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

I have received your letter of February 8, which concerns an appeal directed to Mayor Libous of the City of Binghamton.

You have asked me to "remind" Mayor Libous of his responsibility under the Freedom of Information Law.

Based upon your correspondence, you have indicated that your appeal was received by the Mayor's office on January 29, but that as of February 8 you had not received a determination. In this regard, all that I can offer is that §89(4)(a) of the Freedom of Information Law requires that the person designated to determine appeals:

> "...shall within seven business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon."

I hope that I have been 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: Mayor Libous

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1412

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

February 28, 1980

Ms. Patricia J. Landolfa
Parents Advisory Committee
Newburgh Free Academy
94 Fifth Avenue
Newburgh, New York 12550

Dear Ms. Landolfa:

I have received your letter of February 8, which concerns your unsuccessful attempts to gain access to information in possession of the Childrens Defense Fund and Mid-Hudson Legal Services.

In my opinion, neither the Childrens Defense Fund nor the Mid-Hudson Legal Services is required to provide access to the information sought.

My contention is based upon the provisions of the New York Freedom of Information Law and the federal Freedom of Information Act. Rights of access granted by those statutes are applicable only to records in possession of governmental entities. Specifically, the New York Freedom of Information Law is applicable to agencies that fall within the scope of §86(3) of the Law (see attached). Similarly, the federal Act is applicable to agencies as defined in 5 USC §551. In both instances, rights of access are restricted to governmental entities, rather than the agencies to which you made reference, which may have a relationship with government, but which are not part of government.

Nevertheless, I would like to offer the following suggestion. Both the federal and the New York laws grant access to records in possession of agencies, even if those records deal with non-governmental entities. Therefore, if, for example, Mid-Hudson Legal Services receives public moneys from a county, in all likelihood the county maintains possession of numerous records concerning Mid-Hudson

Legal Services. Those records would be subject to rights of access granted by the New York Freedom of Information Law. Similarly, if the Childrens Defense Fund receives monetary assistance from a federal agency, the federal agency would likely have records in its possession pertaining to the Fund.

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-1413

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

March 3, 1980

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

Dear Mr. Farbman:

I have received your letter of February 7, which reached this office on February 25. Once again, you have inquired with respect to payroll information.

You have indicated that I was quoted in the February 3 New York Times as stating that "payrolls were available to anyone on request." The language quoted is accurate. Nevertheless, I do not believe that it is applicable to the situation that you have brought to my attention.

The New York Times article dealt with a request for and disclosure of payroll information identifiable to public employees. That information is clearly available due to the provisions of §87(3)(b) of the Freedom of Information Law, which states that each agency shall maintain a payroll record which identifies the name, public office address, title and salary of every officer or employee of the agency.

That type of payroll record may be distinguished from the information in which you are interested, for you have sought payroll information identifiable to employees of private companies that maintain contractual relationships with the New York City Housing Authority. Consequently, the information that you are seeking does not concern the "officers or employees" of an agency, but rather the employees of a private firm that does business with a governmental agency.

Consequently, I would like to reaffirm my contention that the payroll information in which you are interested is deniable, for it would identify employees of private corporations and therefore would if disclosed result in an unwarranted invasion of personal privacy.

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-1414

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

March 3, 1980

Mr. John Byczkowski
Reporter
The Tonawanda News
435 River Road
North Tonawanda, NY 14120

Dear Mr. Byczkowski:

As you are aware, I have received your letter of February 21. Your inquiry concerns your unsuccessful attempts to gain access to records reflective of payments made to the attorney for the Tonawanda Urban Renewal Agency, Richard Kinzly. You have indicated that Mr. Kinzly has worked for some eighteen months on a particular lawsuit.

In my opinion, records reflective of the monies paid to the attorney for the Urban Renewal Agency are accessible.

It is important to note 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 thereof that fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision. In my view, none of the grounds for denial could appropriately be cited to withhold the records in question.

On the contrary, one of the provisions for denial in my opinion provides direction to the effect that the records in question should be made available. Section 87(2)(g) states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The quoted provision contains what in effect is a double negative. While an agency may 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 records of the monies paid to the Urban Renewal Agency may likely be characterized as "intra-agency" materials. Nevertheless, it is also likely that they consist solely of "statistical or factual tabulations or data" that should be made available.

In addition, although there may be an attorney-client relationship existing between Mr. Kinzly and the agency that he represents, the courts have held that records reflective of the 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)].

I hope that 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: Mayor G. Delwin Hervey
Common Council
Urban Renewal Agency

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1415

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

March 3, 1980

Mr. Edward F. Baird
Office 1E
1 East 69th Street
New York, New York 10021

Dear Mr. Baird:

I have received your inquiry concerning your ability to gain access to personnel records pertaining to you.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, which have the force and effect of law, and an explanatory pamphlet on the subject that may be helpful to you.

With respect to the records in which you are interested, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, 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 enumerated grounds for denial appearing in §87(2)(a) through (h).

In addition, there is a sample letter of request in the enclosed pamphlet which may be particularly 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1416

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

March 4, 1980

Mr. Leonard Rachlin
[redacted]

Dear Mr. Rachlin:

I have received your letter of February 14 which concerns your attempt to obtain a copy of the "rating key" for the examination for Youth Education Coordinator, No. 27-880.

According to your letter, Donald Mark, Associate Staffing Services Representative of the New York State Department of Civil Service, informed you that you could "view the rating key under supervision..., but could not xerox or hand copy the rating key." You have indicated further that you offered to pay the fees for copying.

In my opinion, if an individual is permitted to inspect records, he or she should also be permitted to request photocopies of the records or make copies by hand.

My contention is bolstered by §89(3) of the Freedom of Information Law, which provides that when records are made available, "[U]pon payment of, or offer to pay, the fee prescribed therefore, the entity shall provide a copy of such record..." Consequently, the Freedom of Information Law requires that agencies make copies of accessible records on request upon payment of or offer to pay the fees prescribed by the agencies.

Further, the courts have held for nearly sixty years that the right to copy records is concomitant with the right to inspect [see e.g., In re Becker, 200 AD 178, 192 NYS 754,(1922)].

Lastly, I believe that it is generally favorable for government to permit the reproduction of accessible records, for reproducing the records insures that the information copied constitutes a true copy. Very simply, errors in transcription or memory cannot be made when records are photocopied.

I hope that 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: Donald Mark

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 452
FOIL-AO- 1417

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

March 5, 1980

Paul M. Bray, Esq.
[redacted]

Dear Mr. Bray:

As you are aware, I have received your letter concerning a request for records made under the Freedom of Information Law directed to the New York State Council on the Arts on December 27.

According to your letter, the Council has denied access to particular documents requested in items one to four of your request, and you have asked for an opinion regarding access to those records.

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 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. Further, the regulations promulgated by the Committee, which have the force and effect of law, require that a written denial of access must state the reasons for the denial [see regulations, §1401.7(b)]. In this regard, the letter of denial addressed to you by Edward Gallagher, Records Access Officer for the Council, stated in several instances that the records sought "are not subject to disclosure under the Freedom of Information Law". Although such a response may be characterized as a "reason" for denial, it is not in my view a sufficient explanation of the reason for withholding.

The first aspect of your request concerns:

> "[I]dentification of all audits of EBA productions, works and its facility made and/or used during the 1978-79 and 1979-80 funding cycles, the name of each auditor or consultant who made such audit or audits and their relevant vitae."

Based upon discussions of the audits with attorneys for the Council on the Arts, I understand the basis for recalcitrance regarding their disclosure. In short, the "auditors" or "consultants" who performed the audits are involved in making subjective judgments regarding the artistic qualities and qualifications of potential recipients of monetary support from the Council. It has been argued that disclosure of the audits would preclude the Council from receiving straightforward advice from professionals having expertise in their respective fields and would result in a "chilling effect" upon the capacity of the Council to gain expert advice.

On the other hand, in our telephone conversations, you have contended that it is important to know the strengths and weaknesses of a particular program following an audit or evaluation, as well as qualifications of the person who authors an audit.

With regard to rights of access, it is questionable whether any of the grounds for denial may be appropriately cited. While the audits are essentially advisory in nature, they are conducted by persons engaged by means of a contractual relationship with the Council on the Arts; those persons are not employees of the Council. Consequently, I doubt that the audits could be characterized as "inter-agency or intra-agency materials" that are deniable under §87(2)(g) of the Freedom of Information Law.

The legislative history of the amendments to the Freedom of Information Law and case law decided prior to the passage of the Freedom of Information Law in my view strengthen my contention. The passage of the amendments to the Freedom of Information Law in 1977 involved substantial negotiation and a series of alterations in the

language of the amendments that were originally introduced. Background relative to the intent of §87(2)(g) was provided in a letter transmitted to me by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law:

> "[M]y original bill would have permitted an agency to deny access to records or portions thereof that 'are non-final or purely advisory drafts or papers.' Several problems were raised with respect to that language. Specifically, in some instances it would be difficult to determine whether a particular record is 'non-final'. More importantly, the term 'advisory' could have been interpreted in a manner that would permit denial of access to records that are accessible under the existing Freedom of Information Law. For example, 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."

Further, studies, audits and similar reports prepared by third party consultants had been held to be available by means of case law decided prior to the enactment of the Freedom of Information Law [see Winston v. Mangan, 338 NYS 2d 654 (1972); Sanchez v. Papontas, 32 AD 2d 948 (1969)].

None of the remaining grounds for denial appearing in §87(2) of the Freedom of Information Law could in my opinion be cited as a basis for withholding.

Considerations concerning privacy arise relative to your request for the vitae of the auditors or consultants. As you indicated in your letter, certainly there are aspects of a vitae which if disclosed would result in an unwarranted invasion of personal privacy. As a general rule, this Committee has advised that records that are relevant to the performance of the official duties of public employees are available, for disclosure of such information 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)]. However, as noted earlier, the auditors and consultants are not "public employees." As such, rights of access to personal information concerning them are in my view less extensive than access to similar information relating to public employees.

While §89(2)(b) of the Law provides direction regarding the scope of what may constitute an unwarranted invasion of personal privacy, the examples of such invasions are in my opinion merely illustrative. Consequently, it can only be advised that the Council is obliged to review the vitae in their entirety to determine which portions of the vitae would if disclosed result in an unwarranted invasion of personal privacy.

Your last inquiry concerns the status of the Advisory Dance Panel as well as minutes relevant to EBA (Electronic Body Arts) of all meetings held by the Advisory Panel, subcommittees and the Council during which EBA was discussed, considered or evaluated for the 1978-79 and 1979-80 funding cycles. You have also asked for the names of those attending such meetings and the records of votes taken pertaining to EBA. In this aspect of your inquiry, both the Freedom of Information Law and the Open Meetings Law are applicable.

First, as you are aware, amendments to the Open Meetings Law became effective on October 1, 1979. Most relevant to your inquiry under the circumstances is the new definition of "public body", which as amended 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" [§97(2)].

It is clear that the Council itself as well as its committees and subcommittees are public bodies subject to the Open Meetings Law in all respects. In addition, if the Advisory Dance Panel consists of at least two members and performs its duties collectively, as a body, it, too, is in my opinion a public body subject to the Open Meetings Law.

This contention may be bolstered by viewing the definition of "public body" in terms of its components.

First, the Advisory Dance Panel and other panels are entities consisting of two or more members.

Second, whether the panels are comprised of public officers or members of the public, they are in my view required to perform their duties by means of a quorum pursuant to the provisions of §41 of the General Construction Law, which defines "quorum".

Third, according to your letter, the Advisory Dance Panel "plays an important role in the Council's grant application review process". If your contention is accurate, the Panel conducts public business and performs a governmental function for an agency of the state.

Moreover, the amendments to the definition of public body tend to strengthen the conclusion that an advisory panel is a "public body". Specifically, the language in the definition of "public body" as originally enacted made reference to entities that "transact" public business, and it was argued by many that advisory groups with only the capacity to recommend and with no authority to take action were not covered by the Law, because they do not "transact" public business, i.e., take final action. The substitution

of the term "conduct" in my opinion represents an intent to include committees, subcommittees and other advisory groups that have no authority to take final action, but merely the authority to advise. The inclusion of committees, subcommittees and "similar" bodies in the definition also indicates an intent on the part of the Legislature to include advisory bodies within the scope of the definition of "public body".

Although members of advisory panels might not be public officers, I believe that the panels are subject to the Law, if each of the conditions described in the definition of "public body" is present. Judicial interpretations of the Open Meetings Law have held that advisory bodies consisting of members of the public are subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977); Pissare v. City of Glens Falls, Sup. Ct., Warren Cty. (1978)]. For example, in Pissare, supra, which concerned a citizens committee designated to advise the City of Glens Falls with respect to the construction of a civic center, the court found that:

> "...all members formally agreed to serve on such Commission. While 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 concerning the Civic Center, 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 concerning the Civic Center. The court holds that when persons are formally requested to advise the legislative and executive officers in deliberating that such persons are charged with a public duty (see General Construction Law §41). Thus, the Commission and its component committees transacted public business whenever they discharged their public duty."

Further, §101 of the Law requires that all public bodies compile minutes with regard to both open meetings and executive sessions. While a committee or advisory body does not take final and binding action, its votes or determinations are reflective of the action taken by those groups. Consequently, it is my view that advisory bodies must compile minutes of the actions they take, as well as other information required to be included in minutes pursuant to §101, even though their action may be subject to review by a governing body or an executive.

Finally, although the minutes requirements of the Open Meetings Law make reference to the vote taken by a public body, it is the Freedom of Information Law that requires that a voting record must be compiled identifiable to each member in every instance in which a vote is taken, and in my view, §87(3)(a) of the Freedom of Information Law is applicable to votes taken by any public body, including the advisory panels and the subcommittees to which you made reference.

I hope that 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: Andrew Berger
Edward Gallagher
Theodore Striggles

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-453
FOIL-AO-1418

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

March 6, 1980

Beverly Paigen, Ph.D.
Roswell Park Memorial
Institute
Department of Molecular
Biology
666 Elm Street
Buffalo, New York 14263

Dear Dr. Paigen:

I have received your letter of February 20 in which you requested an advisory opinion under the Open Meetings Law. According to your letter, you are employed by the New York State Health Department at the Roswell Park Memorial Institute and have publicly released your "independent data on the health problems at Love Canal". Since the release of that data, you have indicated that your superiors have refused to submit a subcontract that you wrote which would have provided funds for environmental research. You also wrote that you are "under orders" not to start pilot studies or write grants until you receive administrative approval, "a requirement that is not applied to any other scientist" at the Institute. The Association of Scientists at Roswell Park has requested that the Board of Visitors review the problem due to the Association's fear that "these actions represent arbitrary and punitive administrative control over scientific activities."

The Board of Visitors has agreed to consider the issues, but will do so, according to your letter, in executive session under §100(1)(a) of the Open Meetings Law. The cited provision permits executive sessions to discuss "matters which will imperil the public safety if disclosed". You have indicated that the Chairman of the Board of Visitors, Mr. Peter Crotty, has stated that the cited ground for executive session is appropriate, for public discussion would harm the reputation of Roswell Park.

Several points should be made with respect to the foregoing.

First, it is important to note that a public body cannot schedule an executive session in advance of a meeting. "Executive session" is defined by §97(3) of the Open Meetings Law as a portion of an open meeting during which the public may be excluded. Further, §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 provision quoted above, in order to enter into an executive session, a public body must first convene an open meeting. Also, a motion to enter into executive session must be made during the open meeting that identifies in general terms the nature of the subject intended for discussion behind closed doors, and the motion must be carried by a majority vote of the total membership of a public body. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. It is also clear that an executive session cannot be scheduled in advance, for a vote must be carried by a majority of the total membership of a public body during an open meeting to convene an executive session.

With regard to the basis for closed door discussion cited by Mr. Crotty, I believe that it is questionable whether that ground for executive session is appropriate. You mentioned that the data released dealt with health problems relative to Love Canal. If the findings of the data were to be considered publicly, it is conceivable that such a discussion would constitute a matter which would imperil the public safety if disclosed. On the other hand,

however, if the subject matter of the discussion pertains to "administrative control over scientific activities", it is difficult to envision how such a discussion would "imperil the public safety" if held open to the public. Essentially, a discussion of that nature would deal with the policy of the Health Department and the Institute with respect to scientific studies by its employees. Such a discussion would likely concern policy which should be discussed during an open meeting, rather than a matter which would imperil the public safety if disclosed. Further, I cannot see how damage to the reputation of Roswell Park could be equated with a matter that would "imperil" public safety.

With regard to your request made under the Freedom of Information Law, I agree with your contention. If the contents of your letter and the response to your request by Mr. Fred Rosen are accurate, you have merely requested copies of materials in which you were a correspondent. If that is the case, it would appear that there would be no ground for denial under the Freedom of Information Law and that the materials should be made available to you. As indicated in the materials previously sent to you, you may appeal a denial of access to the head of the agency or whomever has been designated to determine appeals. The appeals person or body has seven business days from the receipt of the appeal to render a determination. In addition, appeals and the determinations that follow are required to be sent to this Committee under §89(4) of 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/kk

cc: Dr. Gerald Murphy
Dr. Edwin Mirand
Dr. Fred Rosen
Mr. Peter Crotty
Mr. Alfred Kirchhofer
Dr. Charles Elliott
Dr. Thomas Fahey
Dr. Robert Ketter
Dr. Richard Rifkind

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1419

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

March 6, 1980

The Hon. William J. Larkin Jr.
Member of the Assembly
Room 722
Legislative Office Building
Albany, New York 12248

Dear Assemblyman Larkin:

I have received your letter of March 4 and appreciate your interest in the Freedom of Information Law.

Your letter and the correspondence appended to it concern an inquiry sent to you by Ms. Patricia Landolfa relative to the status of Mid-Hudson Legal Services under the Freedom of Information Law. It is noted that I have corresponded with Ms. Landolfa. Consequently, the ensuing comments essentially reiterate the advice previously rendered to her.

In my opinion, neither the Childrens Defense Fund nor the Mid-Hudson Legal Services is required to provide access to the information sought by Ms. Landolfa.

My contention is based upon the provisions of the New York Freedom of Information Law and the federal Freedom of Information Act. Rights of access granted by those statutes are applicable only to records in possession of governmental entities. Specifically, the New York Freedom of Information Law is applicable to agencies that fall within the scope of §86(3) of the Law (see attached). Similarly, the federal Act is applicable to agencies as defined in 5 USC §551. In both instances, rights of access are restricted to governmental entities, rather than the agencies to which she made reference, which may have a relationship with government, but which are not part of government.

Nevertheless, I would like to offer the following suggestion. Both the federal and the New York laws grant access to records in possession of agencies, even if those records deal with non-governmental entities. Therefore, if, for example, Mid-Hudson Legal Services receives public moneys from a county, in all likelihood the county maintains possession of numerous records concerning Mid-Hudson Legal Services. Those records would be subject to rights of access granted by the New York Freedom of Information Law. Similarly, if the Childrens Defense Fund receives monetary assistance from a federal agency, the federal agency would likely have records in its possession pertainin to the fund.

I hope that 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-1420

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

March 7, 1980

Mr. Joseph C. Hembrooke
Superintendent of Schools
Delaware Valley Central School
Callicoon, New York 12723

Dear Mr. Hembrooke:

I have received your letter of February 25 concerning the interpretation of the Freedom of Information Law.

Specifically, you have indicated that a taxpayer has requested the following information regarding a particular employee of the District:

"(a) The type of degree;

(b) The University issuing the degree;

(c) The major subject;

(d) What year this degree was conferred."

You have contended both orally and in your letter that the information in question need not be made available, for the Education Department issues teaching certificates, and the certificate is the document that determines a teacher's qualifications.

I agree with your contention, which in my view is bolstered by the provisions of the Freedom of Information Law.

Most relevant to your inquiry is §87(2)(b) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Although subjective judgments must of necessity often be made regarding privacy, there is in my view a sufficient amount of case law interpreting the privacy

provisions to advise that the information sought is deniable.

In brief, 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 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 2d 664 (Court of Claims, 1978)]. Conversely, it has been held that records which are irrelevant to the manner in which public employees perform their duties are deniable, for disclosure, in such cases would 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, the type of degree awarded to an individual, the university that issued the degree, the major subject upon which the degree was based and the year in which the degree was conferred are in my view largely irrelevant to the manner in which a public employee performs his or her duties. What is important with respect to the qualifications of a teacher is the granting of a teaching certificate by the State Education Department. I believe that the certificate identifies the area in which a teacher is qualified to teach. Certainly the certificate and its contents are relevant to the performance of the official duties of a teacher. The information sought in my opinion is not.

Further, if the same information was sought from the university that granted the degree, the university would be prohibited from disclosing the information without the consent of the subject of the information pursuant to the provisions of the Federal Family Educational Rights and Privacy Act [20 USC, §1232g]. If the teacher in question consents in writing to disclose the information, it would become accessible under the Freedom of Information Law [see §89(2)(c)(ii)]. However, unless such consent is received, I believe that the information sought is deniable for the reasons expressed in 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1421

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

March 7, 1980

[redacted]

Dear [redacted]

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

Although the Freedom of Information Law deals with access to records generally, there are special provisions of law pertaining to access to records of birth, death and marriage, for example, as well as adoption.

It is unclear from your letter whether your mother was legally adopted. Assuming that she was adopted, the records concerning the adoption remain sealed and confidential. In this regard, I have enclosed a copy of §114 of the Domestic Relations Law, which in a nutshell provides that records concerning adoption remain sealed except upon order of a court.

Assuming that you are interested in records of birth and that your mother was not adopted, I believe that such records should be made available to you under the provisions of §§4173 and 4174 of the Public Health Law. In brief, the cited provisions state that records of birth and death are available upon a showing of judicial or other "proper purposes". Since you are related to the subject of the records, a request for birth and death records concerning your mother would in my view constitute a "proper purpose".

Should you seek to obtain birth or death records, your inquiry should be addressed to the Bureau of Vital Records, New York State Health Department, Tower Building, Empire State Plaza, Albany, New York, 12237.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1422

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

March 7, 1980

Mr. Alan J. Azzara
NYCLU
Nassau Cty. Chapter
210 Old Country Road
Minneola, NY 11501

Dear Mr. Azzara:

I have received your letter of February 27 in which you have requested an advisory opinion regarding the propriety of a denial of access to records by the Valley Stream Union Free School District #24.

Specifically, in response to a request for an opportunity to review the by-laws of the District's Board of Education, the attorney for the District, Norman Liben, denied access based upon the following rationale:

> "[Y]ou are not a resident of the School District. You are not a parent of a child in attendance at the District. In your professional capacity, you do not represent a person who is a pupil in the District or who has a case or controversy with the District. Accordingly, it appears to me that you have no justiciable interest in the Board of Education or of the By-Laws or other records of the aforesaid School District. Frankly, the personnel of the School District are busy enough with their regular choes and with requests for access to records from people who have a bona fide interest in the records of the District."

In my opinion, the denial cannot be justified.

One of the cornerstones of the Freedom of Information Law is the principle that accessible records shall be made equally available to any person, without regard to status or interest. This point has been confirmed in judicial interpretations of the Freedom of Information Law and is stated in the statute itself.

The first decision evoking the principle was Burke v. Yudelson [388 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], which in both the Supreme Court and the Appellate Division opinions cited the Committee's resolution issued shortly after the enactment of the Freedom of Information Law in 1974 which advised that accessible records are available to "any person". A second decision dealt with records in possession of a school district. It is noted in this regard that §2116 of the Education Law has long provided substantial rights of access to records in possession of school districts to "qualified voters of the district." However, in construing the Freedom of Information Law in conjunction with the cited provision of the Education Law, 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 Education Law §2116. Respondent's reading of §2116 as a restriction on the Freedom of Information Law is clearly erroneous. Petitioner and her attorney, as well as other persons, whether or not voters or in any way associated with the School District, are intended to be benefitted by Article 6" [Matter of Duncan, 394 NYS 2d 362, 363 (1977)].

Moreover, by viewing the statute itself, there is clearly no restriction on the beneficiaries of rights of access or the reasons for which records may be requested. For instance, §87(2) of the Freedom of Information Law states simply that all records of an agency are available, except those falling within one or more grounds for denial enumerated in paragraphs (a) through (h) of the cited provision. No demonstration of identification or interest is required. In addition, §89(4) of the Law provides that "any person (emphasis added) denied access to a record..." may appeal.

In short, the fact that you may not be a resident of a school district or even a citizen of the United States does not limit your rights under the Freedom of Information Law.

In terms of rights of access to the records in which you are interested, they are in my view clearly available. The by-laws of the School District are reflective of the

policy of the District and therefore are in my opinion 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
Executive Director

RJF:jm

cc: School District
Norman Liben

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1423

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

March 7, 1980

Mr. Almon L. Wait
[redacted]

Dear Mr. Wait:

I have received your letter of February 25, which concerns your unsuccessful attempts to gain access to information from the St. Regis Falls Central School District.

Specifically, you have asked for information regarding extra curicular activities relative to the sports program, such as coaches' salaries, bus mileage and gas consumption. You have indicated that although you requested the information in question eight months ago, you have received no reply.

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 enumerated categories of deniable records [see attached, Freedom of Information Law, §87(2)(a) through (h)].

However, it is also important to point out that the Freedom of Information Law grants access to existing records. Stated differently, an agency is not required to create or compile a record in response to a request.

Assuming that the information in which you are interested exists in the form of a record or records, it is in my view clearly available.

One of the bases for my contention 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...

The provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, 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, records or portions of records that indicate bus mileage or gas consumption, for example, might be characterized as "intra-agency" materials; however, they would constitute "statistical or factual tabulations or data" that are available. Also, books of account, bills, vouchers and similar documentation concerning the expenditure of public money would also be available.

In addition, it is noted that §87(3)(b) of the Law requires that each agency compile a payroll record which indicates the name, public office address, title and salary of all officers or employees of an agency. By means of the payroll record, you should be able to learn of the salaries paid to coaches, teachers and other person employed by the District.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations, which have the force and effect of law, provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days, the request is considered "constructively" denied [see regulations, §1401.7(b)]. If you are denied, you may appeal within thirty days to the head of the agency or whom-

ever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that ensue must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Also, enclosed for your consideration 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
Executive Director

RJF:jm

Encs.

cc: School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1424

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

March 10, 1980

Mr. Anthony Mirra
#79A1453
P.O. Box 149
Attica, NY 14011

Dear Mr. Mirra:

I have received your letter of February 18, which concerns your unanswered requests for transcripts and similar documents related to criminal investigations.

In response, I would like to offer the following advice.

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 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.

In my view, there are two grounds for denial that might to some extent be applicable.

Section 87(2)(e) 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."

Since the cases in which you were involved have been closed and your "friend" is deceased, it is in my view unlikely that disclosure would result in the harmful effects described in the provision quoted above. However, it is possible that related investigations may be ongoing or that the techniques and procedures used in the investigations may not have been"routine". Under those circumstances, it is possible that some of the records may be withheld.

The other ground for denial that might be cited is §87(2)(f), which provides that an agency may withhold records or portions thereof which "if disclosed would endanger the life or safety of any person." The reason for the quoted exception is obvious. The extent to which it may properly be cited depends upon the factual circumstances involved.

It is suggested that a possible source of much of the information in which you are interested would be the court of courts in which you were tried. Unless court records are sealed, they are generally available under the provisions of §255 of the Judiciary Law.

Lastly, you have indicated that you have not received a response to your request, which was made over a month ago. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations, which have the force and effect of law, provides that an agency must response to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny acess, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days, the request is considered "constructively" denied [see regulations, §1401.7(b)]. If you are denied

you may appeal within thirty days to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that ensue must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Also enclosed for your consideration 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
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1425

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

March 10, 1980

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 February 14. Based upon your letter, it appears that there may be semantical confusion regarding the use of the terms "complaint report", "casualty report", and "accident report".

The only document among the three that in my view is easily classified is a motor vehicle accident report. From my perspective, it is likely that the terms "casualty report" and "complaint report" may be used differently by different departments.

The term "accident report", however, is customarily used with respect to motor vehicle accidents. Reports of accidents concerning motor vehicles are now and have long been available under the provisions of §66-a of the Public Officers Law.

I am not sure whether the foregoing has shed any light on the matter. Nevertheless, I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Chief DiNardo
Mayor Libous

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1426

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

March 11, 1980

Mr. Daniel S. Parker
Editor-in-Chief
The Spectrum
355 Squire Hall
State University of New York
Buffalo, New York 14214

Dear Mr. Parker:

As you are aware, I have received a copy of a determination rendered on appeal under the Freedom of Information Law by Nancy S. Harrigan, Deputy University Counsel.

Your request concerns a report prepared by consultants which evaluates the registration program and office at the State University of New York at Buffalo. In response to your request, Ms. Harrigan wrote that:

> "...such an evaluation is an intra-agency document which is not a statistical or factual tabulation, an instruction to staff that affects the public or a final agency policy or determination. Under the Freedom of Information Law such document need not be disclosed. [Public Officers Law §87(2)(g)]. The evaluation constitutes statements of opinion, advice and recommendations and thus represents the kind of non-final, pre-decisional information prepared to assist an agency decision-maker which is exempt from disclosure under the Freedom of Information Law. (see e.g., McAuley v. Board of Education of the City of New York, 48 NY 2d 659, aff'd 61 AD 2d 1048 (2nd Dept. 1978). Your appeal is therefore denied.

I disagree with the determination rendered by Ms. Harrigan.

As I understand the situation, the report in which you are interested was not prepared by the staff of the University, but rather by third party consultants who were engaged by means of a contract by the University. If that is the case, I do not believe that the report could be characterized as "inter-agency or intra-agency" material.

In my view, the term "inter-agency" is applicable to communications between officials of two or more agencies. The term "intra-agency" is in my opinion applicable to communications transmitted between or among officials of a single agency. Consultants hired by an agency are not in my view officials of the agency, for their connection with the agency is contractual in nature and they could not in my opinion be characterized as employees or officials of an agency.

The legislative history of the amendments to the Freedom of Information Law and case law decided prior to the passage of the Freedom of Information Law in my view strengthen my contention. The passage of the amendments to the Freedom of Information Law in 1977 involved substantial negotiation and a series of alterations in the language of the amendments that were originally introduced. Background relative to the intent of §87(2)(g) was provided in a letter transmitted to me by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law:

> "[M]y original bill would have permitted an agency to deny access to records or portions thereof that 'are non-final or purely advisory drafts or papers.' Several problems were raised with respect to that language. Specifically, in some instances it would be difficult to determine whether a particular records is 'non-final'. More importantly, the term 'advisory' could have been interpreted in a manner that would permit denial of access to records that are accessible under the existing Freedom of Information Law.

> For example, 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."

Further, studies, audits and similar reports prepared by third party consultants had been held to be available by means of case law decided prior to the enactment of the Freedom of Information Law [see Winston v. Mangan, 338 NYS 2d 654 (1972); Sanchez v. Papontas, 32 AD 2d 948 (1969)].

None of the remaining grounds for denial appearing in §87(2) of the Freedom of Information Law could in my opinion be cited as a basis 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: Nancy S. Harrigan
Robert W. Engelhardt

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1427

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

March 11, 1980

Mr. Donald J. Gott
Tri-Gott Auto Parts
270 South Main Street
Warsaw, New York 14569

Dear Mr. Gott:

I have received your most recent letter, which concerns fees for copies under the Freedom of Information Law and the destruction of records.

First, you have indicated that two towns in your vicinity have adopted fees of five dollars per photocopy with regard to requests for records made under the Freedom of Information Law.

As you are aware, §87(1)(b)(iii) of the Freedom of Information Law states that an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, unless a different fee is prescribed by law. In my view, a resolution adopting a fee of five dollars does not constitute a "law" and therefore is likely void.

However, it is noted that I have contacted Cathi Schroeder, the Town Clerk of the Town of Wethersfield, on your behalf. She informed me that the resolution concerning the five dollar fee has been rescinded. It has been replaced with a new resolution which permits the Town to charge five dollars for the first copy and the actual cost to the Town of reproducing the remaining copies. The basis for the five dollar fee, as explained to me, is that the Town has no photocopy machine, and that the Town Clerk or her designee must travel to a photocopy machine. The fee of five dollars is intended to cover the cost of time and traveling to and from the site of the photocopy machine. The actual fee for photocopying is based upon what the Town pays to have a record reproduced on the photocopying machine it uses.

In my view, the fee is reasonable, so long as it is reflective of the actual cost to the Town of traveling to and from the site of the photocopy machine. In situations in which a municipality has at its disposal a photocopy machine, the fee is restricted to twenty-five cents per photocopy, unless another enactment provides that a higher fee may be assessed.

Second, with respect to the destruction of dog licenses, I have contacted both the Department of Agriculture and Markets and the State Education Department, as well as Ms. Schroeder. In my opinion, the dog licenses in question should not have been destroyed due to the provisions of §65-b of the Public Officers Law. In brief, the cited provision states that a municipality cannot destroy records unless it obtains the consent of the Commissioner of Education. The Commissioner has in turn developed detailed schedules for the retention and disposal of particular records. According to a representative of the Education Department, an application for a dog license may be destroyed one year after its expiration. The stub of a dog license must be kept for six years.

It is emphasized that Ms. Schroeder, the new Town Clerk, informed me that she has discussed the matter with her predecessor. Ms. Schroeder agrees that the dog licenses should not have been destroyed and has stated that she has become familiar with the relevant schedules for the retention of dog licenses. Unfortunately, Ms. Schroeder had no control over events that occurred in the past. All that I can suggest is that dog licenses and other records will, according to Ms. Schroeder, be maintained in the future as the law requires.

I hope that 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: Cathi Schroeder
Town Board - Town of Wethersfield
Town Board - Town of Orangeville

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1428

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

March 11, 1980

Ms. Carole A. Rowland
[redacted]

Dear Ms. Rowland:

I have received your most recent letter which again concerns your request for a copy of a check transmitted by the State Insurance Fund to the Oswego City School District.

Your specific inquiry is whether the policy of an agency, such as the State Insurance Fund, supersedes statutory law in New York. In this regard, it is my view that an agency cannot adopt policy or promulgate regulations that conflict with provisions of a statute. As such, to the extent that policies, for instance, restrict rights of access granted by the Freedom of Information Law, they are in my view void to that extent.

In any event, I have made several inquiries on your behalf to determine the reason for the delay in response to your request by the State Insurance Fund. I attempted to reach Charmaine Hauff, but instead spoke to John Place, Ms. Hauff's supervisor, who is the District Claims Manager for the Syracuse office of the State Insurance Fund. Mr. Place assured me that steps are being taken to assist you. One of the problems is that the check is not in possession of the Syracuse office and in fact may no longer be in possession of the Fund. Consequently, Mr. Place informed me that he is in the process of contacting and sending relevant information to the Fund's records access officer, Arthur D. Plotnick, at its main office in New York City. I believe that you will hear from the Fund with respect to your request within a reasonable time.

I would like to offer a suggestion at this juncture. I am not sure that your receipt of a copy of the check in question will serve to answer all of your questions. Perhaps it would be more appropriate to request copies of ledgers, books of account, and similar documentation in possession of the School District. A review of those records for the dates surrounding the issuance of the check may shed more light on the situation than the check itself. Ledgers, books of account and similar materials in possession of the School District are clearly available under the Freedom of Information Law, for they constitute "statistical or factual tabulations or data" required to be made available under §87(2)(g)(i).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Oswego City School District
John Place
Arthur D. Plotnick

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1429

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

March 12, 1980

Mr. Lee W. Stemmer
[redacted]

Dear Mr. Stemmer:

As you are aware, I have received your letter concerning a request for records directed to the Town of Pompey.

According to the correspondence appended to your letter, you have requested to review numerous records in possession of the Pompey Building Inspector and Zoning Enforcement Officer. Although no official of the Town has stated that the records are deniable under the Freedom of Information Law, you have been constructively denied access to the records due to their location, the home of Mr. DeLuca, the Building Inspector. Specifically, you were informed by the Town Clerk that the records would not be available on the date requested, because "Mr. DeLuca will be on vacation from 3 to 4 weeks, after which time, the records that you requested will be made available to you."

I would like to make several comments with respect to the foregoing.

First, the Freedom of Information Law prescribes specific time limits for response to requests. Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations, which have the force and effect of law, provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary

to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days, the request is considered "constructively" denied [see regulations, §1401.7(b)]. If you are denied you may appeal within thirty days to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that ensue must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Second, §30 of the Town Law states that the Town Clerk is the legal custodian of all town records. While the records that you are seeking may be in the physical custody of Mr. DeLuca, they are in my view nonetheless in the legal custody of Carole Guynup, the Town Clerk.

Third, the correspondence indicates that the Town Clerk is the designated records access officer. In this regard, it is noted that §1401.2(a) of the Committee's regulations states that the records access officer "shall have the duty of coordinating agency response to public requests for access to records". Therefore, in my view, the records access officer is responsible for insuring that responses to requests for records are given within the time limits specified in the Freedom of Information Law and the regulations. Further, the records access officer should in my opinion have obtained the records from the Building Inspector on your behalf.

Fourth, while I do not believe that it would be unreasonable for a public employee to have physical custody of records necessary to the performance of his or her official duties, the location where records are kept cannot in my opinion be cited as a basis for withholding records or delaying responses to requests for 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: Edward Dietrich
Doctor Harold A. Frediani
Carole Guynup

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1430

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

March 17, 1980

Ms. Marilyn Adriance
Executive Assistant
Professional Insurance Agents
of New York State, Inc.
P.O. Box 196
Glenmont, New York 12077

Dear Ms. Adriance:

As you are aware, your letter addressed to Secretary of State Paterson 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 Secretary of State is a statutory member.

Your inquiry pertains to the status of several entities under the Freedom of Information Law, including the New York Automobile Insurance Plan, the Tri-Borough Bridge Authority, the Metropolitan Transportation Authority, the New York State Thruway Authority and the New York State Insurance Fund.

In my opinion, each of the entities to which you made reference is subject to the Freedom of Information Law in all respects, except the New York Automobile Insurance Plan.

My opinion is based upon the definition of "agency" appearing in §86(3) of the Freedom of Information Law. The cited provision states that the term "agency" includes:

> "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 authorities that you identified clearly fall within the scope of the definition, which makes specific reference to public authorities. In addition, the State Insurance Fund is part of the State Department of Labor. As a matter of fact, I have recently had contact with the State Insurance Fund, and inquiries made under the Freedom of Information Law may be directed to its Records Access Officer, Arthur D. Plotnick, who is located at the Fund's main office at 99 Church Street, New York, New York.

I have made several telephone calls on your behalf in order to determine the nature of the New York Automobile Insurance Plan. The Plan is something of an oddity, for it is not a public corporation, a private corporation, a partnership, or any other typical institution. Although it operates in conjunction with §63 of the Insurance Law, according to officials of the Plan, it was created by the insurance industry and operates on a nationwide basis. Further, while the Plan has a relationship with the Insurance Department, it is private and not governmental.

Nevertheless, due to the relationship between the Insurance Department and the Plan, it is likely that the Insurance Department maintains records in its possession concerning the Plan. Therefore, to the extent that the Insurance Department maintains records relative to the Plan, those records are subject to rights of access granted by the Freedom of Information Law.

Enclosed for your consideration 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
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1431

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

March 17, 1980

Mr. Donald J. Gott
Tri-Gott Auto Parts
270 S. Main Street
Warsaw, NY 14569

Dear Mr. Gott:

I have received your most recent letter, which concerns the deletion of information from dog licenses by the Town Clerk of the Town of Orangeville.

According to your letter, it appears that the deletions were made on the ground that disclosure of identifying details would result in "an unwarranted invasion of personal privacy" under §87(2)(b) of the Freedom of Information Law.

In my opinion, a dog license should be made available for inspection and copying in its entirety.

While it is true that the Law serves to protect against "unwarranted" invasions of personal privacy, it is clear that the Law also envisions "permissible" invasions of personal privacy. In this instance, as in others concerning licenses, the Committee has consistently advised that the contents of licenses are available. The rationale for so advising is based upon the idea that the grant of a license is essentially intended to to let the public know that a particular person has met the requirements required to engage in some aspect of his or her life. For example, a real estate license lets the public know that a particular person has passed the requisite examinations, and is qualified to engage in a particular profession. A dog license lets the public know that a person owning a dog has met the requirements of licensure, i.e., having a dog checked medically and giving a dog the appropriate shots, etc.

For the reasons described above, I believe that the information deleted from the dog license by the Town of Orangeville should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1432

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

March 17, 1980

Mr. James Brocato
#75C346
135 State Street
Auburn, New York 13021

Dear Mr. Brocato:

I have received your letter of March 1, which concerns the means by which you may obtain materials indexed according to your name prepared by the Erie County District Attorney, the Bureau of Criminal Investigation and the State Police Information Unit.

Without knowledge of the information sought, it is difficult to provide you with specific advice. Nevertheless, I can offer the following.

First, 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. As a general rule, the exceptions to rights of access are based upon the effects of disclosure. I have enclosed a copy of the Freedom of Information Law and the Committee's regulations, which govern the procedural aspects of the Law, for your consideration.

Second, there may be three grounds for denial that could be applicable to a request directed to the law enforcement units that you identified. For instance, §87(2)(e) provides that records compiled for law enforcement purposes may be withheld under circumstances specified in the Law. Section 87(2)(f) states that an agency can withhold records when disclosure would endanger the life or safety of any person. Section 87(2)(g) enables government to withhold inter-agency or intra-agency materials that are not reflective of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations.

Lastly, also enclosed is an explanatory pamphlet which includes sample letters of request and appeal. It is suggested that you review the pamphlet closely before directing your requests to the "records access officers" of the agencies that may have possession of 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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1433

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

March 17, 1980

Mr. Kurt M. Shilbury
[redacted]

Dear Mr. Shilbury:

I have received your letter and the complaint attached to it regarding a denial of access under the Freedom of Information Law.

Please be advised that the statutory authority of the Committee involves only providing advice with respect to the Freedom of Information Law and the Open Meetings Law. It has no capacity to join a plaintiff as a friend of the court or an interested party.

It is noted, however, that the Committee has issued hundreds of advisory opinions under the Freedom of Information Law. In this regard, several courts, including two Appellate Divisions, have held that the advice of the Committee should be upheld unless it is unreasonable.

I have enclosed several documents which may be useful to you, including the Committee's most recent annual report to the Governor and the Legislature on the Freedom of Information Law. The report includes as an appendix an index to advisory opinions. After reviewing the index, if there are any opinions of particular interest to you, please identify them by key phrase or number and I will be happy to send them to you.

In addition, enclosed are several advisory opinions that pertain to the subject of your suit. In brief, the Committee has consistently advised that a town's tentative budget, preliminary budget material consisting of statistical or factual data, and checks and vouchers are 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1434

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

March 17, 1980

Mr. Samuel Dorsey
[redacted]

Dear Mr. Dorsey:

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. As a general matter, requests for information directed to members of the Committee are transmitted to me for the purpose of drafting advisory opinions.

According to the materials attached to your letter, Mr. DelPlato, an attorney and a member of the "Committee to Preserve Our Neighborhood", of which you are a member, was denied access to:

> "...a copy of any and all contracts, purchase offers, memoranda of sale or like documents, whether entered into by the City of Batavia, its agents, servants or employs, in regard to the proposed purchase of the Campobello Farm on South Main Street in the Town of Batavia."

In response to the request, Richard King, the Administrative Assistant to the City Administrator of the City of Batavia, wrote that:

> "[T]here are two reasons for this denial. First, information relating to the purchase and sale of real property is not one of the records listed by the City Council in its regulations of September 23, 1974 as available for public inspection. Second, Public Officers Law permits denial of information if it is determined the disclosure of such information would have an adverse impact on the completion of the transaction. Finally, because there are legal documents involved, the matter of attorney-client privilege has some relevance."

You have indicated further than an appeal was transmitted on December 5, but that no response has been given.

In brief, the situation apparently concerns a contract into which the City entered to purchase a particular parcel of land. However, after signing an agreement to purchase the land, the City Council rejected the purchase.

At this juncture, I believe that the records sought by Mr. DelPlato are accessible.

First, with respect to Mr. King's response, it is emphasized that the Freedom of Information Law has been amended. The original statute granted access to specified categories of records to the exclusion of all others. If records requested did not conform to one or more categories, the records sought could justifiably be denied. However, amendments to the Freedom of Information Law that went into effect on January 1, 1978, effectively reverse the presumption of the original statute. Rather than listing categories of accessible records, §87(2) of the amended 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.

Under the circumstances, it does not appear that any of the grounds for denial could justifiably be cited as a basis for withholding.

The only ground for denial that could arguably be applicable is §87(2)(c) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations". It does not appear that either contract awards or collective bargaining negotiations are involved. Further, agreements to purchase the land, according to the information provided, have been signed by representatives of the City as well as representatives of the owner of the property in question. Therefore, I do not believe that the cited ground for denial could appropriately be cited, for disclosure of the records in question would not in my view "impair" the City's ability to consummate the transaction.

It is noted that I believe that I spoke to a City official several months ago with regard to the controversy. Advice may have been given with regard to what is known as the "governmental privilege". At the time, it may have been suggested that case law indicated that the governmental privilege, which is based upon the notion that disclosure would result in detriment to the public interest, might justifiably be cited in the case of records pertaining to an "inchoate" or incomplete transaction [see Sorley v. City of Rockville Centre, 30 AD 2d 822 (1968)]. Since that time, two events have occurred. First, agreements have been signed. Second, and perhaps most importantly, the state's highest court, the Court of Appeals, has rendered a decision which in part qualifies and narrows the capacity of government to assert the governmental privilege. Specifically, Matter of Doolan v. BOCES [48 NY 2d 341], which was decided on November 27, 1979, held in relevant part that:

> "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571 supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting

> basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds."

For the reasons discussed in the preceding paragraphs, I believe that the records in which your Committee is interested should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Michael A. DelPlato
Richard A. King
George E. Schaefer, Jr.
Mario M. Cuomo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1435

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

March 21, 1980

Miss Mary Lou Dickinson
Superintendent of Schools
Homer Central School
Homer, New York 13077

Dear Miss Dickinson:

I have received your letter of March 4 and appreciate your interest in complying with the Freedom of Information Law. You have asked for a review of the existing School District policy on public access to records.

It is noted at the outset that in addition to the procedures, you enclosed a copy of the District's application for public access to records. With regard to that document, comments were made on pages 4 through 6 of my letter of February 14 addressed to Ms. Gretchen L. Quackenbush. Since a copy was sent to your office, I do not believe that it is necessary to reiterate the opinions expressed regarding that document made in my earlier letter.

I have enclosed copies of the Committee's regulations, which govern the procedural aspects of the Freedom of Information Law, as well as model regulations. The model regulations serve to assist agencies in complying with the procedural requirements of the Law by providing a form in which an agency can comply by simply filling in the appropriate blanks. By following the model regulations, I believe that the District can effectively update the procedures adopted on October 8, 1974, which preceded your employment with the District.

Prior to reviewing the content of the procedures, it is important to point out that they were promulgated under §88(2) and (4) of the original Freedom of Information Law. Amendments to the Freedom of Information Law became effective on January 1, 1978. Under the amended Law, rules and regulations are required to be promulgated under §87(1)(b)(iii).

With regard to the substance of the rules, I would like to offer the following observations.

Section II(B) entitled "Location of Records" should in my view indicate the addresses of the offices where the records are maintained.

Section II(C)(1) entitled "Requests for Access" indicates that applicants for records must fill out a form prescribed by the District. 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 denial. On the contrary, the Committee has advised that any request that is made in writing that reasonably describes the records sought should suffice [see Freedom of Information Law, §89(3)].

Section II(C)(5)(b) provides that a search fee may be assessed when records requested are not readily available. As noted in my letter to Ms. Quackenbush, neither the Freedom of Information Law nor the regulations promulgated by the Committee permit the assessment of a search fee. The only fee that may be assessed concerns the reproduction of records. When copies of records are requested, fees may be assessed at a rate of up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing records that are not subject to conventional photocopying.

Section II(D) concerns access to payroll records. While the original Freedom of Information Law appeared to have granted access to payroll information only to members of the news media, §87(3)(b) of the amended Freedom of Information Law makes clear that payroll information is available to any person. In addition, while the original statute made reference to a fiscal officer charged with the duty of responding to requests for payroll information, no such reference is made in the amendments to the Law. Consequently, I believe that the designated records access officer or officers should now be required to respond to requests for payroll information.

Section II(E)(1) indicates that a person denied access to records may appeal within five business days of the denial. However, §1401.7(d) of the Committee's regulations provides that "[A]ny person denied access to records may appeal within thirty days of a denial". Further, the District's rules require that an individual appealing a denial of access specify the basis for a challenge to the denial. An applicant is merely required to indicate the date and location of an initial request, the records that were denied, and his or her return address in order to appeal. Subdivision (2) of the same provision states that the Superintendent as appeals officer must grant access or issue a written opinion explaining the reasons for further denial within ten business days of the receipt of an appeal. In this regard, §89(4)(a) of the Freedom of Information Law provides that the determination on appeal must be rendered within seven business days of receipt of an appeal. In addition, the same section of the Law requires that copies of appeals and the determinations that ensue be sent to this Committee.

Lastly, it is noted that the rules adopted by the District in 1974 are to some extent incomplete. Rather than describing the details that are lacking, it is suggested that you and the Board review the attached regulations promulgated by the Committee and use the model regulations as the basis for updating the procedures drafted 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/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1436

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

March 21, 1980

Mr. John H. O'Connor
[redacted]

Dear Mr. O'Connor:

I have received your card concerning access to records and the means by which a member of the public may become familiar with the voting record of a state senator or assemblyman.

Enclosed for your consideration are copies of a pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", the Freedom of Information Law, and regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law.

It is noted that rights of access to records in possession of the State Legislature are different from rights granted with respect to government generally. In brief, the Freedom of Information Law provides that all records in possession of an "agency" [see Freedom of Information Law, §86(3)] are available, except those records or portions of records that fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h) of the Law. With regard to the State Legislature, §88(2) of the Law lists those categories of records in possession of the State Legislature that are available, to the exclusion of all others.

However, §88(3) of the Law specifies that each house shall maintain and make available for inspection and copying "a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes." Consequently, it is clear that both houses of the Legislature and their committees and subcommittees must compile and make available voting records identifiable to each member.

To obtain the information in which you are interested from the Assembly, it is suggested that you write to the Records Access Officer, who is located at Room 148, State Capitol, Albany 12224. To obtain similar information from the Senate, it is suggested that you write to the Secretary of the Senate, The Capitol, Albany 12224.

I hope that 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-1437

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

March 21, 1980

Mr. John G. McGoldrick
Schulte & McGoldrick
460 Park Avenue
New York, New York 10022

Dear Mr. McGoldrick:

Thank you for your kind letter of March 12.

With respect to your first comment, I must admit to you that due to clerical oversight, there is no advisory opinion number 1409.

Secondly, I agree with your intimation that contracts between agencies and members of the public would not constitute "inter-agency or intra-agency materials". From my perspective, the term "intra-agency" pertains to records transmitted between or among officials of a single agency. The term "inter-agency" is applicable in situations in which records are transmitted between or among officials of more than one agency. Consequently, when records are transmitted or signed by an official of an agency and a member of the public or private corporation, for example, the records would constitute neither inter-agency nor intra-agency materials.

I have enclosed a copy of a recent advisory opinion which deals with the issue more expansively and provides some of the thinking of the lead sponsor of the amendments to the Freedom of Information Law regarding §87(2)(g).

I hope that 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-1438

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

March 21, 1980

Ms. Cathy McDonald
Staff Reporter
The Evening Star
824 Main Street
Peekskill, New York 10566

Dear Ms. McDonald:

I have received your letter of March 5 concerning your unsuccessful attempts to gain access to records regarding the loss of a gun or guns by members of the Peekskill Police Department.

In response to your request, the City Manager, Robert W. Freson, wrote that, in his opinion, §50-a of the Civil Rights Law precludes the City from furnishing you with the information in question under the Freedom of Information Law, for:

> "...it would clearly pertain to the evaluation of an individual police officer's performance toward continued employment or promotion, which personal information is protected under the rights of privacy as provided in that law."

Further, the City Manager wrote that the Commissioner of Police explained that:

> "...there would be no record in the Police Department of a lost weapon which would not identify directly the officer responsible for the weapon's safekeeping. The Commissioner also advises that any fact circumstance of this nature would necessarily lead to the disciplinary action and, if proven, would, therefore, be given weight in the evaluation of a police officer's performance

> in the context of continued employment or promotion."

In my view, although it is possible that the denial might be justified, it is also possible that the information in question does not fall within the scope of §50-a of the Civil Rights Law.

The substance of §50-a of the Civil Rights Law is found in subdivision (1) of that provision, which states that:

> "[A]ll personnel records, used to evaluate performance toward continued employment of promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law shall be considered confidential and not subject to inspection or review without the express written consent of such police officer except as may be mandated by lawful court order."

I believe that the focal point of the provision quoted above is the fact that the records exempted from disclosure must constitute "personnel records". While many records might identify particular individuals, I do not believe that all such records could be characterized as "personnel records". Similarly, although some records might be used to evaluate performance toward continued employment or promotion, they might not be personnel records.

Under the circumstances described by the City Manager, no where does his response indicate that any of the records in which you are interested may be characterized as "personnel" records. He did, however, state that the information would pertain to the evaluation of an officer's performance toward continued employment or promotion, and that such information is "personal". He also stated that the existence of a record of a lost weapon would necessarily lead to a disciplinary action. Nevertheless, it is not indicated that the information constitutes a "personnel" record.

If §50-a of the Civil Rights Law could not justifiably be cited as a basis for withholding on the ground that the records sought do not constitute "personnel records", the information in my opinion should be made available. It is true that the Freedom of Information Law states that records or portions of records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy". However, 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 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 2d 664 (Court of Claims, 1978)]. Conversely, if a record is not relevant to the manner in which a public employee performs his or her official duties, §87(2)(b) of the Freedom of Information Law concerning privacy may be appropriately cited to withhold records [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In sum, the response to your request rendered by Mr. Freson, City Manager, does not make clear whether the records in which you are interested may properly be characterized as personnel records. Consequently, it is questionable whether §50-a of the Civil Rights Law may be cited as a basis for denial. If §50-a cannot be cited as a basis for withholding, it would appear that the records should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Robert W. Freson
Walter Kirkland

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1439

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

March 24, 1980

Harold G. Trabold, Esq.
Dranitzke, Lechtrecker &
Lechtrecker
P.O. Box 510
73 North Ocean Avenue
Patchogue, New York 11772

Dear Mr. Trabold:

I have received your most recent letter concerning access to records relative to school district employees.

There are several points that should be made at the outset.

First, although §89(2) of the Freedom of Information Law permits the Committee to issue guidelines regarding the deletion of identifying details to protect personal privacy, the Committee has not done so. In short, although the Committee has discussed the issue of privacy on many occasions, the members do not feel that they can justifiably impose their subjective judgements relative to privacy upon the agencies generally. Further, there are many instances in which the custodians of records are in a better position to make subjective judgments than the members of the Committee.

I agree that there may be a difference of opinion with regard to our respective concepts of what constitutes a "personnel" file. You have written that your concept is based upon the idea that "such a file would contain truly personal information regarding the employees of the district". In my opinion, there is a distinction between what may be characterized as "personal" and what may pertain to "personnel". A "personnel" file in my view pertains to information that deals with a particular individual as an employee. Certainly such information may to some extent be "personal"; it might

Based upon the foregoing, it is my belief that the public at large could not request and obtain a transcript from a college or university without the consent of the student to whom the transcript pertains. Further, the district could not likely obtain a transcript without the consent of a student. Therefore, it is only by means of the consent of an eligible student that the District has possession of the transcript. Based upon the direction provided by the Family Educational Rights and Privacy Act as well as the privacy provisions in the Freedom of Information Law, transcripts may in my opinion justifiably be withheld, unless the subjects of transcripts consent in writing to disclosure.

You have indicated that the transcripts themselves constitute the verification of completion of courses resulting in salary increase. Therefore, it would appear that a review of a transcript represents the only means by which the public can determine whether an increase in salary was properly granted. However, since the transcripts identify specific students, they are likely deniable.

In my opinion, perhaps it is possible to establish a middle ground which permits the public to determine the accountability of the District but which concurrently protects the privacy of teachers to whom the transcripts relate. The following suggestion may or may not be feasible depending upon the number of teachers engaged in courses of study. It may be possible to copy the transcripts but delete all identifying details. After having deleted identifying details, any member of the public could determine, by means of the remainder of the transcript, whether a person enrolled in a course of study has passed. My question is whether there are so few teachers enrolled in such courses that individuals could be identified notwithstanding the deletion of identifying details. If the group taking courses is substantial in number and disclosure of the transcripts without identifying details would not identify any particular teacher, perhaps that is a course of action that might be satisfactory.

include intimate details of an individual's life, such as marital status, medical information, the number of tax deductions claimed, social security numbers or home addresses, for example. Those items are largely irrelevant to the manner in which a public employee performs his or her duties and may, therefore, in my opinion, be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Other items in a personnel file that are relevant to the manner in which a public employee performs his or her duties are "personal" and are in my opinion generally available for the reasons expressed in our earlier correspondence.

With respect to transcripts, you wrote in an earlier letter that "the procedures for verification of completion of the courses which resulted in an increase in salary involves the obtaining by the school district of transcripts from the educational institutions where such courses were completed." You wrote further that the transcripts essentially constitute a verification of the completion of a course.

I agree with your contention that transcripts need not be made available. As a general rule, the Family Educational Rights and Privacy Act, 20 USC §1235g, provides that education records identifiable to students are confidential, except in situations in which the records are sought or released by a parent of a student under the age of 18 or by an eligible student who has attained the age of 18. Although the submission of a transcript by a teacher may be a condition precedent that must be accomplished prior to a verification of completion of a course, I believe that transcripts can be obtained from the colleges or universities only with the consent of the teachers involved. The foregoing is based upon the premise that a college or university is subject to the Family Educational Rights and Privacy Act, which is applicable to all educational agencies or institutions that receive funding through programs administered by the United States Department of Education. Since most colleges and universities partake in such programs, most are subject to the Act.

Finally, you wrote that the last three types of information sought, copies of written approvals, the names of courses and the number of credits for each course, and the verification of satisfactory completion of the courses, can only be made available by means of review of transcripts. Could it be that the District permits teachers to engage in courses, which if completed successfully, result in increases in salary without the creation of some written records? Does a teacher request to commence such courses and do so without written approval of the District administration? Is a direction to increase that salary of a teacher who has completed a course given orally rather than in writing? If none of the records suggested exist, I would agree that the transcript would be the only means by which one could determine that a course has been successfully completed. However, having worked for government for several years, it would appear unlikely from my perspective that there are no written records created other than the transcript. To the extent that written records concerning the taking of courses exist other than the transcripts, 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: School Board
Leo Davis, President of the Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1440

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

March 24, 1980

Ms. Jeanne S. Frankl
Legal Director
Public Education Association
20 West 40th Street
New York, New York 10018

Dear Ms. Frankl:

I have received your letter of March 6 in which you requested an advisory opinion regarding a denial of access to records by the New York City Board of Examiners.

The correspondence appended to your letter indicates that some of the materials initially requested have been made available, but that other records have been withheld based upon a letter of denial transmitted to you by Harold Kobliner, Chairman of the Board of Examiners.

Dr. Kobliner's denial relates to six areas of your initial request, four of which deal with examinations for teaching licenses, and two of which concern examinations for licenses as principal of a junior high school. I will attempt to deal with each of the categories of information that have been denied.

It is important to note at the outset that the focal point of rights of access to information sought is §87(2)(g) of the Freedom of Information Law. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy of determinations..."

The area of disagreement is apparently based upon conflicting interpretations of the language quoted above.

By way of background, the following consists of an excerpt from a letter transmitted to me by Mark Siegel, Assembly sponsor of the amendments to the Freedom of Information Law (July 21, 1977). In his opinion, §87(2)(g) of the Freedom of Information Law was intended to be interpreted as follows:

> "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 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 the staff to the head of an agency that is solely reflective of the opinion of staff need not be made available."

The first category of information that was denied pertains to validity studies including "content validity studies" which contain:

> "(a) data showing that the examination procedure is a representative sample of important work behaviors to be performed in the position for which candidates are to be evaluated and (b) a description of the steps, if any, taken to reduce adverse racial, ethnic or sex impact in the content of the examination or its administration."

With respect to item "(a)", if data indeed shows that the examination procedure is a representative sample of work behaviors, it would appear that such information is not reflective of advice, but rather is reflective of factual findings on which an evaluation is based. If that contention is correct, to the extent that the information found within item (a) constitutes "statistical or factual data", it is in my view available.

With regard to item "(b)", "a description of the steps taken to reduce the adverse racial, ethnic or sex impact" in an examination or its administration, I believe that in this situation as well, if "steps" are indeed identifiable and followed, they are reflective of the policy of an agency with regard to the means by which the duties of the Board are carried out.

A similar type of reasoning can be used with respect to the second area of information denied, job analyses and the methodology employed to analyze a job. To the extent that the job analyses and the methods of analyzing a position reflect the policy of the Board or describe the parameters of a particular position, the information should in my opinion be available.

On the other hand, if a so-called "expert" transmitted a memorandum to the Board of Examiners which provides an opinion describing what he or she believes are important factors in analyzing a job, that record would in my view be deniable. However, if the advice of several experts is sought, examined, and developed into a set of parameters used to analyze jobs, while individual memoranda might be deniable, the consolidation of the memoranda into a series of guidelines would in my opinion be available, for it would constitute policy.

The third area of information denied concerns:

> "[R]ecords disclosing the impact of the text components of the examination process on the employment opportunities of persons identifiable by racial, ethnic or sex group, including pass rates at the cut-off score and along scoring intervals for each group."

It would appear that the key word in this item is "impact". I believe that the term connotes the fact that something has happened, not that something may happen. If indeed records demonstrate an "impact", they would in my view constitute factual information that should be made available. Nevertheless, Dr. Kobliner has indicated that these records are not in possession of the Board of Examiners. If the Board does not maintain them, very simply, there is nothing to provide. Further, Dr. Kobliner has indicated in his letter of January 17 that the remaining information such as eligible lists, is available at the offices of the Division of Personnel.

The next area of records denied concerns:

> "[C]orrespondence with the Office of Civil Rights of the Department of Health, Education and Welfare pertaining to the test validation provisions of the Memorandum of Understanding of September, 1977 between the New York City Board of Education and the Office of Civil Rights."

In response, Dr. Kobliner wrote that correspondence should be addressed to the Chancellor.

Whichever office maintains the records in question, whether it is the Office of the Chancellor, the Department of Health, Education and Welfare, or the Board of Examiners, they are in my opinion available.

It is noted that the term "agency" is defined by §87(3) of the New York Freedom of Information Law to include entities of government in New York State and their components. Similarly, the term "agency" is defined in 5 U.S.C. §551 in conjunction with the federal Freedom of Information and Privacy Acts to include federal agencies. The respective definitions of "agency" are applicable only to entities of government in their respective levels, i.e., federal and state. Therefore, although an agency in New York may transmit information to an agency of the federal government, the correspondence is not "inter-agency" due to the definitions of "agency" appearing in the federal and New York state laws.

The last two areas of information denied are analogous to the first two discussed, except that they pertain to an examination for a license as a principal of a junior high school. In response to your request, Dr. Kobliner wrote that the "examination is currently in progress" and that, therefore, "the release of any information regarding an examination in progress is inappropriate." In my opinion, whether an examination is in progress or not, the grounds for denial remain the same with respect to the information requested. It is emphasized that the only bases for denial that may be cited by an agency are those appearing in §87 (2)(a) through (h) of the Freedom of Information Law. In the case of inter-agency or intra-agency materials, I believe that rights of access remain the same regardless of the time in which the records may be requested. For example, if a record contains factual data, the data remains factual regardless of the date on which it may be requested; it does not change in substance from advice to facts, or vice versa.

I hope that I have been 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: Dr. Harold Kobliner
Ruth Bernstein

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-459
FOIL-AO-1441

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

March 25, 1980

Mrs. Elizabeth Dougherty
[redacted]

Dear Mrs. Dougherty:

I have received your letter of March 7 and thank you for your interest in the Open Meetings Law. You have raised several questions regarding the propriety of executive sessions.

Before a discussion of the specific events to which you made reference, I would like to offer the following as background.

First, the cornerstone of the Open Meetings Law is the definition of "meeting". Section 97(1) defines "meeting" to include "the official convening of a public body for the purpose of conducting public business". As interpreted by the state's highest court, the definition includes any gathering of a quorum for the purpose of discussing 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]. Consequently, work sessions and similar gatherings fall within the definition of "meeting" and must be convened as open meetings.

Second, the term "executive session" is defined by §97(3) to mean that portion of an open meeting during which the public may be excluded. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

Third, a specific procedure must be followed before a public body may enter into executive session. Section 100(1) of the Law provides 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 be formal vote shall be taken to appropriate public moneys..."

Fourth, paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion that are appropriate for executive session. Those grounds for executive session represent the only topics that may be discussed during an executive session.

And fifth, as a general rule, a public body may vote during a properly convened executive session, unless the vote involves the appropriation of public moneys. When there is a vote to appropriate public moneys, it must be conducted in public during an open meeting.

With respect to the first situation that you described, according to your letter, a closed door meeting was held by the Town Board during which the Board decided to exempt a police officer from the Town's residency law.

In my view, there is only one ground for executive session that might have been cited to close the meeting. Specifically, §100(1)(f) of the Law provides 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..."

Without additional facts, it is unknown to me whether the discussion dealt in any way with a particular police officer's employment or financial history, for example. If none of the language in §100(1)(f) was the subject of the discussion, I believe that the issue should have been discussed publicly.

The same result and the same advice would be given with respect to the second situation that you described, which occurred ten months later.

The third question that you raised involves whether "laws and exemptions to these laws passed behind closed doors by the Town Board" are legal. In my opinion, when a town board or any public body discusses the enactment of local laws or exemptions from those laws, none of the grounds for executive session could likely be appropriately raised to close a meeting.

You wrote that a member of your family who is a police officer requested an exemption from the residency law. You indicated that he submitted a letter to the Town Board "stating his financial inability to relocate at the time". After having submitted the letter, "the door closed" and the members of your family were not invited to discuss the issue with the Board.

In my opinion, since a public body is not required to permit the attendance of the subject of discussion at executive session, i.e., the police officer, his exclusion was not illegal. Further, it appears that the executive session may have been proper, for the Board likely considered the financial history of a particular individual.

Nevertheless, §101 of the Law requires that minutes reflective of action taken during executive sessions must be compiled and made available within one week of executive sessions.

You also mentioned that a disciplinary hearing followed. In this regard, it is noted that §50-a of the Civil Rights Law provides that personnel records of police officers that are used to evaluate performance toward continued employment or promotion are confidential. Therefore, although records may have been kept, they are not available, except in accordance with the provisions of §50-a of the Civil Rights Law, a copy of which is enclosed.

Also enclosed for your consideration are copies of the Open Meetings Law and a pamphlet which describes that Law as well as 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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1442

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

March 25, 1980

Mr. Irving Silver
[redacted]

Dear Mr. Silver:

I have received your letter of March 7, 1980, in which you expressed your disagreement with the advice provided in my earlier letters to you.

First, you have expressed disagreement with regard to the authority of the Committee, which I characterized in the earlier correspondence to you as "solely advisory". You have contended that if the Committee has the capacity to mediate, that the Committee's authority involves more than providing advice. From my perspective, the term "mediate" involves attempts to settle disputes. If the Committee had been given the authority to "arbitrate", for example, I would agree that the Committee's interpretations would be binding.

Your second comment concerns the interpretation of the Social Services Law and regulations. I agree with your contention that the grant of authority given to social services officials to determine who may be considered an "authorized person" in terms of access to social services records offers too much room for interpretation. Very simply, the Law and the regulations should be more specific. Nevertheless, I would like to point out that all that I can do is inform you as to what I believe particular provisions of law mean. Only the Legislature can alter laws, and if you are dissatisfied with a specific provision, perhaps your best course of action would involve seeking the aid of those who represent you in the State Legislature.

Lastly, you stated your disagreement regarding your right to examine original records of the State Department of Motor Vehicles upon payment of the "requisite fee". You stated further that "[N]owhere in the Law does it mention that one has to pay a fee to examine any record." However, as you are aware, §202 of the Vehicle and Traffic Law, and in particular subdivisions (2) and (3), specify that the Department of Motor Vehicles may charge fees for searches and assess fees for copying in excess of twenty-five cents per page.

It is noted in this regard that the Freedom of Information Law is a statute of "general" application. Section 202 of the Vehicle and Traffic Law is what may be considered as a "special" statute, for it concerns fees regarding the search and reproduction of particular records, i.e., those in possession of the Department of Motor Vehicles. Case law has held for decades that a "special" statute prevails over a general statute. Consequently, although there are limitations on the assessment of fees expressed in the Freedom of Information Law, that Law is a "general statute" which is overridden by the direction given in a special statute, such as §202 of the Vehicle and Traffic 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1443

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

March 25, 1980

Ms. Mary K. Guy
[redacted]

Dear Ms. Guy:

I have received your letter of March 7 in which you raised several questions regarding the implementation of the Freedom of Information Law by the Homer School District.

As you are aware, I have drafted opinions on the same subject at the request of both taxpayers and officials of the District. Rather than reiterating the advice given in those opinions, I have enclosed copies for your consideration. I believe that most of the questions raised in your letter have been answered in the other responses.

I will, however, answer your remaining questions.

First, the New York Freedom of Information Law went into effect initially on September 1, 1974. In the Committee's view, the Law was deficient in many respects and efforts were made to amend the Law. Those efforts were successful, for a new Freedom of Information Law was passed and became effective on January 1, 1978. While the original Law provided access to specified categories of records to the exclusion of all others, the amendments to the Law reverse the logic of the original statute and provide that all records of an agency are available, except those records or portions thereof that fall within one or more enumerated grounds for denial [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Second, you asked whether you are required to fill out a form when requesting a payroll record or other records. In this regard, §89(3) of the Law provides that an agency may require that a request be made in writing. However, it has been consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for denial. On the contrary, in the Committee's opinion, any request made in writing that reasonably describes the records sought should suffice.

Third, you have asked whether the District is obliged to permit you to see records if you call the school to let the appropriate officials know that you will be coming in at a specific time to view particular records that have been cleared for inspection. All that I can suggest is that school district officials should act reasonably. On the one hand, I do not believe that the Law is intended to require government officials to "drop everything" to provide access to records. On the other hand, if a request has been approved, I believe that District officials should permit you to inspect the records after having been given reasonable notice of your intention to do so. Assuming that the officials of the School District are no different from any others, there may be days when two or three hours would constitute reasonable notice; there may be other days, however, in which more notice might be necessary.

Lastly, you asked what recourse taxpayers have if the advice provided by this Committee is not followed. It is important to point out that the "advice" given by the Committee is just that; it is not binding on the recipient of an opinion rendered by the Committee. If you feel that a denial of access is improper, the Law provides that you may challenge the denial in the courts. Under §89(4)(b) of the Freedom of Information Law, the agency that has denied access to records is required in a judicial proceeding to prove that the records withheld in fact fall within one or more grounds for denial listed in the Law. As such, although the burden of challenging a governmental determination is in most cases borne by the public, the Freedom of Information Law places the burden of proof on government.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1444

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

March 26,1980

Mr. Louis Goldberg
[redacted]

Dear Mr. Goldberg:

I recently received your letter of March 10 concerning a request for records directed to the Office of Health Systems Management under the Freedom of Information Law.

You have indicated that you filed a request to examine records pertaining to you on February 1. Although the receipt of your request was acknowledged on February 4, no determination has been made as yet.

I have contacted Jerry Jarinski, an attorney with the Office of Health Systems Management, on your behalf. Mr. Jarinski informed me that the records in which you are interested are in the process of being reviewed and that a determination regarding rights of access will be made shortly.

In all honesty, without additional knowledge of the contents of the records sought, I cannot offer specific advice regarding the extent to which the records may be accessible.

Nevertheless, I believe that the time limits for response provided in the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, have been exceeded.

Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the re-

quest is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, the failure to respond within the designated time limits has resulted in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations, and 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
Executive Director

RJF:jm

Encs.

cc: Jerry Jarinski
Melinda Bass

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-460
FOIL-AO-1445

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

March 26, 1980

Mr. Charles J. Young
Fire Chief
City of Olean Fire Department
542 North Union Street
Olean, New York 14760

Dear Mr. Young:

I have received your letter of March 12 in which you requested clarification regarding rights of access to Fire Department records under the Freedom of Information Law. In addition, you have attached several forms used by the Department for review in relation to your inquiry.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Section 86(4) of the Law defines "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..." Therefore, any records in possession of the City and its Fire Department are subject to rights of access granted by the Law. Further, 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 enumerated grounds for denial that appear in §87(2) (a) through (h) of the Law. As such, when a request for records is made, the records sought should be reviewed in their entirety to determine which portions, if any, fall within one or more of the grounds for denial.

In my opinion, there are two grounds for denial that might in some instances be applicable to the records in question.

The first ground for denial that may 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..."

It is emphasized that the provision quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials are accessible to the extent that they consist of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations.

Having reviewed the forms attached to your letter, it is clear that the major portion of the Inspection Survey Report contains factual information which is available. In addition, it is possible that a court might consider that violations constitute "final determinations" that are available. The only portion of the Inspection Survey Report that might justifiably be withheld is found on the second side and is identified under "remarks". Again, to the extent that the remarks contain "factual data" they are in my opinion available. However, if an inspector's comments are reflective of advice, opinion, or recommendations, for example, they could in my view be denied.

The notice of violation would not in my opinion fall within any of the grounds for denial in the Freedom of Information Law. Since the Inspection Survey Report is maintained within the Department, it may be characterized as an "intra-agency" document. However, since the notice of violation is sent outside of the Department, there would in my view be no ground for denial.

Both the Basic Field Incident Report and the Ambulance Report are reflective solely of factual information. As such, §87(2)(g) of the Law could not be cited as a basis for withholding.

Nevertheless, §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". There may be aspects of both reports which would result in an unwarranted invasion of personal privacy if disclosed.

For example, the telephone numbers of the occupants and owners could in my opinion be justifiably withheld. Similarly, the number of the insurance carrier could likely be withheld based upon the privacy provisions.

In addition, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy. Two of the examples may be relevant to the situation with which the Fire Department deals. Specifically, §89(2)(b) in part states that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

The Ambulance Report contains what might be considered medical information. Further, although an ambulance is not a hospital or a clinic, for example, it might be accurate to consider an ambulance a "medical facility" in which injuries or illness might be diagnosed and treated. Consequently, the medical information contained within the Ambulance Report may in my opinion be deleted from the Report, for it would appear that disclosure would result in an unwarranted invasion of personal privacy in accordance with the direction given by §89(2) of the Law.

Lastly, you wrote that officers meetings are held within the Department and that minutes are compiled.

In this regard, I direct your attention to the Open Meetings Law. In brief, that law is applicable to meetings of public bodies consisting of two or more members who are designated to perform some public duty collectively as a body [see Open Meetings Law, definition of "public body", §97(2)].

In my opinion, if officers meet essentially as members of staff, no public body is involved. However, if a specific number of officers has been designated to perform a public duty as a body on behalf of the City or the Fire Department, it would be considered a "public body" subject to the Open Meetings Law that would be required to compile minutes under §101 of that statute.

Without additional information regarding the nature of the meetings or the minutes, I cannot offer specific advice. However it appears from your letter that no public body is involved. Nevertheless, in view of the definition of "record" that was discussed earlier, records compiled at the meetings would appear to fall within the scope of rights of access granted by the Freedom of Information Law. Without additional knowledge of the contents of the minutes, it would be inappropriate to conjecture as to rights of access.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, and a pamphlet which explains both statutes. The pamphlet may be of particular interest, for it may assist you in answering questions regarding both laws.

I hope that 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-1446

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

March 26, 1980

Mr. Joseph W. Connolly
[redacted]

Dear Mr. Connolly:

I have received your letter of March 11 in which you requested an advisory opinion concerning a denial of access to records rendered under the Freedom of Information Law by the Olean City School District.

You have raised three questions, and I will attempt to answer each of them.

The focal point of your inquiry is a grievance proceeding conducted by the District. In response to your request for "records and documents" pertaining to the grievance, you were denied based upon a provision of the collective bargaining agreement between the District and the Olean Teachers Association. Specifically, Article 3, Section 3.1, Paragraph 3:15 of the collective bargaining agreement states that:

> "[A]ll documents, communications and records dealing with the processing of a grievance shall be filled separately from the personnel files of the participants provided that this shall not be construed to prohibit including in the personnel files a notation of the result of a final grievance determination, but such notation shall not refer to the fact that it resulted from a grievance determination. The teacher and his representative shall be entitled to copies of the entire file. In no event may these documents become public record."

Your first question concerns the validity of the contractual agreement quoted above. In my view, it is void to the extent that it conflicts with or in any way abridges rights of access granted by the Freedom of Information Law. Very simply, I do not believe that the District and the public employee union have the capacity to engage in an agreement that conflicts with a statute passed by the State Legislature and signed by the Governor. If individuals could engage in contracts that effectively nullify statutory provisions, society in my view would essentially operate without law. Therefore, I reiterate my belief that the provision of the contract which requires the confidentiality of the records in question is void to the extent that it diminishes rights granted by the Freedom of Information Law.

In your second area of inquiry, you have asked for "an exact description" of the records and documents covered by the Freedom of Information Law. In addition you asked whether "all records inthe grievance action" are subject to rights of access.

First, all records in possession of an agency, which includes a school district, are covered by the Freedom of Information Law. This is not to say that all records are available, but rather that all records are subject to rights of access and the procedural requirements contained in the Freedom of Information Law.

It is noted that §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..." As such, if the School District maintains records, the records fall within the scope of rights of access granted by the Freedom of Information Law.

Second, the Law provides that all records are available, except those records or portions thereof that fall within one or more among eight grounds for denial enumerated in §87(2)(a) through (h). Therefore, it is all but impossible to identify the records that are available. On the contrary, the logic of the Law is based upon a presumption of access, for it states that all records are available with certain exceptions.

In my opinion, there are but two grounds for denial that may be to some extent applicable with regard to the records in which you are interested.

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 provision quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials must be made available to the extent that they consist of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determination. Under the circumstances, it is clear that the final determination of the grievance should be made available. However, in addition, statistical or factual data or statements of policy found within the remaining materials are in my opinion also available.

The other ground for denial that might be raised in §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". Since I am not familiar with the materials developed in relation to the grievance, I can only conjecture with regard to the impact of §87(2)(b). Nevertheless, it is possible that students, for example, may have come forward and offered information relative to the grievance. In that situation, the identities of the students would be required to be deleted pursuant to the Family Educational Rights and Privacy Act (20 USC §1232g). If others participate, it is possible that their identities, if disclosed, would result in an unwarranted invasion of personal privacy. To that extent, portions of records reflective of their identities might also be justifiably deleted.

In sum, I believe that the contractual provision which requires confidentiality is void to the extent that it abridges rights of access granted by the Freedom of Information Law. And second, it appears that the only bases for denial are the two discussed 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: Richard N. Scott
Martin J. Welch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1447

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

March 26, 1980

Mr. Joseph Fournier
#77A3575
Box B
Dannemora, NY 12929

Dear Mr. Fournier:

I have received your letter of March 7 and the materials attached to it.

Your first question concerns the sufficiency of the certification dated March 4, 1980. In this regard, you cited provisions of the Freedom of Information Law and the regulations promulgated by the Committee concerning the steps that must be taken in conjunction with a denial of access. In my opinion, the certification is not reflective of a denial, but is merely an assertion that some of the information in which you are interested does not exist. A certification to the effect that records do not exist is not in my view a denial given in accordance with the provisions that you cited, but rather is a certification provided pursuant to §89(3) of the Freedom of Information Law and §1401.2(b)(6) of the regulations. Consequently, I believe that the certification signed by the Assistant County Attorney, Annalinda Ragazzo, is sufficient and appropriate.

The second area of inquiry concerns your request for a "subject matter list". In response to your request, the Westchester County Attorney's Office provided a copy of what is characterized as a "client code index" consisting of one page. I have contacted Ms. Ragazzo on your behalf in order to obtain more information regarding the controversy. She informed me that your request pertained only to the subject matter list developed by the Office of the County Attorney, not Westchester County generally. If that is the case, it would appear that the client code index, as described to me by Ms. Ragazzo,

represents the equivalent of a subject matter list that relates only to the County Attorney's Office. In my opinion, it is likely sufficient.

As you are aware, there may be other subject matter lists that identify the categories of records in possession of other agencies operating within Westchester County government. If you feel that the County Attorney's index does not provide you with sufficient guidance, it is suggested that other lists may be requested.

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: Annalinda Ragazzo

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1448

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

March 27, 1980

Mr. John D. Hurley, Jr.
[redacted]

Dear Mr. Hurley:

As you are aware, I have received your letter of March 14 in which you requested an advisory opinion.

You have indicated that you are a licensed private investigator hired by an out of state client to attempt to locate the "litigimate heiress of an inheritance". In order to obtain the information sought, you have requested marriage licenses from several towns as well as the Bureau of Vital Records of the State Health Department.

It is noted that the Freedom of Information Law does not govern rights of access to vital records, such as marriage records. Rights of access to such records are governed by the Domestic Relations Law, specifically §§19 and 20-a.

Section 19 of the Domestic Relations Law pertains to records concerning marriages kept by towns and city clerks. From my perspective, subdivision (1) of the cited provision contains an internal conflict. The first sentence states that:

> "[E]ach town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which he shall record and index such information as is required therein, which book shall be kept and preserved as part of the public records of his office."

However, the fifth sentence of §19(1) states that:

> "[A]ll such affidavits, statements, and consents, immediately upon the taking or receiving of the same by the town or city clerk, shall be recorded and indexed as provided herein and shall be public records and open to public inspection whenever the same may be necessary or required for judicial or other proper purposes."

In view of the foregoing, it appears that the books supplied by the State Department of Health in which marriages are recorded and indexed are considered "part of public record" of the office of a town clerk. On the other hand, the remaining records in possession of the clerk concerning marriages "shall be public records and open to public inspection whenever the same may be necessary or required for judicial or other proper purposes."

Similarly, §20-a of the Domestic Relations Law provides that the Commissioner of Health may provide access to marriage records, "unless he is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes."

Several comments should be made with respect to the foregoing.

First, there is no executive order of which I am aware that declares that birth, marriage and death records are privileged.

Second, the language of the provisions quoted above is unclear and is subject to conflicting interpretations, for there is no standard by which one can determine when a request is reflective of a "proper purpose."

Third, although there is a lack of clarity regarding the "proper purpose" standard, it is clear that there must be situations in which a request would be reflective of a proper purpose. From my perspective, a request that is made out of curiosity or for a commercial purpose, for example, could justifiably be denied. Nevertheless, according to the facts described in your letter, it is clear that you are not seeking the records out of curiosity or for any reason that in my opinion could be considered anything but "proper".

In sum, while a town or a city clerk or the Bureau of Vital Records of the State Health Department may have substantial discretion to withhold marriage records, I cannot envision any reason that could be cited for characterizing the purpose of your request as "improper".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Bureau of Vital Records
Tom Baraga
William Bennett
Guy Germano

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1449

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

March 27, 1980

Mr. Thomas E. Walsh, Jr.
[redacted]

Dear Mr. Walsh:

I have received your letter of March 12 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns unsuccessful attempts to gain access to records relative to the insurance coverage and premiums paid by the Fuller Road Fire Department. It is your contention that the coverage is insufficient and that if the Department sustains a substantial loss, as it did several years ago, the burden will be shifted to the taxpayers of fire protection districts by means of added assessments.

In my opinion, records reflective of insurance contracts, coverage and premiums paid are available under the Freedom of Information Law.

The status of volunteer fire companies represents a problem which has been both perplexing and continuous. In brief, the problem involves drawing a line of demarcation between companies' governmental functions and their other functions, such as social or athletic activities. However, I believe that such a line can be drawn with respect to the application of the Freedom of Information Law.

Most relevant to your inquiry relative to access to records is the definition of "agency" in the Freedom of Information Law. The definition, which appears in §86(3) of the Law, includes any "...governmental entity performing a governmental...function for...one or more municipalities..." The question, therefore, is whether volunteer

fire companies are governmental entities that perform a governmental function. To date, there is but one decision of which I am aware that deals even tangentially with the issue. In Everett v. Riverside Hose Company [261 F. Supp. 463 (1966)] a federal court held that a volunteer fireman is "in the public service" and is therefore a public servant, even though no salary is paid. The rationale for the holding involved a finding that a volunteer fire company performs what traditionally has been deemed a governmental function. On that basis, the decision inferred that a volunteer fire company is a governmental entity, notwithstanding its status as a not-for-profit corporation. But for the Everett decision, perhaps it could be contended that a volunteer fire company is not a "governmental entity" and therefore outside the scope of the Freedom of Information Law. Nevertheless, it is the only decision that deals with the status of such companies in relation to statutes that ordinarily apply only to entities of government.

In view of Everett, the Committee has consistently advised that volunteer fire companies are subject to the Freedom of Information Law to the extent that their records pertain to their official duties as firefighters. Stated differently, records in possession of a volunteer fire company that relate to or have a bearing upon the performance of a company's official duties are in my opinion subject to rights of access granted by the Freedom of Information Law. Since the insurance coverage of the Department is relevant to the performance of its official duties, records concerning coverage are in my opinion subject to 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 are available except those records or portions thereof that fall within one or more of the grounds for denial enumerated in §87(2)(a) through (h) of the Law.

I do not believe that any of the grounds for denial could justifiably be cited to withhold the records in which you are interested. Consequently, they are in my view 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: William E. Weiss, Sr.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1450
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 1, 1980

Reverend Ernest Davis, Jr.
Equal Employment Opportunity
Office & Appeals Officer
The City of Poughkeepsie
Municipal Building
Civic Center Plaza
Poughkeepsie, New York 12602

Dear Reverend Davis:

Thank you for your letter of March 14 and the materials appended to it.

In brief, the correspondence concerns a request for a copy of a plumbing permit as well as memoranda transmitted between the City Chamberlain and the Office of Corporation Counsel. In a determination rendered on appeal, you concluded that "the request for the Plumbing Permit should be granted as soon as the principal purpose(s) has been established". In addition, the intra-agency memoranda were denied.

I concur with the determination insofar as it pertains to the memoranda. However, I disagree with the determination regarding access to the plumbing permit.

First, as indicated in the correspondence, the memoranda requested may be considered "intra-agency" materials. Relevant under the circumstances 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..."

I believe that the materials in question are essentially advisory in nature and do not consist of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations. Further, the advice rendered by Corporation Counsel to a City official in the performance of her official duties as Counsel fall within the scope of the attorney-client privilege. As such, I believe that such records are exempt from disclosure under the Civil Practice Law and Rules.

With regard to the plumbing permit, in my view, the purpose of issuance of a permit or a license, for example, essentially enables the public to know that a particular individual is qualified to engage in some aspect of society. Review of a permit in this instance would enable the public to know that the recipient of the permit is qualified to engage in a particular avocation, plumbing.

This Committee has consistently advised that licenses, permits and similar documents are available. Although Corporation Counsel cited a decision in which it was held that a demonstration of a litigimate and reasonable purpose for inspection may be required [Dabrowski vs. Rosenberg, 44 Misc. 2d 877, 255 NYS 2d 305 (1964), that decision was rendered long before the passage of the Freedom of Information Law. Other decisions rendered since Dabrowski have held to the contrary. For example, in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], it was held that if a record is accessible under the Law, it should be made equally available to any person, "without regard to status or interest". Further, the state's highest court, the Court of Appeals, recently held that "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Infor-

mation Law" [see Matter of Doolan v. BOCES, 48 NY 2d 341, 347 (1979)]. In sum, I do not believe that an applicant for a plumbing permit or any permit is required to assert the purpose for which a request is made, whether the basis for making the request is considered reasonable or otherwise.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Jode Millman
Constantine Kazolias

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1451

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

April 1, 1980

Ms. Zelda M. Uthe
Director
The Association of Towns
90 State Street
Albany, New York 12207

Dear Ms. Uthe:

I have received your letter of March 28.

Enclosed are copies of the opinions that you requested.

In short, due to the definition of "record" appearing in §86(4) of the Freedom of Information Law, it has been consistently advised that tape recordings produced for an agency or a public body are "records" subject to rights of access granted by the Freedom of Information Law.

The question of retention of tape recordings has arisen on several occasions. I have been informed that the retention schedule developed by the Education Department indicates that the period of time for which a tape recording must be retained is zero. As such, as a matter of practice, it has been suggested that tape recordings may generally be erased or disposed of when the minutes, for example, to which they relate have been compiled.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1452

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

April 1, 1980

Mr. Christopher Stinson
77D21
Box R
Napanoch, NY 12458

Dear Mr. Stinson:

I have received both of your letters of March 8 concerning rights of access.

Your first letter concerns an application for transcripts of a "Time Allowance Committee" and proceedings before the Superintendent of the facility in which you are housed.

In all honesty, without knowing more about the contents of the records in which you are interested, I cannot provide specific direction.

Nevertheless, enclosed are copies of the Freedom of Information Law, regulations that govern the procedural aspects of the Law, and an explanatory pamphlet on the subject that may be particularly useful to you.

As a general rule, the Freedom of Information Law is based upon a presumption of access. In brief, 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 grounds for denial enumerated in §87(2)(a) through (h). In addition, when a denial is given, the reasons must be stated in writing.

With regard to your second letter, the structure of the federal Freedom of Information Act is similar to that of the New York Freedom of Information Law. The federal Act also provides that records in possession of federal agencies are available, except to the extent that the grounds for denial listed in that Act may appropriately be asserted.

It is important to note that the Freedom of Information Law of New York is applicable only to records in possession of agencies in New York. Similarly, the federal Freedom of Information Act is applicable only to records in possession of federal agencies.

Lastly, although the federal Act contains a provision regarding the possible waiver of fees for copying, the New York Freedom of Information Law does not contain any like provision.

I hope that 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-1453

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

April 1, 1980

Mr. Claude Phillips
[redacted]

Dear Mr. Phillips:

I have received your package of materials regarding a series of events in which you, among others, are involved with the City of Troy.

In brief, the materials concern your requests for information regarding the urban renewal plans of the City. In addition, you have indicated to me orally that you are the owner of one of the properties being considered in the Urban Renewal Agency's plans.

In all honesty, even if you obtain all of the information in which you are interested, I am not sure what the results of the disclosures would be. Nevertheless, several comments can be made with respect to the chain of events described in the materials that you sent.

First, and perhaps most importantly, an advisory opinion was written sometime ago regarding the same subject at the request of Celia Murray. Recent developments in case law require that the opinion sent to Ms. Murray be reevaluated.

At the time, it was explained to Ms. Murray that case law held that appraisals related to an incomplete or "inchoate" transaction concerning an Urban Renewal Agency may be withheld until the transaction to which the records relate has been consummated [see Sorley v. Village of Rockville Center, 30 AD 2d 822 (1968)]. The earlier case law was based upon a finding that the "governmental" or "public interest" privilege might be applicable. In brief, the

governmental privilege stands for the principle that government may withhold information when it can prove that disclosure would, on balance, result in detriment to the public interest.

A recent decision rendered by the Court of Appeals, the state's highest court, dealt with "governmental privilege", and apparently either substantially narrowed the application of the privilege or completely abolished it. In Matter of Doolan v. BOCES, 48 NY 2d 341, an argument was made that disclosure of the records sought would result in detriment to the public interest and the governmental privilege was asserted.

However, in its conclusion, the Court held that:

> "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571, supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds." (id. at 347)

Although the Court of Appeals may further expand upon the relationship between the Freedom of Information Law and the governmental privilege, it is clear that the court found that the public policy regarding disclosure is "fixed by the Freedom of Information Law" and that the public interest "cannot protect from disclosure materials which that law requires to be disclosed".

In view of the foregoing, it is in my opinion questionable whether government generally or the City of Troy in particular can any longer rely upon the public interest privilege as a basis for denial. From my perspective, it appears that the state's highest court has determined that the only bases for withholding government records are those found in the Freedom of Information Law.

You may remember that it was advised in the opinion addressed to Ms. Murray that none of the eight grounds for denial found in §87(2) of the Freedom of Information Law could appropriately be asserted to withhold the records sought. The only basis upon which the City of Troy could justifiably withhold the records involved the assertion of the governmental privilege. If my interpretation of the Doolan case is accurate, the City can no longer rely upon the governmental privilege to withhold the records. If that ground for denial has essentially disappeared, it would appear that the appraisals and the records related to them should in great measure now be available.

In conjunction with the responses to your requests transmitted by Mr. Brier, the City's Records Access Officer, I believe that they are in many instances inadequate.

It is emphasized in this regard that the Freedom of Information Law is based upon a presumption of access. Section 86(4) of the Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..."

Consequently, all records in possession of the City of Troy relative to your requests are subject to rights of access. Moreover, §87(2) of the Law provides that all records of an agency are available, except those records or portions thereof that fall within one or more of the eight enumerated grounds for denial found in paragraphs (a) through (h) of the cited provision. I would like to stress that the use of the phrase "records or portions thereof " in my view evidences a recognition on the part of the Legislature that there may be instances in which records may be accessible or deniable in part. Therefore, when a request for records is made, the agency and its records access officer are obliged to review the records in their entirety to determine which portions, if any, fall within the grounds for denial.

The point made in the preceding paragraph may be relevant with respect to the responses of March 4 by Mr. Brier regarding copies of correspondences between Mr. Brennan and Mr. Buckley. Mr. Brier wrote that there was a letter sent by Mr. Brennan to Mr. Buckley but "that the letter is considered part of the appraisal package---- not to be released at this time --- via action taken January 10..." by the Troy Urban Renewal Agency.

Even if the governmental privilege could appropriately be cited, and that is questionable in view of the Doolan decision, it would have been applicable only to the extent that government could demonstrate that disclosure would result in detriment to the public interest.

There may be many documents within a "package" related to a single subject. However, the nature of the items in the package likely differs and the effects of disclosing individual items might differ.

While a particular record might be deniable under the Freedom of Information Law, other records related to it might be accessible. In my view, even though a letter from Mr. Brennan to Mr. Buckley might relate to the appraisals, which were denied, the denial of the appraisals may have little or nothing to do with a denial of access to the correspondence that you requested.

In a related area, you requested several certifications from Mr. Brier regarding existence of records in which you are interested. It is emphasized at this juncture that the Freedom of Information Law provides access to records or portions thereof; it does not generally require an agency to create a record in response to a request.

With regard to your request for certifications to the effect that records do not exist, you directed my attention to several aspects of Mr. Brier's response of February 19. Item three of his response relative to your certification represents a clear inconsistency. Specifically, Mr. Brier certified that an authorization was approved by the City Council by means of Resolution #401 at its meeting of March 23, 1978. In response, you requested a copy of Resolution #401. However, on February 25 Mr. Brier

wrote that "there was no City Council meeting on February 23, 1978" and that "City Council resolutions never reached the numerical '400' plateau by identification". If Mr. Brier has certified that it exists, certainly it should be made available. If it does not exist, questions arise regarding the means by which the authorization to which your correspondence makes reference was given. Based upon the information that you sent, those questions remain unanswered.

With regard to item five, you requested a certification that the Urban Renewal Agency "never received an original copy from a company or companies commissioned to do the re-use and reappraisal study". In response, Mr. Brier wrote "not applicable". I question whether the response given by Mr. Brier was appropriate. Either the Urban Renewal Agency received a copy of the study or it did not. Further, by way of analogy, this office maintains a log of all the mail that it receives. The log identifies the date on which any correspondence is received, the identity of the correspondent and the nature of the material. If the City of Troy maintains a mail log similar to that used by the Committee, perhaps a review of the log would provide information of interest to you.

The last item concerning certification pertains to the "exact cost of the re-use and reappraisal study". In response, Mr. Brier wrote that the cost of appraising buildings listed was $500 for sixteen buildings. I am not sure that Mr. Brier's answer was responsive to your inquiry. As I understand your request, you were interested in obtaining records indicating the total cost of the reuse or reappraisal study. While "$500" might indicate the cost per unit, in our conversation, questions arose regarding the number of units that actually were appraised. All that I can suggest is that any record that indicates the total cost or a breakdown of costs would in my view be available under the Freedom of Information Law.

Lastly, you attached a statement signed by Jeffrey Setless, which was certified by a notary public. Mr. Setless wrote of his difficulty in gaining access to blueprints and floor plans of the building located at 258 Broadway. He also indicated that he sent a letter of intent expressing his interest in purchasing the building. In short, Mr. Setless was offered reasons for a delay with regard to his request for the blueprints and building plans.

From my perspective, if blueprints and building plans are in possession of an agency of the City of Troy, they are accessible to any person, whether or not the person making the request is interested in purchasing the property. I believe that blueprints, building plans and similar documents are furnished as a general rule to building departments or inspectors. Further, this Committee has consistently advised that such documents are 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].

I hope that I have been of some assistance. If you have further questions regarding rights of access to particular records or the procedures followed regarding your requests, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert T. Brier
John P. Buckley
Sidney L. White

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1454

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

April 2, 1980

Ms. Celia Murray
[redacted]

Dear Ms. Murray:

I have received your letter of March 17 in which you have requested an advisory opinion regarding the sufficiency of a denial of access to records rendered by the Urban Renewal Agency of the City of Troy.

Specifically, you have requested a copy of an appraisal report submitted by Mr. Brennan regarding a downtown urban renewal building in Troy "without his estimated values on either portions of or entire parcels."

As you indicated, I had written an earlier opinion at your request regarding rights of access to the records in question with the estimated values. Consequently, you are attempting to distinguish between a request for records indicating estimated values identified within a report and a second request for the same records minus the estimated values.

At the time of my response to your initial request for an opinion, I felt compelled in good faith to "hedge", due to a judicial decision rendered in 1968 which represented a situation seemingly analagous to that which you raised.

However, a recent development in case law in my view requires that the first opinion sent to you be re-evaluated.

At the time, it was explained that case law held that appraisals related to an incomplete or "inchoate" transaction concerning an Urban Renewal Agency may be withheld until the transaction to which the records relate has been consummated [see Sorley v. Village of Rockville Center, 30 AD 2d 833 (1968)]. The earlier case law

was based upon a finding that the "governmental" or "public interest" privilege might be applicable. In brief, the governmental privilege stands for the principle that government may withhold information when it can prove that disclosure would, on balance, result in detriment to the public interest.

A recent decision rendered by the Court of Appeals, the state's highest court, dealt with "governmental privilege", and apparently either substantially narrowed the application of the privilege or completely abolished it. In Matter of Doolan v. BOCES, 48 NY 2d 341, an argument was made that disclosure of the records sought would result in detriment to the public interest and the governmental privilege was asserted.

However, in its conclusion, the Court held that:

> "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571, supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift or, or waste of, public funds." (id. at 347)

Although the Court of Appeals may further expand upon the relationship between the Freedom of Information Law and the governmental privilege, it is clear that the court found that the public policy regarding disclosure is "fixed by the Freedom of Information Law" and that the public interest "cannot protect from disclosure materials which that law requires to be disclosed."

In view of the foregoing, it is in my opinion questionable whether government generally or the City of Troy in particular can any longer rely upon the public interest privilege as a basis for denial. From my perspective, it appears that the state's highest court has determined that the only bases for withholding government records are those found in the Freedom of Information Law.

You may remember that it was advised in the earlier opinion that none of the eight grounds for denial found in §87(2) of the Freedom of Information Law could appropriately be asserted to withhold the records sought. The only basis upon which the City of Troy could justifiably withhold the records involved the assertion of the governmental privilege. If my interpretation of the Doolan case is accurate, the City can no longer rely upon the governmental privilege to withhold the records. If that ground for denial has essentially disappeared, it would appear that the appraisals and the records related to them should in great measure now be available.

Even if the principle of the governmental privilege could appropriately be asserted, it may be asserted in my view only to the extent that government can prove that disclosure would in fact result in detriment to the public interest. In terms of the factual situation at issue, the governmental privilege might have been asserted if it could be demonstrated that disclosure of the estimated values would preclude the City of Troy from obtaining the best price for the properties identified in the records. If disclosure of the remaining information would have no adverse effects, I believe that it should be made available. Again, however, the Doolan decision cited earlier appears to have all but abolished the common law governmental privilege. If the Doolan decision has done so, it would appear that the appraisal reports in their entirety might now be accessible.

Lastly, it is emphasized that §87(2) of the Freedom of Information Law provides that an agency may withhold records or portions thereof that fall within one or more of the grounds for denial enumerated in paragraphs (a) through (h) of the cited provision. By making reference to records "or portions thereof", the Legislature in my view recognized that there may be situations in which a record might be accessible or deniable in part. Consequently, I believe that an agency is obliged to review

a record or records sought in their entirety to determine which portions, if any, may justifiably be withheld. If, for example, portions of a record fall within the scope of a ground for denial, those portions might be deleted, while the remainder should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Robert T. Brier
John P. Buckley
Louis Anthony, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1455

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

April 2, 1980

Mr. Charles J. Mosello
[redacted]

Dear Mr. Mosello:

I have received your letter regarding a denial of access to records by the Division of Licensing Services.

It is noted at the outset that the Committee on Public Access to Records does not maintain records generally, but rather is responsible for rendering advice under the Freedom of Information Law. Therefore, although you characterized your letter to this office as a request, the Committee does not have possession of any of the records in which you are interested. I believe, as Mr. Roff's letter to you of March 3 indicates, that a denial of access may be appealed to Mr. Donald Croteau, Director of Operations of the Department of State.

With respect to your inquiry, I have contacted Mr. Roff on your behalf and have discussed the matter with him. Although I do not agree with his statement that your request lacked sufficient specificity to respond, it appears that the records sought may justifiably be withheld at this juncture on the ground that disclosure would result in an unwarranted invasion of personal privacy.

It is noted that the interpretation of the privacy provisions of the Law often requires the making of subjective judgments. Stated differently, while you may consider that disclosure of a particular document might result in a "permissible" invasion of personal privacy, an equally reasonable person might consider that disclosure of the same record would result in an "unwarranted" invasion of personal privacy.

Under the circumstances, since the records in which you are interested never resulted in a determination made by the Department of State, it appears that the denial of access to the affidavit may have been justified. Mr. Roff informed me that if there had been a hearing and affidavits and similar documents had been introduced as evidence, the records would be available. Nevertheless, no hearing has been held.

It is noted that §89(2)(c) of the Freedom of Information Law 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."

In view of the foregoing, if you obtain the written consent of the persons named in your correspondence regarding disclosure of the records in question, I am sure that the Division of Licensing Services would be pleased to provide access.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk
bcc: Willard Roff

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1456

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

April 3, 1980

Mr. Donald Berey
Legislative Representative
New York Public Interest
Research Group, Inc.
68 South Swan Street
Albany, New York 12210

Dear Mr. Berey:

I have received your letter of March 21 in which you requested an advisory opinion.

According to your letter, the New York Public Interest Research Group (NYPIRG) is interested in obtaining the 1979 and 1980 budgets of the Elections Committee of the New York State Senate. Your question is whether the information in question is available.

It is noted at the outset that the Freedom of Information Law states that an agency need not generally create or compile records in response to a request [see §89(3)]. Therefore, if there are no records in existence that are reflective of the information sought, the Senate is not obliged to create such records on your behalf.

Assuming that the records sought do exist, they are in my opinion available under §88(2) of the Freedom of Information Law.

It is important to point out at this juncture that the scope of rights of access to records in possession of the State Legislature differs from the scope of rights of access to records in possession of an "agency" [see §86(3)]. In brief, agencies are required to provide access to all records, except those falling within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h) of the Freedom of Information Law. The Legislature, however, is required to provide access only to

those records enumerated in §88(2)(a) through (j) of the Law.

Although there is no specific provision in §88(2) that grants access to the budget of a particular committee, §88(2)(f) requires that the State Legislature shall make available for public inspection and copying:

> "...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..."

Bills introduced in and passed by the Legislature are clearly available under §88(2)(a). Since a budget is passed in the form of a bill or bills, records indicative of the budget of the Elections Committee would in my view constitute "statistical or factual tabulations of, or with respect to, materials otherwise available for public inspection and copying..." Therefore, to the extent that records exist that are reflective of the budgets of committees of the Legislature, they are in my view 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. Roger Thompson
Secretary of the Senate

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1457

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

April 3, 1980

Mr. Ramon Pina
#78-A-3165
Great Meadows Correctional
Facility
Box 51
Comstock, New York 12821

Dear Mr. Pina:

I have recently received your letter regarding the Freedom of Information Law.

Enclosed for your consideration are copies of the Law, regulations which govern its procedural implementation, and an explanatory pamphlet that may be particularly useful to you.

As a general rule, the Freedom of Information Law is based upon a presumption of access. In short, 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 of the grounds for denial appearing in §87(2)(a) through (h). Most of the exceptions to rights of access are written in terms of the effects of disclosure. For example, §87(2)(e) of the Law states that records compiled for law enforcement purposes are deniable, but only when the harmful effects of disclosure described in §87(2)(e)(i) through (iv) would arise. Therefore, when a request is directed to government in New York, the agency must determine the extent, if any, to which one or more of the grounds for denial may appropriately be asserted.

With respect to the "subject matter list", §87(3)(c) of the Law requires that each agency maintain:

> "...a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The list is not in my view intended to make reference to every record in possession of an agency; on the contrary, I believe that it is intended to make reference to the categories of records in possession of an agency by subject matter. The Drug Enforcement Agency is federal and therefore is not subject to the New York Freedom of Information Law. Therefore, unlike agencies of government in New York, it is not required to maintain a subject matter list. However, it is subject to the federal Freedom of Information Act (5 USC §552).

I hope that I have been 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-1458

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

April 3, 1980

Mr. Christopher M. Kelly
Mr. L. Christopher Lund
St. Bonaventure University
Box 1313
St. Bonaventure, New York 14778

Dear Messrs. Kelly and Lund:

I have received your letter regarding your capacity to obtain financial information pertaining to St. Bonaventure University.

You have indicated that your requests directed to the University have been denied and you have asked for a description of the laws that govern disclosure by private universities. In addition, you have asked where you can obtain financial information and footnotes of St. Bonaventure University for 1975 through 1979.

It is important to note at the outset that access statutes, such as the New York Freedom of Information Law, are applicable only to records in possession of government. Therefore, private universities and corporations, for example, fall outside the scope of the rights of access granted by the Freedom of Information Law. Consequently, while government is required to provide public access to records in its possession, private entities are not as a general rule required to do so.

Nevertheless, I have made several inquiries on your behalf and found that the regulations promulgated by the State Board of Regents require the submission of annual financial reports by private colleges and universities chartered by the Board. Specifically, §3.51 of the Rules of the Board of Regents states that:

> "[A]ll institutions in the university shall transmit to the department yearly, on or before September 1, a report in prescribed form for the preceding statutory school year. No such institution whose report is not filed before the 20th day of September shall participate in any apportionments, unless such neglect is duly excused. Any institution failing to report for two consecutive years shall be deemed to have discontinued its operations, and after due notice its charter may be suspended as provided in section 222 of the Education Law."

In order to assist you in obtaining the information in which you are interested, I have transmitted your letter to the appropriate office of the State Education Department. I am sure that you will receive a response from that office shortly.

Enclosed for your consideration is a pamphlet regarding the New York Freedom of Information Law that 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/kk

Enc.

cc: Ms. Theodora Thayer
Associate Coordinator
State Education Department
Cultural Education Center
Room 5B44
Albany, New York 12230

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-463
FOIL-AO-1459

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

April 3, 1980

Ms. Joan J. Smith
[redacted]

Dear Ms. Smith:

As you are aware, 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 and Open Meetings Laws.

Your letter contains four comments, and I will attempt to respond to each.

First, you indicated that at the meeting of the Town Board of the Town of Lockport held on March 5, you wanted to ask a question regarding fire contracts. You were told that questions could not be asked until the topics identified on the agenda had been discussed. In this regard, it is important to point out that the Open Meetings Law is silent with respect to public participation. The Law in brief provides that the public has the right to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy (see Open Meetings Law, §95). Nowhere does the Law provide that the public has the right to participate. Consequently, if a public body chooses to permit public participation, it may do so; nevertheless, it need not. If, however, a public body does permit public participation, I believe that it is required to do so by means of reasonable rules. Having reviewed the minutes of the meeting held on January 2, item 7 concerns public participation and restricts the ability to speak to five minutes. So long as all members of the public are treated equally, the rule adopted by the Town Board is in my view reasonable.

Your second comment concerns a statement by the Town Supervisor in which he indicated that the meeting held to discuss the fire contracts would be closed to the public. After having questioned the reason, the Town Attorney stated that the meeting could be closed under "article 100-F".

Several comments should be made with respect to the foregoing. The language of your letter appears to indicate that a closed session was scheduled in advance of the meeting. I do not believe that a public body has the capacity to schedule an executive session in advance.

The phrase "executive session" is defined in §97(3) of the Law to mean that 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) of the Open Meetings 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, it is clear that a motion to enter into executive session must be made during an open meeting, that the motion must identify in general terms the subject matter for discussion in executive session, and that the motion must be carried by a majority of the total membership of a public body. In addition, paragraphs (a) through (h) of §100(1) specify and limit the subject matter that may appropriately be discussed behind closed doors.

The basis for closing the meeting cited by the attorney is §100(1)(f), which provides 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..."

Under the circumstances, it would appear that a discussion of a contract with a volunteer fire company, for example, might concern the financial history of a particular corporation. However, from my perspective, it is unlikely that the entire discussion would have appropriately fallen within the quoted ground for executive session. To the extent that §100(1)(f) was inapplicable, the discussion should in my view have been held open to the public.

Your third comment concerns a report of the Town Constable which indicated, without explanation, that 210 summonses had been issued. There is no requirement of which I am aware that a report must be discussed or explained. In this instance, perhaps you could obtain more information regarding the summonses or the activities of the Constable by seeking to review records pursuant to the Freedom of Information Law. In short, the Freedom of Information Law states that all records in possession of an agency are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law. Copies of summonses, for example, dockets of town justices and similar records are available for inspection and copying. Perhaps a review of such records would help to answer questions you might have regarding the Constable's reports.

Lastly, you have indicated that the procedure adopted by the Board essentially prohibits the members of the Board from answering or asking questions "unless the Supervisor says they can". According to the minutes of the meeting of January 2, it was stated that:

> "[I]deally, the Town Board members will leave the running of the meeting to the Supervisor and not volunteer information or ask questions. The more other members get involved the more likelihood there is for bringing up questions not on issues."

My only response here concerns the philosophy behind both the Open Meetings Law and the creation of public bodies. In my opinion, boards, committees and similar bodies were created in order to obtain the input and commentary from several in the hope that a number of opinions or points of view will result in a better or fairer decision than a single individual could make alone. If the State Legislature determined that an executive, such as a town supervisor, should make all decisions, I believe that town boards would not have been created as governing bodies. However, since a town board is the governing body, it is my belief that the Legislature intended that members of a board should individually provide their thoughts and expertise in order to arrive at determinations collectively that are preferable to decisions made by a single individual.

I hope that 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: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-404
FOIL-AO-1460

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

April 4, 1980

Mr. Dennis Glassberg
[redacted]

Dear Mr. Glassberg:

I have received your letter of March 19 which concerns the interpretation of both the New York Freedom of Information and Open Meetings Laws.

The first issue raised in your letter pertains to the means by which an applicant may request records and the requirements upon government with respect to requests made under the Freedom of Information Law. You have indicated that officials of the Town of Huntington, after having received a written request for records, informed you that you would "have to come in and fill out the special form the Town had".

In this regard, the Committee has consistently advised that a failure to complete a prescribed form cannot constitute a valid ground for denial of access or delay in response to requests. Section 89(3) of the Law and §1401.5 of the regulations promulgated by the Committee, which have the force of law, provide that an agency may require that a request be made in writing. Nevertheless, nowhere in the Law or the regulations is there a provision that requires that a form prescribed by an agency be completed as a condition precedent to a response to a request. In short, it has been advised that any request made in writing that reasonably describes the records sought [see Freedom of Information Law, §89(3)] should suffice.

The rationale for this advice is obvious. If, for example, you are located in Suffolk County and the records in which you are interested are located only at the office of a state agency in Albany, why should you be required to visit Albany to make a request or to write to Albany, request a form, have the state agency mail the form to you, fill it out in Suffolk, and mail it back to Albany? Very simply, such a procedure is inordinately long and in my view would conflict with the clear intent of the Freedom of Information Law, which is to facilitate public access, not hinder public access.

The second issue concerns a meeting held by the Huntington Town Board on March 11. According to your letter, the Supervisor during the meeting asked if any member of the public wished to "speak out on issues of concern". You indicated that all the speakers who addressed the Board "did so for at least ten to twenty minutes". However, when you asked to speak about the "landfilling of garbage" in relation to the Multi-Town Solid Waste Management Authority, the Supervisor "almost immediately imposed a 5 minute restriction on the length" of your talk.

Two points should be made with respect to the foregoing.

First, the Open Meetings Law is silent with respect to public participation. Section 95 of the Law states that the public has the right to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. Nowhere does the Law provide a right on the part of the public to participate at meetings. Nevertheless, there is nothing in the Law that precludes a public body from permitting public participation. Consequently, a public body may permit public participation at meetings, but it need not. Second, if a public body does permit the public to speak or otherwise participate at meetings, it must in my view do so by means of reasonable rules that grant an equal opportunity to speak to all members of the public who wish to speak. Stated differently, if one person can speak for ten minutes, all should in my view be permitted to speak for the same length of time. To lengthen or shorten the amount of time in which a member of the public is permitted to speak based upon the identity of the speaker or the subject matter discussed would in my view be unreasonable.

Lastly, in a letter addressed to the Supervisor, Mr. Kenneth Butterfield, you requested records reflective of "the procedural requirement that arbitrarily limits the time that a person can speak to five minutes" and minutes that indicate "the last time that the Town Supervisor... either mentioned it or implemented the above requirement". To the extent that such records exist, they are in my opinion available. Procedures, statements of policy, minutes and similar rules adopted by an agency, such as the Town of Huntington, are clearly available under the Freedom of Information Law [see §87(2)(g)(iii)].

It is not inconceivable, however, that minutes might not make reference to the nature of discussion initiated by members of the public. This may be so due to the requirements of §101(1) of the Open Meetings Law which 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."

In view of the foregoing, the Open Meetings Law, insofar as it pertains to minutes, merely requires that they consist of a record or summary of "motions, proposals, resolutions and any other matter formally voted upon and the vote thereon". The Law does not require that the minutes include reference to every statement that is made at a meeting. Again, however, if the minutes do include reference to speakers, I believe that they are clearly accessible under both the Freedom of Information Law and §101(3) of the Open Meetings Law.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations, the Open Meetings Law, and a pamphlet that discusses both statutes. Copies of the same will be sent to the Supervisor, and in addition, I will enclose for the Town a copy of model regulations designed to assist government in complying with 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/kk

Encs.

cc: Kenneth Butterfield
Councilman Clementi
Councilman Thompson
Councilwoman Clair Kropft
Mark McIntyre
Roger Rammie
Councilman Deegan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1416

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

April 4, 1980

Mr. Irwin L. Fisch
Herald Newspaper Group
110 East 23rd Street
New York, New York 10010

Dear Mr. Fisch:

I have received your letter of March 17 regarding rights of access to real estate appraisals that you requested from the New York City Department of General Services.

According to the response attached to your letter rendered by Jay S. Gingold, the Assistant Commissioner for Administration and Records Access Officer for the Department, the records in question were denied pursuant to §87(2)(g)(iii) of the Freedom of Information Law.

In my opinion, the ground for denial cited by Mr. Gingold is inappropriate and it appears that the records sought should be made available under the Freedom of Information Law.

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 those records or portions thereof falling within one or more of the grounds for denial appearin in §87(2)(a) through (h) of the Law.

The ground for denial cited by Mr. Gingold pertains to "inter-agency or intra-agency materials". From my perspective, the term "inter-agency" is applicable to records transmitted from one agency to another. The term "intra-agency" is applicable to records transmitted from an official of an agency to one or more officials of the same agency.

Under the circumstances described, the records sought were prepared by independent appraisers who are not officials of any agency. Consequently, I do not believe that the records sought should be characterized as "inter-agency or intra-agency".

The fact that the appraisals may be non-final or advisory is in my view of no import. Further, the legislative history of the amendments to the Freedom of Information Law passed in 1977 tend to bolster my contention. In a letter addressed to me by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law, advice was given with respect to alterations in the bill to amend the Law as originally introduced. In a letter dated July 21, 1977, Assemblyman Siegel wrote that his

> "...original bill would have permitted an agency to deny access to records or portions thereof that 'are non-final or purely advisory drafts or papers.' Several problems were raised with respect to that language. Specifically, in some instances it would be difficult to determine whether a particular record is 'non-final'. More importantly, the term 'advisory' could have been interpreted in a manner that would permit denial of access to records that are accessible under the existing Freedom of Information Law. For example, 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."

In view of the statement made by the sponsor, it is reiterated that the records in question cannot in my opinion be characterized as "inter-agency or intra-agency materials", and in addition, it appears that there was an intent to provide access to records analogous to those in which you are interested.

It does not appear that any of the other grounds for denial in the Freedom of Information Law could justifiably be cited. Although §87(2)(c) states that an agency may withhold records or portions thereof which "if disclosed would impair present or imminent contract awards...", I do not believe that any contract awards are involved in this situation.

Further, it is noted that rights of access to similar appraisals had in the past under some conditions been questionable due to the possible proper assertion of the so-called "governmental" or "public interest" privilege. Nevertheless, a recent decision by the Court of Appeals appears to have substantially narrowed or essentially abolished the governmental privilege. In Matter of Doolan v. BOCES, the Court held that:

> "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571, supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds." [48 NY 2d 341, 347 (1979)].

Based upon the foregoing, I believe that the records in which you are interested are accessible under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Jay S. Gingold
Neil F. Murphy

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1462

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

April 4, 1980

Mr. Tony Rodriguez
77-A-4285
Box 51
Comstock, New York 12821

Dear Mr. Rodriguez:

I have received your letter of March 18 regarding the means by which hospital records may be obtained.

It is noted at the outset that the Freedom of Information Law is applicable only to records in possession of government. Consequently, if the records in which you are interested involve a private hospital, the Freedom of Information Law does not apply.

However, there is a provision of law which provides a patient with indirect rights of access to hospital and other medical records. Specifically, §17 of the Public Health Law states 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. Either the physician or hosptial incurring the expense of providing copies of x-rays, medical records and test records including all laboratory tests pursuant to the provisions of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expense."

In view of the quoted provision, if you are the subject of the records sought, a physician of your choice could obtain hospital records pertaining to you on your behalf.

Further, if the records are relevant to a judicial proceeding in which you are involved, it is possible that the records in which you are interested might be obtained by means of a court order or discovery 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

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1463

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

April 7, 1980

Sally Zanger, Esq.
Prisoners' Legal Services
of New York
84 Holland Avenue
Albany, New York 12208

Dear Ms. Zanger:

I have received your letter of March 20 in which you requested an advisory opinion regarding a denial of access to records by the State Commission on Correction.

The correspondence attached to your letter indicates that on October 26, 1979, you requested:

> "...all information and documents in the possession of the Commission of Corrections that have any relation to incidents of violence at Coxsackie Correctional Facility in the years 1977, 1978 and 1979, including but not limited to, any complaints the Commission has received from inmates, and your response thereto and the details of and results and reports of any and all investigations the commission has done in response to complaints and incidents of violence."

Your request was denied on appeal by Stephen Chinlund, Chairman of the Commission.

The determination of November 28, 1979, does not cite any specific provision of the Freedom of Information Law as a basis for withholding. It does, however, assert that all of the records identified "pertain to continuing investigation into a series of disruptive incidents..." at the Coxsackie Correctional Facility. He added that the Commission has not made a final determination with respect to the incidents and that the Commission often studies patterns of behavior that become apparent through a series of incidents that assist the Commission in formulating policy and taking corrective or disciplinary action. In addition, Mr. Chinlund wrote that:

> "[I]t would not be in the best interest of the public or of the Commission at this time to release the identified records. Release of those records would interfere with the ongoing investigative process and policy determinations of the Commission."

Without having seen the records in which you are interested, it is impossible to provide specific advice with respect to the scope of rights of access. Nevertheless, I believe that the denial of the records sought in their entirety is likely overbroad for a number of reasons.

First, it is important to emphasize 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 those records or portions thereof that fall within one or more numerated grounds for denial appearing in §87(2)(a) through (h). Therefore, when a request for records is made, the only question that may be raised by an agency involves the extent, if any, to which records sought fall within one or more of the grounds for denial. Further, an agency is obliged to review the records sought in their entirety to determine the extent to which the grounds for denial may appropriately be asserted.

Second, it is important to point out that §87(2) of the Law states that agencies may withhold "records or portions thereof...". As such, it is clear that the Legislature envisioned situations in which a single record, for example, might be accessible or deniable in part. Thus, it is reiterated that the records sought should be reviewed in their entirety to determine which portions, if any, may justifiably be withheld.

Third, from my perspective, there are four grounds for denial that could conceivably be applicable in part. Also, as a general rule, the majority of the bases for denial in the Freedom of Information Law are written in terms of the effects of disclosure.

For instance, the first ground that might be applicable is §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". In this regard, it is possible that many of the records that you are seeking identify either inmates or employees of the facility. If disclosure of the identities of those individuals would result in an unwarranted invasion of personal privacy, their names or other identifying details may be deleted.

It is noted at this juncture that the courts have held that public employees require lesser protection in terms of privacy than the public generally. This Committee has advised and the courts have upheld the notion that records which 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 [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)]. Consequently, it is possible that the names of inmates may be deleted in many instances where the identities of public employees should be made available, for the records might be relevant to the performance of their official duties.

A second ground for denial that could be relevant is §87(2)(e). The cited provision 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 view, it is questionable whether any of the four grounds for denial found within the exception to rights of access quoted above would be applicable. I am not sure that an investigation conducted by the Commission could properly be characterized as a "law enforcement investigation". Similarly, although records might identify a "confidential source", it is equally questionable whether the information relates to a "criminal investigation".

Moreover, judicial determinations rendered under both the Freedom of Information Law as originally enacted and as amended have found that the "law enforcement purposes" exception may appropriately be asserted only by a criminal law enforcement agency [Young v. Town of Huntington, 388 NYS 2d 978 (1976); Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)]. If "confidential sources" are identified, it would appear in any event that their identities could be deleted from the records under the privacy provisions discussed earlier.

The third ground for denial that might be applicable is §87(2)(f), which states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person". Although, as noted earlier, I am not familiar with the contents of the records in question, it is possible that disclosure of some aspects of the records might endanger the life or safety of a person or persons. To that extent, the records may in my view be withheld. However, it is emphasized once again that it may be possible to delete portions of records while providing access to the remainder, when disclosure would not result in the harm described in the Law.

The final ground for denial that might be appropriately cited in some situations 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 provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency material may be withheld, 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.

Under the circumstances, many of the records in which you are interested might be characterized as "inter-agency or intra-agency". Nevertheless, it is possible that they contain statistical or factual data, instructions to staff that affect the public, and statements of policy. To that extent, the records are in my view accessible, so long as none of the other grounds for denial of access may be applicable.

With the copy of the determination to deny access rendered on appeal, a memorandum drafted by George King, Counsel to the Commission, was also sent to this office. The memorandum contains a review of the Freedom of Information Law and a discussion of the so-called "governmental" or "public interest" privilege. In this regard, for years it had been advised that the enactment of the Freedom of Information Law did not abolish the governmental privilege, which is based upon the principle that government may withhold records when it can be demonstrated that disclosure would result in detriment to the public interest [see e.g., Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)]. Recently, however, the Court of Appeals apparently either narrowed the application of the privilege or abolished it. In Doolan v. BOCES, the Court of Appeals held that:

> "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571, supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [48 NY 2d 341, at 347 (1979)].

In view of the recent Court of Appeals decision, it is questionable in my view whether the governmental privilege can any longer be cited as a basis for withholding.

In sum, to fully comply with the Law, I believe that the Commission is obliged to review the records sought in their entirety to determine which portions, if any, fall within the grounds for denial mentioned earlier, and it is reiterated that there may be situations in which records may be accessible and deniable in part.

I hope that I have been 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: Stephen Chinlund
George King

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 467
FOIL-AO-14164

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

April 8, 1980

Honorable William T. Smith
Honorable Hugh S. MacNeil
Legislative Office Building
Room 915
Albany, New York 12247

Dear Senator Smith and Assemblyman MacNeil:

I have received your letter in which an advisory opinion has been requested with respect to a proposal by the Village of Lansing regarding disclosure.

The proposal concerns the establishment by means of local law of a "Landlord-Tenant Ombudsman", as well as a "Landlord-Tenant Advisory Board". Apparently, Village officials believe that the proposal requires that special legislation be enacted under the Municipal Home Rule Law in order to carry out its provisions.

On one hand, I do not believe that the enactment of special legislation is necessary. On the other hand, however, to accomplish each of the goals contained in the proposal, and particularly the goals regarding disclosure, special legislation would have to be enacted. Stated differently, although special legislation would be required to give effect to the portions of the proposal concerning disclosure, I do not believe that those aspects of the proposal are necessary.

I direct your attention to Article VII of the proposal, entitled "Rights of Ombudsman". The cited provision, if enacted, would state that:

> "[T]he ombudsman, and all clerical staff and employees in the ombudsman's office shall not be compelled to disclose to any administrative or judicial tribunal any information relating to, or acquired in, the course of their official activities under this law, nor shall any reports, minutes, written communications or other documents of the ombudsman's office pertaining to such information be subject to subpoena; except that where the information so required indicates that the person appearing or who has appeared before the ombudsman has been the victim or subject of a crime, the ombudsman or the ombudsman's staff and employees may be required to testify fully in relation thereto or any examination, trial or other proceeding in which the commission of a crime is the subject of inquiry."

The provision quoted above would essentially require the confidentiality of all records in the possession of the Ombudsman, except statistical data and records reflective of the resolution of disputes, minus the identifying details [see Article VI(11)]. In fact, the confidentiality provision would remove many written communications from the scope of a judicial subpoena.

From my perspective, the only means by which a confidentiality provision such as that contained in Article VII could be valid would involve the passage of a special statute by the State Legislature. If a local law is passed that requires confidentiality, it is in my view void to the extent that it abridges rights of access granted by a general law such as the Freedom of Information Law. The provision in the Freedom of Information Law regarding confidentiality is §87(2)(a), which states that an agency, such as a village, may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". As such, only a statute passed by the State Legislature or Congress can require confidentiality; a local law cannot unless special legislation is enacted under the Municipal Home Rule Law (see §§23 and 40).

Nevertheless, the necessity of passing special legislation is in my view questionable, for the Freedom of Information Law offers substantial protection in terms of privacy. 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 illustrations of unwarranted invasions of personal privacy.

From my perspective, the provisions concerning privacy in the Freedom of Information Law provide sufficient protection to both the Village and persons who may be involved in disputes to render the proposed Article VII unnecessary. For example, if a determination is rendered, as Article VI(11) indicates, a record indicating the resolution of the dispute would be available, except to the extent that the parties might be identified. Similarly, if, for instance, a landlord or a tenant sends a complaint to the Ombudsman, I believe that any identifying details, including names, addresses or other facets of the correspondence that might tend to identify any individual, could justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

In short, I believe that the confidentiality requirements of Article VII are unnecessary and that the Freedom of Information Law provides enough protection to the Ombudsman, landlords and tenants to make unnecessary the passage of special legislation.

It is also important to point out that the Landlord-Tenant Advisory Board that may be established under Article IX would be subject to the Open Meetings Law. Section 97(2) of that statute, which defines "public body", was recently amended to include within its scope committees, subcommittees and similar bodies. Therefore, even though the Advisory Board may have no authority to make final determinations, it would nonetheless be subject to the Open Meetings Law.

Section 100(1)(f) of the Law 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..."

In the Committee's view, the provision quoted above is intended largely to protect privacy. In some situations, when tenants or landlords go before a board, it is likely that the employment or financial history of a particular person or corporation would be considered, or that the advisory board would consider matters leading to the discipline of a particular person or corporation.

Further, it appears that the Advisory Board would be created to discuss policy concerns rather than specific incidents in which disputes have arisen. Consequently, the privacy of particular individuals may not be involved in the deliberations of the Board.

The other function of the Advisory Board would apparently involve "recommending persons to serve as ombudsmen when a vacancy occurs" [see Article IX, second paragraph]. In such a situation, the Advisory Board would clearly be discussing a matter "leading to the appointment" of a particular person, which would be a proper subject for executive session.

Lastly, if the Ombudsman acts as an arbitrator, the proceedings before him or her would fall outside the scope of the Open Meetings Law. Since the Open Meetings Law applies to entities consisting of two or more, a single ombudsman would not constitute a "public body". In addition, I believe that Article VI indicates that a proceeding before the Ombudsman would be quasi-judicial in nature. If that is the case, the Open Meetings Law would not be applicable in any case, for §103(1) exempts from the provisions of the Law "judicial or quasi-judicial proceedings...".

In sum, I do not believe that the disclosure provisions contained in the proposal are necessary, for both the Freedom of Information Law and the Open Meetings Law provide government with substantial latitude with respect to the protection of personal privacy. Further, the proposal could in my view be useful and effective without the disclosure provisions and, therefore, without the passage of special legislation.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1465

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

April 8, 1980

James F. Collins, Esq.
410 Litchfield Street
Frankfort, New York 13340

Dear Mr. Collins:

I have received your letter of March 20 in which you have requested an advisory opinion regarding the scope of a request for records made under the Freedom of Information Law.

In short, the District that you represent has received two requests in which the applicant has sought records concerning particular subjects developed over a period of twenty years. According to your letter, the types of records in which the applicant is interested may be destroyed within six years of their creation pursuant to the schedules for the retention and disposal of records established by the State Education Department. You have stated further that you have no knowledge of whether the records in question continue to exist, for the District suffered a fire and records have been moved several times within the past few years.

In short, it is clear that you and District officials are not certain that the records sought exist. In this regard, I would like to offer the following comments.

First, §89(3) of the Law requires that an applicant reasonably describe the records in which he or she is interested. Although there is little case law concerning questions of whether a request "reasonably describes" the records sought, it is my view questionable whether a request for records developed over a period of twenty years "reasonably describes" the records sought.

Second, the regulations promulgated by the Committee, which have the force and effect of law, impose several responsibilities upon a designated records access officer. Those responsibilities deal in part with situations in which records cannot be found. Specifically, I direct your attention to §1401.2(6) of the regulations, which states that the records access officer, upon failure to locate records, must 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."

In view of the foregoing, if indeed it is unknown whether the records sought exist, a records access officer may in my opinion in good faith certify in writing that the records of which the District may be custodian "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

Robert J. Freeman
Executive Director

RJF/kk

cc: Arthur J. Brewster

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1466

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

C' TTEE MEMBERS
THOMAS H. COLLINS
MARIO M. CUOMO
WALTER W. GRUNFELD
MARCELLA MAXWELL
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

April 11, 1980

Mr. Kearney L. Jones
Assistant Commissioner
for Administration
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Mr. Jones:

Thank you for sending a copy of the determination on appeal rendered in response to a request by Mr. John Cutro.

In brief, the records sought concern the health effects, radiological and chemical, of the operations of NL Industries in Colonie. In response, access was denied on the ground that the State has initiated judicial proceedings against NL Industries and that the records sought may be withheld under §87(2)(e)(i) of the Freedom of Information Law.

Although I am not familiar with the records sought, the bases for the denial are in my view questionable.

As you are aware, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are available, except those records or portions thereof that fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law.

In this regard, the fact that the State of New York has initiated judicial proceedings may be irrelevant to rights of access.

There may be situations in which records related to a judicial proceeding may be withheld. For example, material prepared for litigation or records created pursuant to the attorney-client relationship may be privileged and, therefore, deniable under §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof when the records are "specifically exempted by state or federal statute".

However, if records are created in the ordinary course of business, the grounds for denial appearing in the Civil Practice Law and Rules with respect to discovery or privilege are in my view inapplicable. Further, case law has held that records that may be relevant to ligitation but which are otherwise accessible under the Freedom of Information Law remain available [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. As such, while the records sought may relate to or have a bearing upon litigation in which the state is involved, that factor alone does not in my opinion determine rights of access. As in the case of Burke, supra, the records sought may have been prepared in the ordinary course of business. As such, it is reiterated that the only grounds for denial that may appropriately be cited are those appearing in §87(2)(a) through (h) of the Freedom of Information Law [see also, Doolan v. BOCES, 48 NY 2d 341 (1979)].

The provision cited in your letter as a basis for withholding is §87(2)(e)(i), which states that an agency may withhold records compiled for law enforcement purposes and which if disclosed would "interfere with law enforcement investigations or judicial proceedings." It is important to point out that judicial interpretations of both the original and the amended versions of the Freedom of Information Law have found that the "law enforcement purposes" exception to rights of access may appropriately be cited as a basis for withholding only by criminal law enforcement agencies. While the Health Department is involved in the enforcement of the Public Health Law, it is not in my opinion a "criminal" law enforcement agency. Consequently, based upon extant case law, I do not believe that §87(2)(e)(i) can be cited as a basis for withholding the information sought by Mr. Cutro.

I hope that 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: John Cutro

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1467

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

April 14, 1980

Mr. Tom A. Forsell
[redacted]

Dear Mr. Forsell:

I have received both of your letter and apologize for the delay in response.

You have requested information on a number of subjects, including motor vehicle accident reports, police records, court records and related information.

It is emphasized at the outset that this office does not have possession of records generally. On the contrary, the responsibilities of this office involve providing advice with respect to the New York Freedom of Information Law.

Enclosed for your consideration are copies of the Law, regulations that govern its procedural implemention, and an explanatory pamphlet which may be particularly useful to you.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency in New York are available, except those records or portions thereof that fall within one or more among eight grounds for denial listed in §87(2)(a) through (h). Without knowing more about the records in which you are interested, it is difficult to provide specific advice. Nevertheless, I offer the following suggestions.

First, motor vehicle accident reports are available under §66-a of the Public Officers Law. To obtain motor vehicle accident reports, it is suggested that you request the reports from the police department that was involved in compiling the report or the New York State Department of Motor Vehicles.

Second, although courts and court records are not subject to the Freedom of Information Law, as a general rule, court records are available from a court clerk pursuant to §255 of the Judiciary Law.

Third, records in possession of police departments may be available depending upon the nature of their contents. It is suggested that you review §87(2)(e) of the Freedom of Information Law in order to provide you with an understanding of the grounds for denial that may appropriately be cited in conjunction with records compiled for law enforcement purposes.

Fourth, you mentioned records that may relate to drug addiction or drug abuse. It is noted in this regard that federal law provides that records identifiable to an individual maintained in conjunction with drug abuse programs are confidential. Specifically, 21 U.S.C. §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".

Lastly, some of the information in which you are interested may be several years old. Consequently, it is possible that some of the records that you are seeking might no longer exist. In conjunction with the foregoing, it is noted 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 you request information from agencies which does not exist in the form of a record or records, the agency is under no obligation to create new records on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1468

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

April 14, 1980

Mr. Daniel Jean Lipsman
[redacted]

Dear Mr. Lipsman:

I apologize for the delay in response to your letter of March 17.

Once again, your inquiry concerns access to transcripts of students of a particular program at CUNY with the proviso that identifying details be deleted.

I have received the materials to which you made reference transmitted by Mr. Darl Hulit of the FERPA Office at the Department of Health, Education and Welfare. In my view, the materials have no specific relevance to the question that you have raised. One opinion concerns access to what might be characterized as "directory information". The second pertains to a situation in which identifying details regarding students were deleted, making the records traceable only with great difficulty.

The question here as I see it is whether disclosure of the transcripts without identifying details would make the students to which the records relate "easily traceable". From my perspective, the foregoing represents a question of fact. I do not recollect the number of students in the program in which you are interested. If the number is small, it would appear that even after having deleted identifying details, the records might be "easily traceable" to the students in the program. If, however, the number is large, the deletion of identifying details might make it all but impossible to identify the students to whom

the transcripts relate. In the former case, it would appear that the records could be withheld under the Family Educational Rights and Privacy Act, as well as the New York Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy. In the latter, it would appear that the records would be available under both statutes.

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: Counsel's Office - CUNY

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1469

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

April 14, 1980

Mr. J. Sotenberg
[redacted]

Dear Mr. Sotenberg:

I apologize for the delay in response to your letter.

Enclosed for your consideration are copies of the advisory opinions that you requested.

Your question concerns the existence of a personnel office manual that may have been developed by the Department of Commerce. In response to your request for the manual in question, Mr. Pishko, the Records Access Officer for the Department of Commerce, has written that no such document exists. You have contended, however, that both public employee unions and the Department of Civil Service have "indicated the existence of such a document". It appears that there may be semantical difficulty in terms of the means by which your request was made or phrased.

In this regard, I have several points to offer.

First, if a manual analogous to that which you have described does indeed exist, it is in my view available under the Freedom of Information Law. Section 87(2)(g) of the Law provides that inter-agency and intra-agency materials consisting of policy or instructions to staff that affect the public are available.

Second, as I indicated to you by phone, an applicant for records need not identify the records down to the last detail. While the Freedom of Information Law as originally enacted required an applicant to request "identifiable" records, §89(3) of the Law as amended requires that an applicant "reasonably describe" the record sought. Whether you have "reasonably described" the manual is unknown to me. Nevertheless, there is nothing in the Law that prohibits you from making a new request.

Third, both §89(3) of the Law and §1401.2 of the Committee's regulations, which have the force and effect of law, enable you to request a certification in writing to the effect that records do not exist. Specifically, §1401.2(b)(6) of the regulations (see attached) states that the records access officer is obliged, upon failure to locate records, to 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."

Lastly, §86(4) of the Law defines "record" broadly to mean any information in any physical form whatsoever in possession of an agency. Therefore, if, for example, the Department of Civil Service maintains possession of the manual in which you are interested, it should be made available from that office, as well as any other agency that might have possession of the document in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Charles Pishko

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1470

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

April 14, 1980

Ms. Geraldine Ann Jannone
[redacted]

Dear Ms. Jannone:

As you are aware, 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.

Your letter concerns access to records regarding a case in which you were the defendant. Apparently you have been unsuccessful in your attempts to gain access to court records, as well as records that may be in possession of the Westchester County District Attorney and the New Rochelle Police Department.

Two points should be made at the outset.

First, court records are not subject to the Freedom of Information Law, for the Law specifically exempts the "judiciary" from the scope of the Law [see attached Freedom of Information Law, §86(1) and (3)].

Nevertheless, as a general rule, court records are available. For example, §255 of the Judiciary Law states that a clerk of a court is required to search and make available for inspection and copying all records in his or her possession.

Second, an agency need not create records in response to a request. Therefore, if you seek information that does not exist in a form of a record or records, an agency is not obliged to create a new record on your behalf.

In terms of rights of access to records of the District Attorney and the Police Department, it is noted 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 those records or portions thereof that fall within one or more of the grounds for denial enumerated in §87(2)(a) through (h) of the Law. It is also noted that both the Office of the District Attorney and the Police Department are considered "agencies" subject to rights of access granted by the Law [see e.g., New York Public Interest Research Group v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979].

It would appear that the most relevant ground for denial with respect to the records in which you are interested 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 investigation or judicial proceedings;
>
> ii. deprive a person or 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."

With respect to the foregoing, it is emphasized that the grounds for denial are based to a great extent on the effects of disclosure. For example, §87(2)(e)(i) enables an agency to withhold records compiled for law enforcement purposes when disclosure would "interfere" with an investigation. In this regard, if a case has been closed, presumably disclosure could not interfere with an investigation. However,

it is possible that some of the records in which you are interested, to the extent that they exist, might identify a "confidential source". To that extent, records or portions of records may be withheld if disclosure would tend to identify confidential sources.

Enclosed for your consideration is a pamphlet that explains the Freedom of Information Law. It contains sample letters of request and appeal which may be particularly useful to you. It is suggested that you read the pamphlet carefully and renew your requests.

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: Carl Vergari
New Rochelle Police Department

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-469
FOIL-AO-1471

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

April 14, 1980

Mr. Eskel Norbeck
UniServ Director
New York Educators Association
Rochester Service Center
150 Allen's Creek Road
Rochester, New York 14618

Dear Mr. Norbeck:

I have received your letter of March 21 in which you have raised several questions relative to the interpretation of the Freedom of Information Law and the Open Meetings Law.

According to the materials appended to your letter, you have been involved in a series of requests directed to the Waterloo Central School District. Several questions have been raised, and I will attempt to respond to each.

Your first question concerns a situation in which you requested records orally on March 6, and thereafter completed a request form on March 10. You have asked whether the District could have required you to wait until March 27 to gain access to the records. Several points should be made with respect to the foregoing.

The Freedom of Information Law, §89(3), and the regulations promulgated by the Committee, which have the force and effect of law, §1401.5, prescribe the time limits for response to requests. Both the Law and the regulations state that an agency must respond to a request within five business days of its receipt. The response can take one of three forms. It can grant access. It can deny access, and if so, the reasons for the denial must be stated in writing and the applicant must be informed of the name and address of the person or body to whom an appeal should be directed. In the alternative, if, for example, records

cannot be located within five business days or if the records must be evaluated to determine rights of access, the agency may acknowledge receipt of a request within the five business day period and thereafter take up to ten business days to grant or deny access. Consequently, if a request was submitted on March 10, an acknowledgement would have to be given within five business days in order to delay a response. Thereafter, the records access officer could take up to ten business days to render a determination. As such, under the facts described, it appears that if a request in writing was submitted on March 10, and if the procedural steps described above were taken, a response given as late as March 27 would be legal.

You did point out, however, that you requested records orally on March 6 and submitted the request in writing some four days later. In this regard, although an agency may require that a request be made 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. On the contrary, any request made in writing that reasonably describes the records sought should suffice [see Freedom of Information Law, §89(3)].

Your second question concerns a situation in which you might not know which specific record you may be seeking and whether it is the responsibility of a records access officer to assist you in identifying the record. I direct your attention to §1401.2(b)(2) of the regulations, which states that a records access officer is responsible for assuring that agency personnel "assist the requester in identifying requested records, if necessary". It is also important to note that the Freedom of Information Law as originally enacted required an applicant to request "identifiable" records. In some instances, that requirement precluded members of the public from gaining access to records that were clearly available due to an inability to identify records with particularity. To remove that deficiency in the Law, the amendments that went into effect on January 1, 1978, altered the original provision by requiring that an applicant merely request "a record reasonably described" [see §89(3)].

The third area of inquiry is whether a public body must "post and make available the process to be used to make an appeal when access is denied". Section 1401.7(b) of the regulations states that:

> "[D]enial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

With respect to posting, §1401.9 of the regulations requires that information concerning the location where records are available for inspection and copying, the name, title, and business address and business telephone number of the records access officer and the right to appeal and the name and business address of the person or body to whom an appeal should be directed must be given by means of posting "and/or publication in a local newspaper of general circulation". Therefore, an agency is not required to post the information described in the preceding sentence if the same information is published in a local newspaper of general circulation. Conversely, if the items specified were not published, they must be posted.

The next question is phrased as follows:

> "[I]n view of the enclosed correspondence would the district have the right to deny access to public records to one or any of the individuals named in Ex 2 if they asked for the records on March 19, 1980 at approximately 11 A.M.?"

The question stated above concerns both the procedural implementation of the Law as well as rights of access. With regard to the response to Mr. DeRaddo's letter, it appears that the proper course of action would have been

the initiation of an appeal. To state that you or other individuals would be visiting an office at a particular time in my opinion does not require that school district officials respond at that moment.

It is possible that some of the information in which you are interested may justifiably be denied on the ground that disclosure would result in "an unwarranted invasion of personal privacy" under §87(2)(b). In this regard, 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 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 2d 664 (Court of Claims, 1978)]. Conversely, it has been advised that records that are irrelevant to the performance of a public employee's official duties are deniable, for disclosure in such cases would indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Among the items requested concerning leave time, it is my view that disclosure of a record or a portion of a record indicating leave for legal adoption could be withheld under the privacy provisions, for court records concerning adoption are required to be kept confidential (see Domestic Relations Law, §114). Similarly, if records indicate the nature of an illness, those portions could in my view be withheld. However, barring unusual circumstances it would appear that the majority of remaining information concerning the use of leave time is available.

It is important to note that the Freedom of Information Law provides access to existing records. As such, if, for example, information that you are seeking does not exist in the form of a record or records, District officials are not obliged to create records in response to your request. In a related sense, if totals regarding leave time have not been compiled, the District would not be required to tabulate the totals on your behalf.

The fifth question concerns the assessment of fees by the School District. In the resolution approved by the Board of Education on March 17, 1980, it is indicated that the District will photocopy records at a cost of twenty-five cents per sheet. That fee is appropriate [see Freedom of Information Law, §87(1)(b)(iii)]. However, the

resolution also states that "the Board of Education has established a fee of $10.00 per hour for services required in searching such records within the limitation of the rules of the Committee on Public Access to Records". The regulations promulgated by this Committee, however, specifically prohibit the assessment of a search fee. Section 1401.8(a)(2) provides that there shall be no fee charged for "search for records". Consequently, any fee assessed for searching records by the School District would in my view be contrary to both the Freedom of Information Law and the regulations.

Lastly, you have asked whether a District may "discuss its policy or determine its policy for access to public documents in executive session". Here I direct your attention to §100(1)(a) through (h) of the Open Meetings Law, which specifies and limits the subjects that may appropriately be considered in executive session. Having reviewed the grounds for entry into executive session, none could in my view be appropriately cited as a basis for an executive session to discuss the issue that you have identified.

In order to assist you and the District, I have enclosed copies of the Freedom of Information Law, regulations, model regulations and an explanatory pamphlet.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Richard Conover

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1472

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

April 15, 1980

Mr. Nathan Stambler
[redacted]

Dear Mr. Stambler:

I have received your letter of March 21 and apologize for the delay in response.

You have raised two questions relative to the procedural implementation of the Freedom of Information Law.

The first question concerns the identification of the official of a town who is the custodian of all town records. In this regard, I direct your attention to §30 of the Town Law, which states that:

> "[T]he town clerk of each town:
>
> 1. Shall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting, and of all propositions adopted pursuant to this chapter."

In view of the provision quoted above, the Town Clerk is clearly designated as the legal custodian of all town records.

Your second question is as follows:

> "[I]f a request is made to the Town Supervisor for a copy of a record and that official fails or refuses to answer the request, to whom is the appeal made to satisfy the exhaustion of administrative remedies to allow the application to the Court under Article 78, CPLR?"

In my opinion, the question can best be answered by means of a review of the procedural aspects of the Freedom of Information Law and the regulations promulgated by the Committee which have the force and effect of law.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of a request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgement of receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

It is noted as well that the regulations require the designation of one or more records access officers as well as an appeals person or body. According to §89(4)(a) of the statute:

> "[A]ny person denied access to a record may within thirty days appeal in writing such denial 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 record the reasons for further denial, or provide access to the record sought."

Further, §1401.7(b) states in part that "[T]he records access officer shall not be the appeals officer". As such, if the request was initially made to the Town Supervisor, who may also be the appeals officer, it would appear that the only course of action would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules, for the last step in the process of exhausting one's administrative remedies would have been constructively exhausted. It is also possible, however, that the Town Supervisor may be designated as the records access officer and that the Town Board may be the appeals body. If that is the case, an appeal should be directed to the Town Board in order to exhaust your administrative remedies.

I hope that 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-1473

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

April 15, 1980

Ms. Norma H. Fatone
[redacted]

Dear Ms. Fatone:

I have received both of your letters regarding requests for information directed to Mr. Robert Brier, Records Access Officer for the City of Troy.

In one situation, a request was "hand delivered" to Mr. Brier on March 4. As of March 13, no response had been given.

In the second situation, a request was made on March 26, but no response had been given as of April 3.

In my opinion, based upon the facts described in your letter, the time limits for responses to requests provided in the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, were exceeded.

Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing it more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations, and 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.

cc: Robert Brier

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1474

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

April 16, 1980

Mr. Noel van Swol
Sullivan County
Long Eddy
New York 12760

Dear Mr. van Swol:

As you know, I have received your letter of March 22. Your inquiry concerns access to information concerning Dr. Joseph Hembrooke, Superintendent of Schools of the Delaware Valley Central School District.

You have unsuccessfully requested information reflective of the nature of Dr. Hembrooke's doctorate, the identity of the institution that granted that degree, his major field of study and the year in which the degree was conferred.

It is emphasized that an opinion had been sent at the request of Dr. Hembrooke relative to the same subject matter on March 7, 1980. In brief, that opinion advised that the information sought need not be made available.

However, based upon our recent conversations, I believe that the advice given on March 7 must be reevaluated.

Based upon our conversation of this morning, it appears that new facts surrounding your request for information have been uncovered. Specifically, you have indicated that although Dr. Hembrooke informed the School District that he received his doctorate from Northwestern University, it was admitted last night that Northwestern University did not in fact confer a doctorate upon Dr. Hembrooke. Dr. Hembrooke has apparently not yet identified the university that did confer such a degree upon him.

As I wrote to Dr. Hembrooke, the focal point of the controversy concerns privacy. The Freedom of Information Law states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In this regard, 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 [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, if a record has no bearing upon the manner in which a public employee performs his official duties, it may be withheld under the privacy provisions [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the new facts that you have provided, what may have been considered pro forma and largely irrelevant to the manner in which a public employee performs his duties has in my view become relevant to the manner in which both the Superintendent and the Board of Education perform their respective duties. Due to the admission made by Dr. Hembrooke at last night's meeting, the records have in my view become relevant to the performance of his duties. Therefore, perhaps at this juncture disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy.

Further, it is noted that the federal Freedom of Information Act contains language concerning privacy similar to that contained in the New York statute. In this regard, there is a relatively recent decision that dealt with disclosure of background information regarding the head of a federal office. The court, to the best of my recollection, found that the information was available, because the background information had a bearing upon whether or not he should have obtained his new position. By analogy, it could be argued that the representation of having received a doctorate from Northwester University was relevant to the School Board's choice of a superintendent. Under the unusual circumstances that you have described, it is possible that a court of New York would find that the information in question should be made available.

Lastly, I have contacted the Department of Health, Education and Welfare, which administers the Family Educational Rights and Privacy Act (20 USC 1232g). I was informed that the information in which you are interested might be considered as "directory information" that may be made available by an educational agency or institution. Directory information is defined by the regulations promulgated by the Department of Health, Education and Welfare to include the following information relating to a student:

> "the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information."

It is also emphasized that an educational agency or institution may, but need not, disclose directory information. To make such disclosures, an educational agency or institution is required to follow the procedures set forth in §99.37 of the regulations promulgated by the Department of Health, Education and Welfare. Whether or not the procedure has been followed and directory information is made available by the Northwestern University or any other institution that may have conferred a doctoral degree to Dr. Hembrooke is unknown to me. Nevertheless, it is clear that information in the nature of that in which you are interested may be made available by an institution of higher learning.

I hope that 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: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1475

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

April 16, 1980

[redacted]

Dear [redacted]:

I have received your letter of March 24 and, as requested, have enclosed a copy of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

Your inquiry concerns unsuccessful attempts to gain access to your son's disciplinary record at the Massena Central High School. You have also sought to inspect the rules of the institution where is is now housed, as well as "current progress records" concerning your son which have been denied on the ground that they are "medical records".

There are several provisions of law that are relevant to your questions.

First, with respect to the disciplinary records in possession of the Massena Central School District, the applicable provision of law is the federal Family Educational Rights and Privacy Act [20 U.S.C. §1232(g)], which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment applies to all educational agencies or institutions that receive funds through programs administered by the U.S. Commission of Education. Consequently, virtually all public schools are subject to the Buckley Amendment. Further, that Act provides that all "education records" identifiable to a particular student or students are confidential to all but the parents of students under the age of 18 and the students themselves when they reach the age of 18. As such, a parent of a student has the right to inspect education records pertaining to his or her children,

but the same records would be confidential if requested by a third party. Therefore, I believe that under federal law you have the right to inspect the records concerning discipline relative to your son. Concurrently, you need not ask to have education records sealed, for they are confidential to all but the parents, unless the parents consent in writing to disclosure.

The second area of inquiry concerns a request for rules of the institution where your son is housed. Apparently the institution is the St. Lawrence Psychiatric Center. In this instance, the Freedom of Information Law is applicable. 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 §87(2)(a) through (h). In my opinion, the rules of an institution are clearly available, for §87(2)(g) grants access to inter-agency or intra-agency materials containing "instructions to staff that affect the public" and "final agency policy or determinations". The rules of an institution are in my view reflective of both instructions to staff that affect the public and the policy of the agency. Therefore, they are in my opinion accessible.

The last area concerning the medical or psychiatric records of your son, which are in possession of the St. Lawrence Psychiatric Center, is more difficult to answer. In all likelihood, the provision of law that is most relevant is §33.13 of the Mental Hygiene Law. That provision applies to clinical records in possession of facilities administered by the Department of Mental Hygiene. It states that clinical records regarding patients at facilities are confidential, except as otherwise provided. I have enclosed a copy of §33.13 of the Mental Hygiene Law for your consideration. Perhaps the best method of obtaining the records concerning your son would involve attempting to find out the means by which consent to disclose can be obtained from the Commissioner of the Department.

In addition, if records are transmitted from the Psychiatric Center to the School District, for example, the records become subject to the Buckley Amendment and would be available to you indirectly through the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: Massena Central School District
St. Lawrence Psychiatric Center

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1476

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

April 17, 1980

Peter F. Davidson, Esq.
City of Peekskill
Department of Law
City Hall
Peekskill, New York 10566

Dear Mr. Davidson:

Thank you for your letter of March 27 and your interest in compliance with the Freedom of Information Law.

The issue that you have raised concerns a request for marriage records by a minister of a local church. You have indicated that "there appears to be an allegation of a bigamous marriage and the Minister desires to see our records as to a prior marriage of a particular individual".

It is noted at the outset that rights of access to vital records are not governed by the Freedom of Information Law, but rather by the provisions of the Public Health Law relative to birth and death records, and as you intimated, by the Domestic Relations Law with respect to marriage records.

As you are aware, §19 of the Domestic Relations Law provides that marriage records can be made available upon a showing of judicial or other "proper purposes". Due to the vagueness of the provision in question, the custodians of vital records have substantial latitude in determining whether a request is reflective of a "proper purpose".

From my perspective, the provisions of the Domestic Relations Law and the Public Health Law concerning vital records are intended largely to protect privacy. It would appear that mere curiosity, for example, would not constitute a proper purpose. In terms of the specific request, I do not personally believe that an inquiry from a religious group would be reflective of a proper purpose.

It is emphasized, however, that my opinion is purely subjective and that the "proper purpose" standard is flexible.

It is suggested that you might want to contact the Bureau of Vital Records at the State Department of Health, which administers §19 of the Domestic Relations Law. The appropriate person to contact is:

Mr. Peter Carucci
Bureau of Vital Records
State Health Department
Empire State Plaza
Tower Building
Albany, New York 12237

Mr. Carucci can be reached at (518) 474-3038.

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-1477

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

April 17, 1980

Mr. Donald C. Muffly, Editor
The Catalyst
West Babylon Teachers Association
P.O. Box 1003
West Babylon, NY 11704

Dear Mr. Muffly:

I have received your letter of March 25 and thank you for your kind words.

Your inquiry concerns rights of access to records "pertaining to the methods by which the West Babylon School District selects teachers to be excessed, specifically all seniority lists of teachers employed in the district."

In my opinion, to the extent that the information in which you are interested exists in the form of a record or records, it is available under the Freedom of Information Law.

It is emphasized that the Freedom of Information Law, §89(3), states that an agency need not create records in response to a request, unless there is specific direction to do so provided in §87(3). Therefore, if, for example, the District does not maintain records reflective of the information sought, it has no obligation to do so.

With respect to rights of access, 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 enumerated grounds for denial appearing in §87(2)(a) through (h) of the Law. While two of the grounds for denial might have a bearing upon rights of access, neither could in my view be appropriately cited to withhold the information requested.

One ground for denial that may be relevant to your request 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 inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In terms of the information sought, records reflective of "the methods by which...the district selects teachers to be excessed" would in my view constitute the policy of the District. As such, records indicative of the methods by which teachers are excessed are in my opinion available.

The remaining ground for denial that may be relevant 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."

It is noted in this regard that the courts have determined that public employees require a lesser degree of privacy than members of the public generally. Further, the Committee has advised and the courts have upheld the notion that records which are relevant to the performance of the official duties of public employees are available, 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, 50 AD 2d 309 (1978); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)].

Conversely, if records that identify public employees have no relevance to the manner in which public duties are performed, such records may be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy.

Under the circumstances, it appears that the seniority lists are relevant to the performance of the official duties of both the teachers identified and the Board of Education. If, as you indicated, the District uses seniority lists as one of the bases for determining which teachers should be excessed, although the lists may identify particular employees, they are clearly relevant to the work of the School District and the employees cited. Moreover, the lists constitute intra-agency materials consisting of "factual tabulations or data" that are available under §87(2)(g)(i).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1478

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

April 17, 1980

Richard Hodza, Esq.
Route 35
South Salem, NY 10590

Dear Mr. Hodza:

I have received your letter of March 27 and the materials appended to it. Although you have indicated that you have indeed obtained the records sought, I believe that several points should be made in conjunction with the means by which the records were obtained.

First, although §89(3) of the Freedom of Information Law states that an agency may require that a request be made 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 or a delay. In the Committee's view, any request that is made in writing that "reasonably describes" the record or records sought should suffice [see also, §89(3)]. The rationale for this advice is obvious. If, for example, a resident of Putnam County seeks access to records that are located in Albany, why should that person be compelled to write to Albany to request a form, have the form sent back to Putnam County, fill out the form and return it to Albany? Very simply, such a procedure would take an inordinate amount of time and conflict with the basic philosophy of the Freedom of Information Law, which is to facilitate rather than hinder public access to records.

Second, although there is no provision in either the Freedom of Information Law or the regulations promulgated by the Committee, which have the force and effect of law, that would preclude a records access officer from consulting with other persons, such as an attorney, regarding access, I believe that the designation of one or more records access officers is intended to avoid such circumstances. In short, a records access officer should in my view be generally familiar with the records of an agency and have the capacity to make decisions regarding rights of access in all but unusual cases.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

The same information will be sent to Mr. Folchetti.

I hope that 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: Mr. Folchetti

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1479

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

April 21, 1980

Mr. Raymond J. Palmer
#77-D-103
Box 51
Comstock, NY 12821

Dear Mr. Palmer:

I have received your letter of March 27 in which you requested your "parole records" and reports filed by particular officers.

It is emphasized that the Committee on Public Access to Records is responsible for providing advice with respect to the Freedom of Information Law. It does not have possession of records generally, nor does it have the capacity to obtain records from other agencies.

It is suggested that you submit requests to the records access officers of the agencies that have possession of the records in which you are interested.

It is also noted 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 categories of deniable information appearing in §87(2)(a) through (h) of the Law.

There may be instances in which some of the records or portions of the records in which you are interested might justifiably be withheld. For example, intra-agency materials that do not consist of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations may be withheld.

To assist you in making your requests and explaining the Law, I have enclosed a copy of the Law, regulations that govern its procedural implementation and a pamphlet entitled "The Freedom of Information and Open Meetings Laws ...Opening the Door". The pamphlet may be of particular value to you, for it includes sample letters of request and appeal.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1480

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

April 21, 1980

Mr. Edward Wiggins
[redacted]

Dear Mr. Wiggins:

I have received your recent letter concerning the Freedom of Information Law.

As requested, enclosed are copies of the Law, regulations that govern its procedural implementation and have the force and effect of law, model regulations designed to assist government in complying with the Law, an explanatory pamphlet and a pocket card. By reviewing the regulations and the pamphlet, I believe that the procedures for requesting records or appealing a denial of access, for example, will become clear.

You mentioned that you were interested in obtaining information regarding salaries. In this regard, it is noted that §87(3)(b) of the Freedom of Information Law requires that each agency maintain a payroll record consisting of the names, public office addresses, titles and salaries of all officers and employees of the agency. Consequently, you should have no difficulty in gaining salary information from any unit of government in New York.

I hope that I have been 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-1481

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

April 21, 1980

Mr. Alfred O. Kuhnle
[redacted]

Dear Mr. Kuhnle:

I have received your letter regarding a request for records directed to the New York City Police Department.

Specifically, you requested information regarding a particular retiree and asked whether "that member was retired for a line of duty disability or a non-service connected disability, not the nature of the disability".

It is noted that I have made several telephone calls on your behalf and have discussed the matter with Patrick W. Lehane, who initially denied your request. Based upon the information provided to me, it appears that the information in which you are interested may be withheld under the Freedom of Information Law. As I understand it, disclosure in the opinion of the Police Department would result in an unwarranted invasion of personal privacy due to the medical nature of the information sought.

Since §89(2)(b) of the Freedom of Information Law states that disclosure of the medical history of an individual results in an unwarranted invasion of personal privacy, it appears that the denial was proper.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Patrick W. Lehane

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1482

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

April 22, 1980

Mr. Michael DeRaddo
President
Waterloo Education Association
Waterloo Central Schools
Waterloo, New York 13165

Dear Mr. DeRaddo:

I have received your letter of April 1 concerning the implementation of the Freedom of Information Law by the Waterloo Central School District.

As you are likely aware, an advisory opinion dated April 14 was transmitted to Mr. Eskel Norbeck of the New York Educators Association. I believe that several of the questions raised directly in your letter and implicitly in the materials attached to it were answered in my response to Mr. Norbeck.

With respect to the requirements of an agency relative to appeals, I direct your attention to §89(4)(a) of the Freedom of Information Law. The cited provision states that:

> "[A]ny person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor 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 record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon."

In my opinion, the provision quoted above requires an agency to transmit a copy of an appeal to the Committee on Public Access to Records "immediately". Thereafter, the determination that must be rendered within seven business days of the receipt of an appeal must also be transmitted to the Committee. I believe that the procedure was intended to enable this office to intercede in situations in which a denial of access may in the view of the Committee be without merit.

The focal point of your letter is the unanswered question: "[W]hat do you do when you are not satisfied with a decision of the Head of the Agency?" In my view, there are two avenues.

One would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules. As a general rule, a person initiating an Article 78 proceeding has the burden of proving that an agency's action is unreasonable or "arbitrary and capricious". While the Freedom of Information Law also cites the Article 78 proceeding as the basis for challenging a denial of access, it is emphasized that the burden of proof is on the agency to demonstrate that the records withheld fall within one or more of the grounds for denial appearing in §87(2)(a) through (h). Further, the Court of Appeals, the state's highest court, has held that an agency cannot merely assert a ground 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 Church of Scientology v. State, 46 NY 2d 906 (1979)].

In the alternative, you can seek an opinion from the Committee. Although the opinions rendered by this office are advisory in nature, the courts have increasingly cited them as the basis for their determinations. Moreover, two departments of the Appellate Division have held that an opinion by the Committee must be upheld unless it is unreasonable [see Sheehan v. City of Binghamton, (Third Department) 59 AD 2d 808, (1977); Miracle Mile Associates v. Yudelson, (Fourth Department) 68 AD 2d 176 (1979)]. As such, although the opinions rendered by this office are not binding, it is my belief that they may often be persuasive and help to avoid the necessity of litigation.

Lastly, the resolution of the Board of Education concerning its implementation of the Freedom of Information Law makes reference to "a partial list of records available..." In this regard, I do not know whether the "partial list" is intended to be the equivalent of the "subject matter list" required to be compiled under §87(3)(c). If it is intended to be the equivalent of a subject matter list, it is not in my view as expansive as it should be. Section 87(3)(c) states that each agency is required to 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, while an agency is not required to compile a list of every record in its possession, it is required to compile a list in reasonable detail by subject matter of all records in its possession, whether or not the records 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:jm

cc: Board of Education
Richard A. Conover, Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1483

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

April 22, 1980

Ms. Karen Martini
[redacted]

Dear Ms. Martini:

As you are aware, I have received your letter concerning a request for records from the Dutchess County Office of Human Resources. You have sought an advisory opinion with respect to the response offered to you by Mr. Louis H. Crepet.

In my view, there are several aspects of Mr. Crepet's response that are likely reflective of failure to comply with the Freedom of Information Law.

First, you indicated in your correspondence and orally that you requested specific financial information from the Office of Human Resources. In response, Mr. Crepet wrote that "[Y]our request for financial records should be specified as to the documents you require since there is a per copy charge and a charge for the labor involved by our staff in compiling this information."

In my opinion, based upon your correspondence and our conversation, you have provided sufficient information for Mr. Crepet to respond. The Freedom of Information Law as originally enacted required an applicant to seek "identifiable" records. This resulted in problems, for applicants often knew the general subject area of interest, but could not "identify" the records sought with particularity. However, the amended Freedom of Information Law, which went into effect on January 1, 1978, merely requires that an applicant submit "a written request for a record reasonably described" [see §89(3)]. Consequently, when a request is made, a person need not identify the records in which he or she is interested down to the last detail. On the contrary, it has been held that if the agency is able to determine the nature of records that are being sought,

an applicant has met his or her burden [see Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)].

Second, Mr. Crepet made reference to "a charge for the labor involved...in compiling this information". In this regard, the only fee that may be assessed by an agency under the Freedom of Information Law concerns copying. No fee may be assessed for a search for records or the labor involved in locating records. Further, the regulations promulgated by the Committee, which have the force and effect of law and with which each agency must comply, specifically state that "[T]here shall be no fee charged for...search for records" [§1401.8(a)(2)]. As such, it is reiterated that the only fee that may be assessed under the circumstances would be a fee for photocopying the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Louis H. Crepet

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1484

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

April 22, 1980

Mr. Richard Behrens
[redacted]

Dear Mr. Behrens:

I have received your letter of March 30 in which you described some of your difficulties in gaining access to records from the New York City Board of Education.

You have indicated that you believe that the Board of Education has in some instances sought to evade the Freedom of Information Law, particularly in situations in which the questions raised "might prove embarrassing". In this regard, although there have been differences of opinion between this office and officials of the Board, I believe that Board officials have sought to comply with the Law in good faith.

From my perspective, one of the reasons for the Board's delay is likely the profusion of requests. While failures to respond within applicable time limits should not be condoned, my records indicate that the Board of Education appears to receive more requests and certainly receives more appeals than any agency in New York. To continually increase the number of requests to the Board does not ameleorate the situation; it may exacerbate it.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgement of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Lastly, I would like to offer the following comments with respect to the forms which you have attached to your letter.

First, an applicant is required to "reasonably describe" the record or records sought [see Freedom of Information Law, §89(3)]. Therefore, enough information must be given to an agency to enable it to respond to a request.

And second, your letter of request contains reference to the possibility of a waiver of fees based upon the potential benefit that would accrue to the public due to disclosure. In this regard, although the federal Freedom of Information Act contains a provision regarding the waiver of fees when disclosure might be beneficial to the public, the New York Freedom of Information Law contains no analogous provision. Any person who requests copies of records may be assessed a fee, regardless of the benefits of disclosure.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Harold Siegel
Mark Siegel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-477
FOIL-AO-1485

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

April 22, 1980

Mr. Robert Levin
Town of Deerpark
Drawer A
Huguenot, New York 12746

Dear Mr. Levin:

I have received your letter of March 28 and appreciate your interest in complying with the Open Meetings Law.

Your question concerns the status of the Town's Police Commission and the capacity of the Town Board to meet privately "from time to time" with your Police Department.

As a general rule, all meetings of public bodies must be convened as open meetings preceded by notice given in compliance with §99 of the Open Meetings Law. Further, the definition of "meeting" appearing in §97(1) of the Law has been interpreted expansively by the courts. In brief, the state's highest court, the Court of Appeals, has held that the definition encompasses any situation in which a quorum of a public body convenes for the purpose of discussing 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, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In addition, the definition of "meeting" was recently amended to essentially codify the Court of Appeals' decision.

Among the amendments to the Open Meetings Law that went into effect on October 1, 1979, was a new definition of "public body". While there was controversy regarding the scope of the original Law with respect to committees, subcommittees or similar advisory bodies, such questions

have been largely answered by means of the new definition of "public body", which makes specific reference to committees, subcommittees and similar bodies [see Open Meetings Law, §97(2)]. Consequently, I believe that the Police Commission consisting of three members, constitutes a "public body" for which a quorum would be two, and which is subject to the Open Meetings Law in all respects, as is the Town Board.

It is noted, however, that there are two bases in the Law for conducting public business behind closed doors. The first concerns executive sessions (see §100); the second concerns "exemptions" from the Law (see §103).

In order to go into an executive session, a public body must follow the procedure set forth in §100(1) of the Law. Further, the Law specifies and limits the topics of discussions that may appropriately be considered behind closed doors [see §100(1)(a) through (h)]. One or more among the eight grounds for entry into executive session may in some instances be properly cited to close meetings of the Police Commission.

With regard to the exemptions appearing in §103, it is important to point out that if a matter is exempted from the Open Meetings Law, the Law simply does not apply. Consequently, when a topic under discussion is exempt from the Open Meetings Law, notice need not be given and the procedure for entry into executive session need not be followed.

Most relevant in terms of an exemption would be a situation in which police officers' personnel records are considered. I direct your attention to §50-a of the Civil Rights Law which states in subdivision (1) that:

> "[A]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law shall be considered confidential and not subject to inspection or review without the express written consent of such police officer except as may be mandated by lawful court order."

Based upon the provision quoted above, personnel records used to evaluate performance toward continued employment or promotion would be exempted from disclosure and as such would be clearly deniable under §87(2)(a) of the Freedom of Information Law.

In terms of the Open Meetings Law, §103(3) states that matters "made confidential by federal or state law" are exempt from the Open Meetings Law. Therefore, if the records deemed confidential under §50-a of the Civil Rights Law are considered by the Police Commission or the Town Board, the discussion could be closed, for it would constitute a matter made confidential by state law that would be exempt from 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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1486

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

April 22, 1980

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

I have received your letter of March 31 concerning the Article 78 proceeding.

First, "Article 78" refers to particular provisions in the Civil Practice Law and Rules. As a general rule, an Article 78 proceeding is initiated either to challenge a determination made by a public officer based upon an argument that the determination was "arbitrary and capricious", or to seek to compel a public officer to perform a duty that he or she is required to perform by law.

Second, the burden of proof in an Article 78 proceeding is generally upon the petitioner, a member of the public who must demonstrate that an agency's determination, for example, was unreasonable, arbitrary and capricious.

Although the Freedom of Information Law makes reference to the Article 78 proceeding, as you are aware, §89(4)(b) of the Law specifically states that "the agency involved shall have the burden of proving" that records withheld fall within one or more of the grounds for denial appearing in §87(2)(a) through (h). As such, although the vehicle for challenging a denial of access under the Freedom of Information Law is an Article 78 proceeding, the burden of proof is on the government rather than the petitioner.

In the case of the Open Meetings Law, if, for instance, a public body held a questionable executive session, the petitioner would have to prove that the public body acted unreasonably in closing its doors.

With respect to costs, forms, and procedures involved in an Article 78 proceeding, it is suggested that you might want to review one or more among various "form" books. For example, in most law libraries (at the County Courthouse perhaps), it might be worthwhile to locate McKinney's Forms. As the name implies, McKinney's Forms contain numerous blank forms regarding motions, affidavits, pleadings, etc., which essentially enable a person to fill in the appropriate blanks.

In terms of costs, needless to say, various attorneys charge different fees. A great deal depends upon the number of appeals that may be taken. In all honesty, I would hesitate to conjecture what the "going rate" might be in Suffolk County. Certainly it would be less than the rate charged by a Wall Street firm, but perhaps more than small firms upstate.

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-1487

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

April 23, 1980

Mr. John H. Mulkeen
[redacted]

Dear Mr. Mulkeen:

I have received your letter of April 7 regarding the licensing requirements of independent laboratories used by medical doctors. You have made specific reference to the length of time that the laboratories are required to maintain their records.

In this regard, I have enclosed copies of appropriate portions of the rules and regulations promulgated by the New York State Health Department. The regulations are found in 10 NYCRR.

Particular attention should be directed to §58-1.11 (d), which appears to indicate that various provisions of New York state or federal law require specific retention periods for particular laboratory analyses.

It is noted in closing that the records in which you are interested would clearly fall outside the scope of the Freedom of Information Law, for they would be maintained by entities other than governmental entities.

However, they are in my view subject to the provisions of §17 of the Public Health Law and the regulations promulgated by the Board of Regents regarding the standards of professional conduct that must be maintained by physicians. I have enclosed copies of those provisions as well.

I hope that 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-1488

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

April 23, 1980

Mr. Peter L. Davis
[redacted]

Dear Mr. Davis:

I have received your letter of April 5, which, unfortunately, reached this office only recently.

Your inquiry concerns a response to a request for training films used by the staff of the New York County Office of the District Attorney. Although the Records Access Officer, David S. Worgan, wrote that the videotapes in which you are interested are available for inspection, you had asked several questions regarding your capacity to view the films.

First, you asked whether you have the right to view "each and every film". In my opinion, since the videotapes are available in toto, you have the right to view each training film in possession of or used by the District Attorney. However, as noted in your letter, you have stated a willingness to avoid inconveniencing the staff of the District Attorney's office. As such, it is suggested that perhaps you and Mr. Worgan can arrange a mutually convenient schedule for viewing one or more tapes per visit during regular business hours over a scheduled period of days or weeks, for example.

Your second question is whether you have the right to bring with you other persons for the purpose of viewing the films. As a general rule, the Freedom of Information Law states that and has been interpreted by the courts to provide equal rightsof access to available records 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, I do not believe that there is any restriction on bringing other individuals with you to view the film.

And third, you asked whether when viewing the films you have the right to take notes, tape record or videotape record "any or all of the films". In my opinion, there is nothing in the Freedom of Information Law which precludes an individual from taking notes. Moreover, the Freedom of Information Law provides that a person may inspect and copy accessible records. Therefore, if you have the means to tape record or videotape record the films, I believe that the Freedom of Information Law permits you to do so. Similarly, upon request, the District Attorney's office would in my opinion be required to reproduce the films on request and upon payment of 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/kk

cc: David S. Worgan

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1489

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

April 23, 1980

Mr. Ramon Ricardo Pina
#78-A-3165
Great Meadows Correctional Facility
Box 51
Comstock, New York 12821

Dear Mr. Pina:

I have received your most recent letter regarding the interpretation of the Freedom of Information Law.

First, in the pamphlet that was sent to you, reference was made to regulations promulgated by the Committee. You have asked whether each agency has its own regulations. In this regard, §89(1)(b)(iii) of the Freedom of Information Law provides that the Committee must promulgate regulations concerning the procedural aspects of the Law. In turn, §87(1) of the Law requires each agency to adopt its own regulations consistent with those promulgated by the Committee. Therefore, although each agency should have adopted regulations under the Freedom of Information Law, those regulations should be based upon those adopted by the Committee.

Second, apparently you requested a parole violation report from the parole officer "about six years ago". At the time you were informed that the report would be sent to your attorney. However, you have indicated that you are still waiting for the report. In addition, you wrote that you have been informed that you do not "need it any more". In my opinion, "need" is not an issue relevant to the Freedom of Information Law. In brief, this Committee has advised and the courts have upheld the principle that accessible records should 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]. Consequently, if the record would otherwise be available to you or if it had in the past been available, in my opinion it remains available.

Lastly, it is noted that §259-k of the Executive Law pertains to access to records of the Division of Parole and institutions. The cited provision states that:

> "1. All case files shall be maintained by the division of parole for the use by the division and board of parole. The division and board of parole and authorized officers and employees thereof shall have complete access to such files and the right to make such entries as the division or board of parole shall deem appropriate in accordance with law.
>
> 2. The board shall make rules for the purpose of maintaining the confidentiality of records, information contained therein and information obtained in an official capacity by officers, employees or members of the division or board of parole,
>
> 3. Members of the board and officers and employees of the division designated by the chairman shall have free access to all inmates confined in institutions under the jurisdiction of the department of correctional services in order to enable them to perform their functions.

From my perspective, although it is clear that records concerning parole and parolees are not intended to be open to the public generally in their entirety, it is also clear that rules must be adopted concerning the confidentiality of and access to information. Further, I do not believe that the rules can exempt records that would otherwise be available under the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405]. It is suggested that you attempt to obtain a copy of such rules, for they may provide you with additional guidance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1490

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

April 23, 1980

Mr. Neil M. Lorber
Fulton House
899 Boulevard East
Weehawken, New Jersey 07087

Dear Mr. Lorber:

I have received your letter of April 4 concerning a delay in response to a request for information by the New York City Board of Education.

The correspondence attached to your letter indicates that on January 29 you requested "the title and work locations of William May for the Spring and Fall of 1976..." As of the date of your letter, no response had been given, and you indicated that, in your view, the Board of Education is deliberately delaying transmitting the information to you.

I disagree with your contention that the Board of Education has deliberately delayed its response to your request. In many instances, particularly in the case of a large institution such as the Board of Education, it may be difficult to locate records that may no longer have continuing relevance to the work of the agency. Further, since municipal agencies may destroy records in conjunction with regulations regarding the preservation and disposal of records promulgated by the Department of Education, the records sought may no longer exist.

Nevertheless, I would like to offer the following comments.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, the regulations promulgated by the Committee, which have the force and effect of law, contain provisions regarding the duties of a records access officer. Specifically, §1401.2(b)(6) states that a records access officer, upon failure to locate records, must on request 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."

I hope that 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: Ruth Bernstein

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1491

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

April 24, 1980

Mr. Irving Silver
[redacted]

Dear Mr. Silver:

I have received your latest correspondence regarding access to records in possession of the Department of Motor Vehicles.

With regard to fees, I would like to reiterate my contention with respect to the provisions of the Freedom of Information Law and those contained in the Vehicle and Traffic Law. Specifically, §87(1)(b)(iii) of the Freedom of Information Law provides that an agency may not assess a fee of more than "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." Again, in this instance, a different fee is indeed prescribed by another provision of law, §202 of the Vehicle and Traffic Law, copies of which have been sent to you in the past.

With regard to the ability to inspect records of the Department of Motor Vehicles, it is possible that records do not exist in a form that permits inspection. While many records exist in "paper" form, for example, it may be that the registration information in which you are interested exists only in a computer. While the computer might have the capacity to produce records, the information contained within the computer might not be tangible.

It is noted that listings of registration information regarding all vehicle registrations is essentially confidential to all but "the highest responsible bidder" pursuant to the provisions of §202(3)(b) of the Vehicle and Traffic Law. While I agree that it may be unfair to

grant access to vehicle registration information in its entirety to only the highest responsible bidder, the courts have upheld §202(3)(b) of the Vehicle and Traffic Law following a challenge to a denial of access brought under the Freedom of Information Law.

Further, the Freedom of Information Law is in my view a statute of "general" application, for it deals with access to records generally; it does not deal with access to specific types of records. The courts for years have considered "special" statutes to supersede a general law such as the Freedom of Information Law.

You suggested that I read the federal law, particularly in conjunction with the availability of records in possession of the FBI. I am quite familiar with the federal Freedom of Information Act, which does indeed grant access to some records in possession of the FBI and other federal law enforcement agencies. While the federal Freedom of Information Act and the New York Freedom of Information Law may be similar in structure and in intent, the federal Act is applicable only to records of federal agencies, and the state Law is applicable only to records in possession of state and local government in New York.

Lastly, regardless of the contents of this opinion or my earlier correspondence with you, it is suggested that you attempt to visit the local office of the Department of Motor Vehicles and request whatever records you are interested in inspecting. Perhaps the records do exist in a form that permits manual or personal inspection.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Senator Howard Babbush

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-481
FOIL-AO-1492

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

April 24, 1980

Mr. John W. Cummings
[redacted]

Dear Mr. Cummings:

I have received your letter which raises questions related to both the Freedom of Information Law and the Open Meetings Law.

You have indicated that some two years ago you requested that the Education Department enforce one of its regulations against the Averill Park School District. To date, apparently the Department has taken no action. Subsequently, you contacted an official of the Education Department in order to obtain information regarding the situation, but you were refused. You have asked what steps can be taken to obtain records concerning the controversy.

First, I have enclosed for your consideration copies of the Freedom of Information Law, regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, and an explanatory pamphlet on the subject. I believe that the pamphlet may be particularly useful for it contains sample letters of request and appeal.

Second, it is important to emphasize that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the State Education Department or the Averill Park School District, are available, except those records or portions thereof that fall within one or more among the eight grounds for denial found in §87(2)(a) through (h) of the Law.

It would appear that the most relevant ground for denial, based upon the information provided in your letter, would be §87(2)(g). The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The provision quoted above contains what in effect is a double negative. Although inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. Therefore, if, for example, correspondence was transmitted between the Education Department and the District, it could be characterized as "inter-agency". Nevertheless, it might contain significant amounts of statistical or factual information, statements of policy or determinations that would clearly be available.

Third, it is suggested that you renew your requests in writing, "reasonably describe" in writing the records in which you are interested [see Freedom of Information Law, §89(3)], and transmit your request to the respective records access officers of the State Education Department and the District. The records access officer for the State Education Department is Eugene Snay, whose office is located at the Education Building, Washington Avenue, Albany, New York 12234.

Your remaining area of inquiry concerns the means by which the Averill Park School Board selected a principal. You have indicated that the Principal was chosen in executive session and stated your belief that a school district is required to hold a public hearing when it reaches the last stages of eliminating candidates for the position of principal.

To the best of my knowledge, there is no requirement that a school board hold a public hearing to consider the matter which you have identified. However, I do not believe that a school board can vote to select a principal during an executive session.

In this regard, I direct your attention to the Open Meetings Law, a copy of which is attached. Relevant under the circumstances is §100(1) of the Open Meetings Law, which prescribes the procedure that must be followed by a public body in order to enter into executive session and specifies the areas of discussion that may appropriately be considered in executive session.

In my opinion, §100(1)(f) of the Open Meetings Law would constitute a proper ground for executive session to discuss particular candidates for the position of principal. The cited provision states that a public body may enter into executive sesion 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, I believe that a school board could justifiably discuss a matter leading to the appointment of a particular person behind closed doors.

As a general rule, a public body may vote during a properly convened executive session, unless the vote involves the appropriation of public moneys. 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, whichpertains 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.

I hope that 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: A. Mae Timmer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1493

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

April 24, 1980

Howard N. Meyer, Esq.
270 Madison Avenue
New York, New York 10016

Dear Mr. Meyer:

I have received your letter of April 8 as well as the correspondence appended to it concerning your inability to gain access to records in possession of the New York City Board of Education. You noted your aggravation regarding the request due to the fact that the document in which you are interested had been described in an article appearing in the New York Times.

Several points should be made with respect to the foregoing.

First, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of a request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considred "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Second, according to the description of the records that you are seeking that appears in one of your items of correspondence, one of the members of the Board of Education wrote that "in the Office of Education Evaluation, the school system's student testing department, 45% of the 47 education administrators had no previous school experience". From my perspective, although the document in question may be characterized as "intra-agency" material, to the extent that it contains statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations, it is available [see Freedom of Information Law, §87(2)(g)]. Under the circumstances, it would appear that the letter consists at least in part of "statistical or factual tabulations or data" that would clearly be available.

Third, one of the basic principles of the Freedom of Information Law is that it grants equal access to records to any person who makes a request. The Committee has advised since the Law went into effect and the courts have upheld the notion that accessible records 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].

Lastly, you asked whether there are any reports of litigation regarding the allowance of attorney fees in cases against a municipal corporation. The Freedom of Information Law currently contains no provision regarding the award of attorney fees. However, bills have been introduced in both houses of the Legislature which if enacted would grant a court discretionary authority to assess against an agency reasonable attorney fees to be awarded to a petitioner who substantially prevails in a proceeding brought under the Freedom of Information Law. As a matter of fact, S. 7610, a copy of which is attached, will be considered by the Senate Judiciary Committee at its meeting on Tuesday, April 29.

I hope that 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: Harold Siegel
Secretary to the New York City Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1494

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

April 25, 1980

Mr. David Greenberg
Greenberg & Wanderman
35 North Madison Avenue
Spring Valley, NY 10977

Dear Mr. Greenberg:

I have received your letter of April 9 in which you requested information regarding a judicial decision concerning the records retention and disposition schedules used by school districts in relation to the subject matter list required to be maintained under the Freedom of Information Law, §87(3)(c).

To the best of my knowledge, there is no decision that deals with the possibility of using retention and disposition schedules as a basis for the creation of a subject matter list or for substituting such schedules for a subject matter list.

However, it has been suggested on many occasions to officials of local government that the retention and disposition schedules developed by the State Education Department for municipalities are in most instances far more detailed than a subject matter list must be. While a subject matter list must make reference to categories of records in possession of an agency "in reasonable detail", the schedules that I have seen identify records with particularity. Often a series of records to which reference is made in a retention and disposition schedule would fall within the classification of a single category of records to which reference would be made in a subject matter list.

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-AD-1495

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

April 25, 1980

Ms. Sara Murray
[redacted]

Dear Ms. Murray:

I have received your letter of April 9 in which you have requested information concerning the means by which you can gain access to records.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation, and an explanatory pamphlet on the subject.

Since you are apparently most interested in records relative to a matrimonial proceeding, it is important to point out that the Freedom of Information Law is not applicable to court records, for §86(3) specifically exempts the "judiciary" from the scope of the Law.

Nevertheless, §235 of the Domestic Relations Law in my opinion grants access to a party to a matrimonial proceeding to virtually all of the records regarding the proceeding. It is emphasized as well that although a party may gain access to those records, disclosure to the public is prohibited with respect to the details of matrimonial proceedings.

Enclosed for your consideration is a copy of §235 of the Domestic Relations 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.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1496

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

April 29, 1980

Mr. Anthony Mirra
#79A1453
P.O. Box 149
Attica, New York 14011

Dear Mr. Mirra:

I have received your latest letter, in which you requested information concerning the means by which you can obtain names and addresses of jurors. You have indicated further that your reason for seeking the information in question is based upon your desire to "hire a Private Investigator to try to get Sworn Statements concerning the state of mind of certain of the jurors about a very crucial point now being litigated..."

While I believe that the names of jurors, which must be chosen in open court under Article 16 of the Judiciary Law, are available from a county clerk, I do not believe that the home addresses or any other information regarding jurors is available. Disclosure of home addresses would in my view result in an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law. Further, jurors' qualification questionnaires must be kept confidential under §509 of the Judiciary Law.

Moreover, although the Freedom of Information Law does not envision the purpose for which a request is made as a determining factor, I feel that there are several points that should be made with regard to your reason for seeking the information in question.

First, even if you contact jurors, there is no law of which I am aware that requires a juror to speak to a private investigator or any other person regarding a particular case.

Second, I believe that the state of mind of jurors is all but irrelevant and is largely unchallengeable, and that it is extremely rare that a jury's verdict is or may be impeached.

Third, I personally question the ethics of doing what you seek to do. For better or worse, the United States has a jury system; if you are dissatisfied with a verdict, you can appeal, which you have obviously done.

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-1497

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

April 29, 1980

Ms. Deirdre M. Conforte
Assistant Town Attorney
Town of Islip
Town Hall
Islip, New York 11751

Dear Ms. Conforte:

I have received your letter of April 7 and thank you for your interest in complying with the Freedom of Information Law.

Your inquiry concerns a situation in which a congressman has requested "a current printout of the Veterans preference list for property tax exemptions." You have indicated your belief that a similar request for the names and addresses of veterans residing in the Congressman's district was denied by the United States Veterans' Administration.

Your questions are whether the Federal Privacy Act, 5 USC §552a, constitutes a sufficient ground for withholding the records in question, whether there is any other state or federal statute that would exempt the records in question from disclosure, or whether the records sought could be withheld under §89(2)(b)(iii) of the Freedom of Information Law on the ground that disclosure would result in "an unwarranted invasion of personal privacy".

In my opinion, the records sought are available.

It is noted first that the Freedom of Information Law defines record in §86(4) to include an information "in any physical form whatsoever" in possession of an agency. Although the information in question may be contained within a computer, it nonetheless is subject to rights of access. Further, while the Freedom of Information Law does not require an agency to create a record in response to a request [see Freedom of Information Law, §89(3)], you have indicated orally that the information be readily retrievable from the computer without any modifications of existing programs.

Further, the Federal Privacy Act is in my opinion applicable only to records in possession of a federal agency as defined in 5 USC 551. Under the circumstances, since the information sought is in possession of an agency of New York state government, the Privacy Act is in my opinion of no relevance with respect to rights of access for it deals only with federal agency records.

In a related sense, there is no statute of which I am aware which specifically exempts the records in question from disclosure.

Lastly, §89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

From my perspective, without additional information it would be all but impossible to determine whether the list requested would be used for a fund-raising purpose. It is more likely in my view that a "public purpose" would be cited as the basis for the request.

Perhaps most importantly, you indicated during our recent telephone conversation that the assessment rolls, which have long been subject to inspection, indicate the names and addresses of the individuals who have been granted a veteran's exemption. Since any person has the right to inspect the assessment roll and the information that the Congressman is seeking, it would in my view be inappropriate to deny access to a list containing virtually the same information on the ground that disclosure would result in an unwarranted invasion of personal privacy.

For the reasons stated above, I believe that the list of persons who have been granted a veteran's exemption is accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1498

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

May 1, 1980

Mr. T.L. Jackrell
[redacted]

Dear Mr. Jackrell:

I have recently received your letter of April 16.

As requested, enclosed is a copy of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

You wrote that you are interested in obtaining records from a regional office of the FBI.

In this regard, it is important to point out that access to records in possession of a federal agency, such as the FBI, is governed by the federal Freedom of Information Act (5 USC §552). Records in possession of government in New York fall within the provisions of the New York State Freedom of Information Law.

With regard to the specifics of your request and rights of access, a great deal depends upon the nature of records in which you are interested and the possible impact of disclosure upon individuals identified in the records as well as the FBI's capacity to carry out its duties. I have enclosed a copy of the federal Freedom of Information Act for your consideration. It is suggested that you review §552(b)(7) of the federal 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-1499

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

May 1, 1980

Ms. Marilyn Youngs
[redacted]

Dear Ms. Youngs:

I have recently received your letter regarding your capacity to inspect and copy the payment vouchers of an attorney, which are apparently in possession of Cattaraugus County. You have indicated that the County Attorney has not responded to your request.

In my opinion, the voucher or vouchers in which you are interested are available for several reasons.

First, 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Under the circumstances, I believe that a voucher could be characterized as intra-agency material. However, §87(2)(g)(i) of the Freedom of Information Law specifically directs that "statistical or factual tabulations or data" found within intra-agency materials are accessible. Since a voucher consists of "factual data", it is in my view available.

Second, although an attorney for a public corporation, for example, might engage in a privileged relationship with his or her client (i.e., a municipal board), it has been held that records reflective of the payments made to an attorney fall outside the scope of the attorney-client privilege [People v. Cooke, 372 NYS 2d 10 (1975)].

And third, §89(5) of the Freedom of Information Law states that nothing in the Law "shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records". Stated differently, if there are any other provisions of law that grant access to records, those provisions are preserved. In this regard, §51 of the General Municipal Law has provided access to books of account, vouchers, checks and similar documents in possession of a municipality for nearly a century.

I hope that 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: Dennis Tobolski

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1500

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

May 1, 1980

Mr. Ernest A. Hunter
[redacted]

Dear Mr. Hunter:

I have received your letter which apparently concerns an appeal that you have taken regarding your status on a preferred list for parole officers.

In order to obtain more information on the subject, I have contacted Roger Griffin, Supervisor for Physical Fitness Testing, at the State Department of Civil Service on your behalf. According to Mr. Griffin, your appeal has been received and the appropriate action is in the process of being taken.

Mr. Griffin informed me further that as a general rule psychiatric and other types of interpretive medical records are generally not provided directly to the subjects of the records, but rather to physicians of their choice. This stance is in my view consistent with the provisions of the Freedom of Information Law as well as other provisions of law that deal with access to medical and psychiatric records (i.e., Public Health Law, §17; Mental Hygiene Law, §33.13).

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-1501

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

COMMITTEE MEMBERS
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GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 1, 1980

Mr. William Cody
79-A-2232
Great Meadows Correctional Facility
Box 51
Comstock, New York 12821

Dear Mr. Cody:

I have recently received your letter of April 10 concerning a denial of your request for medical records by the Great Meadows Correctional Facility.

It is noted at the outset that the correspondence attached to your letter indicated that you requested the records under 5 USC §552. The provision cited is the federal Freedom of Information Act, which is applicable only to records in possession of federal agencies. I have enclosed a copy of the New York Freedom of Information Law and an explanatory pamphlet on the subject. That law is applicable to records in possession of agencies of government in New York.

In addition, I have contacted the Office of Counsel at the State Department of Correctional Services on your behalf. I was informed that factual medical information, such as laboratory results or findings are available, but that evaluative, psychiatric or diagnostic information found within a medical history is generally withheld.

In my view, the stance adopted by the Department of Correctional Services is likely appropriate, for §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 provision quoted above contains what in effect is a double negative. Although inter-agency or intra-agency materials may be withheld, statistical or factual data found within such materials, for example, must be made available.

Under the circumstances, as noted earlier, laboratory results constitute factual data that should be available. However, an evaluation reflective of the opinion of a doctor would be deniable.

It is suggested that it may be helpful in the future to request particular aspects of records contained within a medical history file, rather than requesting the entire file.

I hope that 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: Rich Howard

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1502

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

May 1, 1980

Mr. Ramon Pina
#78-A-3165
Great Meadows Correctional Facility
Box 51
Comstock, New York 12821

Dear Mr. Pina:

I have received your most recent letter concerning a request directed to the New York City Police Department.

You have indicated that the Police Department has informed you that you are not entitled to a copy of its "subject matter list". It was advised that you may view the list, which, under the circumstances, is impossible.

In my opinion, since §89(3) of the Freedom of Information Law requires an agency to provide copies of accessible records "upon payment, or offer to pay" the requisite fees, the Police Department is required to reproduce the subject matter list on your behalf upon payment of the appropriate fees.

You have also asked about "what we can and can't have from the New York City Police Department..." That is a question that is difficult to answer due to the structure of the Freedom of Information Law. While the original Freedom of Information Law listed the categories of records that must be made available to the exclusion of all others, the current Freedom of Information Law provides that all records are available except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h). All that I can suggest is that you review the grounds for denial in order to become familiar with the types of records

that may be withheld. It is also noted that the majority of the grounds for denial are written in terms of the effects of disclosure. As a general rule, if disclosure of records would in some way harm a person or impede some governmental process, there is likely a ground for denial. On the other hand, if no person would be harmed and if no governmental process would be damaged by disclosure, it is likely that records are available.

Lastly, with regard to medical records, I have contacted the State Department of Correctional Services on your behalf in order to gain information regarding the disclosure of medical records to inmates. I was informed that factual areas of medical information, such as laboratory results, are generally made available. Evaluative, psychiatric, or diagnostic information, for example, is generally withheld, for it is advisory in nature and therefore likely deniable under §87(2)(g) of the Freedom of Information Law.

It is suggested that in requesting medical information, you attempt to identify the particular aspects of your medical history in which you are interested, rather than requesting an entire "medical file".

I hope that 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: Rosemary Carroll, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1503

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

May 2, 1980

Ms. Judith T. Terry
Town Clerk
Town of Southold
Southold, New York 11971

Dear Ms. Terry:

Thank you for your letter of April 24 and your interest in complying with the Freedom of Information Law.

You have asked whether a form similar to that attached to your letter has been prepared by the Committee and, if so, whether copies can be sent to your office.

It is noted at the outset that the form attached to your letter is out of date. Under §88(1)(g) of the original Freedom of Information Law, the State Comptroller was required to prepare a form concerning access to payroll information. It is noted further that the form as well as the statute made reference to the news media and its ability to gain access to payroll information. In this regard, the Committee had consistently advised under the original Freedom of Information Law that payroll information was accessible to any person due to rights of access granted by case law prior to the enactment of the Freedom of Information Law [see e.g., Winston v. Mangan, 338 NYS 2d 654 (1972)].

The amended Freedom of Information Law clearly grants equal rights of access to any person, without regard to status or interest. Consequently, there are in my view no restrictions upon rights of access to the payroll record now required to be compiled pursuant to §87(3)(b) of the Freedom of Information Law (see attached).

Lastly, although an agency may create a form for the purpose of making requests under the law, 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. On the contrary, any request that is made in writing that "reasonably describes" the records sought should suffice [see Freedom of Information Law, §89(3)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1504

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

May 2, 1980

Mr. Joe Louis Howard
#67-C-0036
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Dear Mr. Howard:

Your letter addressed to Secretary of State Paterson 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 the Department of State does not maintain records pertaining to criminal law enforcement. Consequently, I believe that your request should be directed to the law enforcement agencies that may have possession of the information in which you are interested.

Second, I have enclosed copies of the Freedom of Information Law, regulations that govern its procedural implementation and an explanatory pamphlet on the subject that may be particularly useful to you.

With respect to the records that you are seeking, it is suggested that you review the provisions of §87(2)(a) through (h) of the Freedom of Information Law and that you pay special attention to §87(2)(e). That provision states that an agency may withhold records compiled for law enforcement purposes when disclosure 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."

From my perspective, it is possible that some of the documentation that you are seeking might justifiably be withheld under the language quoted above. Nevertheless, scientific reports, the names of arresting officers, radio logs or police blotters and similar information are likely accessible. It is also possible, however, that the names of witnesses or confidential informants might justifiably be withheld under §87(2)(e)(iii) or §87(2)(f), which states that an agency may withhold records when disclosure would "endanger the life or safety of any person."

Lastly, it is suggested that the court in which you were tried likely has possession of a great deal of the information that you are seeking. Since §255 of the Judiciary Law requires a court clerk to diligently search for and provide access to the records in his possession, unless otherwise prescribed by law, it is suggested that you request pertinent information from the court 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1505

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

May 2, 1980

Mr. Ralph Clinton Davidson
[redacted]

Dear Mr. Davidson:

As you are aware, I have received the materials sent to this office concerning your ability to gain access to records of birth and your subsequent adoption under the Freedom of Information Law.

In my opinion, the Freedom of Information Law cannot be cited as a vehicle for seeking disclosure of the information in which you are interested.

First, adoption records are generally in possession of courts. In this regard, §86(3) of the Freedom of Information Law, a copy of which is attached, specifically excludes the "judiciary" from the scope of the Law.

Second, the Freedom of Information Law states that an agency may withhold records or portions thereof that "are specifically exempted from disclosure by state or federal statute" [§87(2)(a)].

Under the circumstances, statutes relative to the birth records and the adoption records in which you are interested specifically exempt such records from disclosure. Both §114 of the Domestic Relations Law concerning adoption records and §4138(3) of the Public Health Law concerning the birth records in question require confidentiality unless a court orders disclosure. I have enclosed copies of both statutes for your consideration.

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-1506

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

May 2, 1980

Mr. Kurt M. Shilbury
[redacted]

Dear Mr. Shilbury:

As you requested, I have reviewed the legal papers that you have sent to me.

In general, I feel that you did an adequate job in presenting your views to the court. I believe that you made it clear that the absence of regulations or procedures should not be used as a basis for withholding records that are available under the Freedom of Information Law as of right.

There are a couple of points, however, that I would like to make.

First, you made reference to "privileges" granted by the Freedom of Information Law. There are many statutes which grant privileges to the public when the public meets certain conditions, as in the case of a receipt of a license or a permit, for example. Nevertheless, the Freedom of Information Law confers a right upon the public based upon the declaration of public policy appearing in the statement of legislative intent in §84 of the Law.

Second, it may have been appropriate to make reference to the records that you are seeking.

I wish you the best and wish to convey my respect to you for initiating the lawsuit pro se.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-485
FOIL-AO-1507

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

May 2, 1980

Ms. Fran Schilling
Pawling News-Chronicle
3 Memorial Drive
Pawling, New York 12564

Dear Ms. Schilling:

I have received your letter of April 14 which concerns the propriety of nondisclosure on the part of the Dover Union Free School District Board of Education.

You wrote that:

> "[I]n the act of passing a final service request for Dutchess County BOCES, member of the board of education gave the superintendent latitude to negotiate 'in a downward spiral' some of those services at a latter date when their budget was more solidyly defined. The areas that the superintendent could negotiate were detailed in an administrative memorandum members of the board had before them."

Thereafter, you asked the Superintendent and the President of the Board to clarify the areas involved. They refused to provide additional information based upon their contention that it involved "personnel". You contended that the issue dealt with a "position" and not "personnel" and therefore should be considered public information and asked whether the subject matter fell within the grounds for executive session.

It is noted at the outset that I am uncertain as to whether your question deals with access to records under the Freedom of Information Law or the holding of an executive session under the Open Meetings Law. In any event, I will attempt to deal with both areas.

With respect to the Open Meetings Law, the ground for executive session that would most likely come within consideration is §100(1)(f). The cited provision 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..." (emphasis added).

The language quoted above represents an alteration from the analogous provision that appeared in the Open Meetings Law as originally enacted. In its original form, §100(1)(f) enabled a public body to enter into executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..." (emphasis added).

Under the original provision, many public bodies entered into executive session to discuss matters of policy that dealt indirectly or tangentially with "personnel". It had been and continues to be the Committee's view that §100(1)(f) was and is now intended to protect privacy, not to shield matters of policy under the guise of privacy. Moreover, the Committee successfully attempted to clarify §100(1)(f) by means of an amendment to the language substituting the term "particular" for "any" person or corporation.

From my perspective, according to your letter, the issue with which the School Board dealt concerned money and how much should be spent. It did not apparently deal with whether a particular employee was performing his or her duties well or poorly, for example. As such, I believe that the subject matter, as you described it, should likely have been considered in public.

With respect to the Freedom of Information Law, as you may be aware, the Law is based upon a presumption of access. All records in possession of an agency, such as a school board, are accessible, except to the extent that records or portions of records fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Freedom of Information Law.

Most relevant under the circumstances is §87(2)(g), which states that government 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 inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

It would appear that the memorandum provided by the Board of Education to the Superintendent would be reflective of "instructions to staff that affect the public" which should be made available.

It is noted in closing that the Open Meetings Law provides that an executive session may be held to discuss collective bargaining negotiations under the Taylor Law under §100(1)(e). Similarly, §87(2)(c) of the Freedom of Information Law states that an agency may withhold records or portions thereof which if disclosed would "impair present or imminent contract awards or collective bargaining negotiations". In my view, neither the cited ground for executive session under the Open Meetings Law nor §87(2)(c) of the Freedom of Information Law could justifiably have been advanced for closing the meeting or withholding the records, for neither contract awards nor collective bargaining negotiations were involved.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: J. Bruce McKenna
Elaine Schultz
Kay Spenard

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1508

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

May 5, 1980

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

Dear Ms. Bernstein:

I have recently received your letter of April 14 concerning a denial of access rendered under the Freedom of Information Law by the Nassau County District Attorney.

According to your letter, Dr. Nathanial Lehrman, the retired director of Kings County Psychiatric Hospital, has been asked by the American Psychiatric Association to report on the case of Adam Berwid, a mental patient who allegedly killed his wife while on a day's leave from the institution where he was living. In order to prepare his report, Dr. Lehrman has requested without success a transcript of the 911 telephone tape containing the conversation between Mrs. Berwid and the emergency operator. Although the District Attorney denied access on the ground that disclosure would interfere with an ongoing investigation, the tape recording was played on 60 Minutes and excerpts of the tape were published in the New York Times.

I agree with your contention that a prosecutor "cannot pick and choose" those to whom records are made available "and at the same time claim protection under the Freedom of Information Act".

It is emphasized at the outset that the Committee on Public Access to Records has long advised and the courts have upheld the principle 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, affirmed 51 AD 673, 378 NYS 2d 165]. Consequently, if a record is made available to one member

of the public or representative of the news media, I believe that it should be made available to all. The effects of disclosure are the same, regardless of which member of the public gains access to records.

Further, it is in my opinion impossible to justify a denial if indeed the information sought was broadcast nationally on 60 Minutes.

With respect to rights of access granted by the Freedom of Information Law, it appears that a tape recording or a transcript of a tape recording is available.

First, §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 or the state legislature, in any physical form whatsoever..." Since the tape recording is in possession of and was produced by the Nassau County Police Department, it is a "record" subject to rights of access.

Second, the 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 appearing in §87(2)(a) through (h) of the Law.

Third, in my opinion, there are two grounds for denial that might conceivably be cited to deny access.

Section 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 adjudiciation;
>
> 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."

From my perspective, it is questionable whether §87(2)(e) may justifiably be cited to withhold the tape recording or the transcript, for the record in question was likely compiled in the ordinary course of business, rather than for law enforcement purposes.

By means of analogy, it is noted that police blotters have long been available. Although the term "police blotter" is not specifically defined by any provision of law, it has been held by the Appellate Division that a police blotter is a log or diary in which any event reported by or to a police department is recorded [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The court found that a police blotter is merely a summary of events or occurrences, and that it contains no investigative information. In my opinion, the use of the 911 number and the tape recordings is essentially the equivalent of what has considered to be a police blotter. I do not believe that the form in which the substance of a police blotter exists can be cited to distinguish rights of access. In this instance, I contend that the tape recording was compiled in the ordinary course of business, and not for law enforcement purposes.

Moreover, as noted earlier, if disclosure of a tape recording or a transcript of a tape recording could not have been found to interfere with an investigation when released to 60 Minutes or the New York Times, it could not in my view interfere in an investigation when requested by or released to another person, such as Dr. Lehrman.

Lastly, the remaining ground for denial that may have relevance 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 some situations, perhaps there may be a distinction between the effects of disclosure of a tape recording and the transcript of a tape recording. For example, when one hears a tape recording, it is possible that the state of mind of the caller may become evident due to the inflections or emotions of one's voice. As such, it is in my opinion possible that a tape recording may in some instances be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Again, however, in this case, the tape recording has been played on national television. Consequently, at the very least, it is an inconsistency for the District Attorney to deny Dr. Lehrman's request. A transcript of a tape recording, however, should in my opinion generally be made available, for there would be a lesser invasion of privacy than in the case of the tape recording, for the transcript contains the printed word, rather than an oral statement.

In sum, I believe that the 911 log that is maintained by means of tape recordings is equivalent to a police blotter, which has long been available by means of common law, as well as the Freedom of Information Law. Further, one of the basic principles of the Freedom of Information Law is that accessible records are available to any person, notwithstanding 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
Executive Director

RJF/kk

cc: Denis Dillon
Nassau County District Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1509

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

May 5, 1980

Mr. Theodore Howard
#76-A-2921
Drawer B
Stormville, NY 12582

Dear Mr. Howard:

I have received your letter of April 14 in which you described a response to a request for records directed to the New York City Police Department. You indicated that the reply that you received from the Police Department "was a form letter" in which you were advised that it could not comply with your request within five days.

In my view, the response may have been appropriate.

Although the Freedom of Information Law provides that an agency must respond to a request within five business days of its receipt of a request, one of the responses that may be given is an "acknowledgment" [see Freedom of Information Law, §89(3)].

An acknowledgment is intended to inform an applicant that a request has been received, but that more than five business days will be needed to locate the records or evaluate them to determine rights to access.

However, the Committee's regulations [see attached, §1401.5(d)] require that a determination must be made within ten business days of the date of acknowledgment. If you obtain no response within ten business days of an acknowledgment, your request is considered a denial that may be appealed.

Generally, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business daysof the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

The same information, as well as a copy of this letter, will be sent to Mimi Gertz, the Records Access Officer for the New York City Police Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Mimi Gertz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1510

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

May 5, 1980

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

I have received your letter of April 11 as well as the materials attached to it.

You have asked whether an assault report in which you are interested should now be made available.

As I understand the situation, you initially requested a copy of the report in question prior to the completion of a criminal investigation. At that time, the report was withheld on the ground that it was compiled for law enforcement purposes and that disclosure would interfere with an ongoing investigation [see Freedom of Information Law, §87(2)(e)(i)].

While I believe that the initial denial of access was proper at the time because the investigation was open, it would appear that the harmful effects of disclosure described in §87(2)(e) have essentially disappeared, for the case has been terminated. Consequently, based upon the facts that you have provided, I believe that the record initially sought should now 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

bcc: Alfred Paniccia, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1511

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

May 5, 1980

Mr. Francis G. Adee
79-C-0152 9-2/K-1
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Adee:

I have received your letter of April 14 concerning your continuous unsuccessful attempts to gain access to "log book entries made by the deputies of the Broome County Sheriff's Department..." related to specific dates and times that you cited.

First, if the records in which you are interested are the equivalent of what is considered to be a "police blotter", I believe that they should be made available. Although the term "police blotter" has no precise legal definition, in a decision that was initiated in Broome County, it was held that a police blotter is a log or diary in which any event reported by or to a police department is recorded [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The decision noted that a police blotter is merely a summary of events or occurrences and that it contains no investigative information. Assuming that the log book in which you are interested is analogous to the police blotter, it is in my opinion available upon payment of the requisite fees for photocopying.

Second, with respect to procedures, I have enclosed a copy of the regulations promulgated by this Committee, which govern the procedural aspects of the law and which have the force and effect of law. Each agency in the state is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee. In addition, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject which may be particularly 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.

cc: Broome County Sheriff

bcc: Alfred Paniccia, Jr.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-486
FOIL-AO-512

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

May 5, 1980

Mr. Alfred B. Lowy
Editor
The Daily Item
Port Chester, NY 10573

Dear Mr. Lowy:

I have recently received your letter concerning meetings held by the Board of Education of the Harrison School District to consider the District's budget.

According to your letter, the Superintendent of Schools, Dr. Joseph Carbone, has argued that discussions regarding the budget relative to personnel should be held in executive session because "the discussion might involve the mention of names of people to be laid off". You have also indicated that Dr. Carbone has stated that the State Education Department has informed him that the Board of Education "must meet in private if any particular name is mentioned or risk a possible libel suit". I disagree with the contention expressed by Dr. Carbone as well as the State Education Department.

It is emphasized at the outset that the so-called "personnel" exception for executive session appearing in §100(1)(f) of the Open Meetings Law was amended to preclude public bodies from engaging in the types of closed sessions that are the subject of your inquiry.

As noted in several of the Committee's annual reports to the Legislature on the Open Meetings Law, §100(1)(f) as originally enacted had in the Committee's view been cited inappropriately. The original provision stated that a public body could 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, suspensions, dismissal or removal of any person or corporation..." (emphasis added)

The Committee had consistently advised that the language quoted above was intended to protect privacy, not to shield discussions regarding policy under the guise of privacy. In its third annual report to the Legislature, the Committee sought to provide the Legislature with an indication of the problem by suggesting that:

> "...a distinction should be made between a situation in which a municipal board discusses the dismissal of public employees for budgetary reasons (a policy matter that should be publicly discussed) and a situation in which the board discusses dismissal of a particular employee because that person is not performing his or her duties adequately (a personnel matter that deals with the employment history of a named individual that may properly be discussed in executive session)."

In order to clarify the scope of §100(1)(f) of the Open Meetings Law, the Committee recommended an amendment, which was passed and became effective on October 1, 1979.

Section 100(1)(f) now provides 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..." (emphasis added)

In view of the change in the language, it is clear that discussions concerning the budget or lay-offs in general terms must be held in full view of the public.

Even before the clarification of §100(1)(f), in Orange County Publications v. City of Middletown, (Sup. Ct., Orange Cty., December 26, 1979), it was held that:

> "...personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1. f. of §100, for which the Legislature has authorized closed 'executive sessions.' Therefore, the court declares that budgetary lay-offs are not personnel matters within the intent of Subdiv. 1.f. of §100..."

Should a situation arise in which the employment history of a particular individual arises, for example, an executive session may be held. Nevertheless, I believe that the deliberations of a public body are required to be held open to the public, except to the extent that an executive session may properly be convened. An executive session cannot in my opinion be convened based upon the possibility that a name may be mentioned. If and when a particular person is discussed in relation to one or more of the grounds for executive session, the public may be excluded. Until that time, however, I believe that a meeting must remain open.

With regard to the second area of contention, if the State Education Department advised Dr. Carbone that a private meeting must be held to prevent a libel suit when a name is mentioned, I respectfully disagree.

As in the case of the Freedom of Information Law, the Open Meetings Law is permissive. Although a public body may enter into an executive session, it need not. That point is clear, for §100(1) requires that a motion to enter into executive session be carried by a majority of the total membership of a public body. As such, it is clear that a public body may vote to hold an open meeting, in the public interest, for example, even when a ground for executive session may be appropriately asserted.

Moreover, although I am not an expert on the subject of libel and slander, I would like to point out that the Court of Appeals has on several occasions held that a public official is absolutely immune from liability when he or she speaks, writes or otherwise discloses in the per-

formance of his or her official duties [see e.g., Ward Telecommunication and Computer Services, Inc. v. State, 42 NY 2d 289 (1977)]. Consequently, I cannot see how a cause of action for libel could arise by the mere mention of the name of a public employee at a meeting.

Further, it is clear that public employees enjoy a lesser right to privacy than the public generally. By means of analogy, under the Freedom of Information Law, the courts have held on several occasions 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 [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)]. In addition is is emphasized that the Court of Appeals found that a list of public employees laid off by a county was accessible (Gannett Co. v. County of Monroe, supra.). If disclosure of the names of public employees who had been laid off is required to be made under the Freedom of Information Law, I cannot understand how the mention of a name under the Open Meetings Law could result in an action for libel.

I hope that 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. Joseph Carbone
Joseph Ungaro
Raymond O'Keefe, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1513

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

May 7, 1980

Carl G. Scalise, Esq.
319 North Main Street
Herkimer, New York 13350

Dear Mr. Scalise:

I have received your letter of April 17 and apologize for the delay in response.

Your inquiry concerns a situation in which you have attempted unsuccessfully to obtain a copy of a Certificate of Acceptance filed with the Village of Herkimer. Since the Certificate is in my view available for inspection and copying under the Freedom of Information Law, as well as the provisions of the Election Law, I can only suggest that the procedures found in the Freedom of Information Law and the regulations promulgated by the Committee be followed and exhausted.

It would appear that the time limits for responding to your request have likely been exceeded.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

Copies of this letter and the materials sent to you will be transmitted to the Village Clerk and the Mayor.

I hope that 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: Mayor Patterson
Village Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1514

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

May 7, 1980

Mr. Tom Friedman
Times-Union Reporter
Capital Newspapers Group
645 Albany Shaker Road
Albany, New York 12212

Dear Mr. Friedman:

I have received your letter of April 28 in which you requested an advisory opinion under the Freedom of Information Law. You have indicated that Albany County has denied access to "worksheets and historical documents used in [the] making of a tax map for the town of Guilderland". You wrote further that the worksheets, documents and related notes are in possession of a contractor, Smith and Mahoney Engineers.

In my opinion, the records in which you are interested are available under the Freedom of Information Law in great measure, if not in their entirety.

First, it is emphasized that §86(4) of the Law defines the term "record" broadly 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, microfilm, computer tapes or discs, rules, regulations or codes."

In view of the definition quoted above, it is clear that records in possession of an agency, as well as those "produced or reproduced by, with or for an agency..." are subject to rights of access. As such, I believe that records in possession of the County as well as those produced by means of a contractual relationship for the County are subject to rights of access granted by the Law.

Second, the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as a county, 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. Based upon the facts as you described them, it does not appear that any of the grounds for denial could justifiably be cited.

Under the circumstances, one of the grounds for denial, §87(2)(g), tends to bolster a contention that the records sought are available. The cited provision states that government in New York 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. Although inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In this instance, it would appear that virtually all of the information generated by Albany County with respect to the assessment process constitutes "statistical or factual" data that is accessible.

With respect to the materials generated by the contractor, I do not believe that they could be characterized as "inter-agency or intra-agency materials". Although they may be produced for an agency, they do not constitute communications between officials of a single agency (intra-agency materials), nor do they constitute materials transmitted from an official of one agency to an official of another (inter-agency materials). Further, according to the information provided, I do not believe that any of the remaining grounds for denial listed in §87(2) could be appropriately cited to withhold the records.

Third, even before the enactment of the Freedom of Information Law, the courts held under §51 of the General Municipal Law that virtually all records developed in the assessment process are available [see e.g., Sears Roebuck & Co., v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1969)]. In Sanchez, supra, the Appellate Division found that pencil-marked data cards used by municipal assessors to reappraise real property are available to the public, even though the cards were prepared by a third party, a private contractor.

In the situation that you have described, it appears that the data in possession of the contractor is similar to that determined to be available under Sanchez in 1969, some nine years prior to the enactment of the amended Freedom of Information Law. The distinction is that the records in Sanchez were in possession of government. Nevertheless, due to the definition of "record" discussed earlier, I believe that the records in possession of the contractor in which you are interested are subject to rights of access, for they have been prepared for an agency.

Lastly, §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 means of statutory or decisional law. Since there is case law indicating that records analogous to those in which you are interested are accessible, in my opinion they remain accessible and should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Peter Danziger
John F. Lynch
Guy Pacquin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-487
FOIL-AO-1515

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

May 7, 1980

Mrs. Pat Montemorano
[redacted]

Dear Mrs. Montemorano:

I have recently received your letter of April 17 which raises questions relative to both the Freedom of Information Law and the Open Meetings Law.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation which have the force and effect of law, the Open Meetings Law, which is attached to a memorandum explaining amendments that went into effect on October 1, 1979, and an explanatory pamphlet concerning both laws.

Your first question pertains to rights of access to the proposed budget developed by a school district. You have indicated that you were told that you could not review the proposed budget, "because it has not been approved by the members of the board". You indicated further that you were informed that you could not review until it is "voted on by them".

In this regard, it is noted initially that §1716 of the Education Law requires a board of education to develop and present at an annual meeting "a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specify the several purposes and the amount for each". The cited provision also states that:

> "[S]uch statement shall be completed at least seven days before the annual or special meeting at which it is to be presented and copies thereof shall be prepared and made available, upon request, to taxpayers within the district during the period of seven days immediately preceding such meeting and at such meeting. The board shall also as a part of the notice required by section two thousand four of this chapter give notice that a copy of such statement may be obtained by any taxpayer in the district at each schoolhouse in the district in which school is maintained during certain designated hours on each day other than a Saturday, Sunday or holiday during the seven days immediately preceding such meeting."

Moreover, 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 of the grounds for denial appearing in §87(2)(a) through (h).

Notwithstanding §1716 of the Education Law, I believe that the documentation concerning proposed expenditures would be available under the Freedom of Information Law. Specifically, §87(2)(g) states that "statistical or factual tabulations or data" found within intra-agency materials are available.

Your second question is whether you have a right to inspect and copy minutes of a meeting before the minutes have been approved by the Board of Education. In this regard, I direct your attention to §101(3) of the Open Meetings Law. The cited provision requires that minutes of open meetings must be compiled and made available within two weeks of the meetings to which they relate. As such, minutes must be made available within two weeks, whether or not they have been approved by a board.

It is important to point out that the requirement that minutes be made available within two weeks represents one of the recent amendments to the Open Meetings Law. In anticipation of the absence of approval of minutes within the two week period, in the memorandum attached to the Open Meetings Law, it was suggested that the minutes must be made available, but that they may be marked "unapproved", "non-final" or "draft", for example. By so doing, the public can learn generally of what transpired at a meeting, and at the same time, a board is given a measure of protection.

The third question concerns rights of access to a "packet" of information that the Board of Education receives prior to its meeting. Your question is whether you can ask for the records found within the packet. I can only suggest that the Law states that all records are available, except to the extent that records or portions thereof may be withheld under one or more of the enumerated grounds for denial. Consequently, while it is possible that many of the records contained with the packet are accessible, there may be portions of the records that might justifiably be withheld. In short, rights of access depend in great measure upon the contents of the records individually.

Lastly, you indicated that a letter addressed to the Board by a taxpayer was discussed during an open meeting. You have asked whether a copy of the letter must be made available. Again, so long as none of the grounds for denial could appropriately be asserted, the letter should be made available. If, for example, the taxpayer was identified, I believe that the letter is likely available in its entirety. However, if reference was made to the letter, but the identity of the taxpayer was not given, it is suggested that the substance of the letter may be made available and that identifying details concerning the writer may be deleted if it is determined that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b) and 89(2)(b) 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
Encs.
cc: Clyde Savannah Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-488
FOIL-AO-1516

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

May 12, 1980

Mrs. Doris Wenger
[redacted]

Dear Mrs. Wenger:

As you are aware, I have received your most recent letter as well as the materials appended to it. I apologize for the delay in response.

The following paragraphs will seek to respond to comments made in your letter and the correspondence. However, it is noted that some of the copies are not completely legible.

The first area of inquiry concerns the retention of Mr. Vincent Trainor as an administrative aide after his retirement. Having requested a copy of the motion to retain Mr. Trainor and the vote to do so by the Board of Education, you were informed that such records are not maintained by the School District.

Assuming that the subject matter in question is generally determined by the Board of Education at its meetings, it would appear that any action by the School Board to retain Mr. Trainor should have been taken during an open meeting.

Although the subject of Mr. Trainor's retention might have properly been discussed during an executive session under §100(1)(f) of the Open Meetings Law, I believe that any motion to retain him as well as the vote on the motion should have been conducted in public and contained in minutes required to be compiled under §101 of the Open Meetings Law.

While public bodies may generally vote during a properly convened executive session, 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 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.

Further, §101(1) of the Open Meetings Law requires that minutes must consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the date and vote thereon.

Consequently, if action was indeed taken to retain Mr. Trainor, I believe that such action should be referenced in School Board minutes.

The second area of inquiry concerns the attendance of members of the Board of Education and administrators at a meeting held in Los Angeles. You wrote that when you asked which administrators or board members would be attending, the Board refused to provide the names of those scheduled to attend. You indicated further that, to the best of your knowledge, the trip to Los Angeles had not been discussed at an open meeting.

As you are aware, the Open Meetings Law describes eight grounds for entering into executive session; they represent the only circumstances in which an executive session may be held. In my view, it is unlikely that any of the grounds for executive session could have been cited to discuss attendance at the convention to be held in Los Angeles.

Further, while the Freedom of Information Law states that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy", the courts have consistently held that records related to public officials 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 2d 664 (Court of Claims, 1978)]. Since board members or administrators would be attending in the performance of their official duties, records concerning their attendance at the convention should in my opinion be available. As such, vouchers, plane tickets, receipts regarding lodging and similar documentation are also in my view accessible.

One of the items of correspondence attached to your letter constitutes a denial of access to a request made on March 28 on the ground that the "description used" for particular items "does not sufficiently describe the document so that it can be located". In addition, Mr. Walter B. Kerr, the writer of the response wrote: "P.S. We do not do research". According to the copy of your application, items 3 and 4 of your request dealt respectively with a "subject matter list" and the "payroll register - current". In my opinion, you met the requirements of the Law.

It is noted that the Freedom of Information Law merely requires that an applicant "reasonably describe" the records sought. To date, the courts have held essentially that a person has "reasonably described" the records in which he or she is interested when agency officials can determine the nature of records sought [see e.g., Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)]. Under the circumstances, I believe that the nature of records sought is described in items 3 and 4 is clear.

The subject matter list, as you are aware, is a record required to be compiled pursuant to §87(3)(c) of the Freedom of Information Law. The cited provision requires that each agency compile a list in reasonable detail by subject matter of all its records, whether or not records to which reference was made are available. Similarly, §87(3)(b) of the Freedom of Information Law requires that each agency compile a payroll record which identifies each officer or employee by name, public office address, title and salary.

It is emphasized that the provisions regarding both the subject matter list and the payroll record represent aberrations from the general rule that an agency need not create a record in response to a request. Therefore, although I am in general agreement with Mr. Kerr's contention that the School District need not "do research", the provisions of the Freedom of Information Law regarding the subject matter list and the payroll record require that the District create and make available such records on request.

You also wrote that in 1979 you requested and received records pertaining to the "McIntosh Scholarship Fund". However, when a request was made for analogous information more recently, you were informed that the records are not maintained by the District. Without greater knowledge of the McIntosh Scholarship Fund, I cannot provide specific direction. Nevertheless, if the scholarship fund in question is administered by the School District, it would appear that the District maintains records on the subject. It is also noted that the Freedom of Information Law and the regulations promulgated by the Committee enable an applicant to seek a certification in writing to the effect that an agency does not maintain requested records [see respectively Freedom of Information Law, §89(3), regulations, §1401.2(b)(6)].

Lastly, in one of our telephone conversations you raised questions regarding the time limits for response to records.

With respect to that inquiry, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access , and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: School Board
Walter B. Kerr

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1517

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

May 12, 1980

Carl G. Scalise, Esq.
319 North Main Street
Herkimer, New York 13350

Dear Mr. Scalise:

I have received your letter of April 17 and apologize for the delay in response.

Your inquiry concerns a request directed to the then Village Clerk for a copy of the proposed agenda of the organizational meeting held by the Herkimer Village Board of Trustees. You wrote that you were denied access to the agenda, which indicated various appointments to be made, and that the Mayor instructed the Clerk to make only one copy of the agenda for his use and to deny access to the agenda to interested persons who might request it.

In my opinion, as you described it, the agenda in question should likely have been made available.

It is noted that the Freedom of Information Law is based upon a presumption of access. All records of an agency 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 Freedom of Information Law. Further, the term "record" is defined by §86(4) to include any information kept, held, filed, produced or reproduced by, with or for an agency "in any physical form whatsoever". Therefore, as soon as a record such as the agenda in question exists, it is subject to rights of access granted by the Law.

Under the circumstances, it would appear that the portions of the agenda in which you were interested consisted merely of a factual rendition of the positions open for appointment. You indicated that the names of those later appointed and the vote by the Board were "filled in"

at the meeting in which the appointments were made. Based upon that description of the agenda, I believe that it was available under §87(2)(g)(i), which provides access to intra-agency materials consisting of "statistical or factual tabulations or data".

It is important to point out, however, that the Freedom of Information Law does not require an agency to respond to a request immediately. While I do not believe that a public officer has the authority to restrict access to records unilaterally, the Freedom of Information Law and the regulations promulgated by the Committee prescribe specific time limits for responses to requests.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days or receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and 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
Executive Director

RJF:jm

Encs.

cc: Herkimer Village Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-489
FOIL-AO-1518

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

May 12, 1980

Mr. Frank P. Spatto
Councilman
[redacted]

Dear Mr. Spatto:

As you are aware, I have received your letter of April 28, 1980 regarding tape recordings of meetings held by the Town Board of the Town of German Flatts.

According to your letter, you asked the Town Clerk whether you could listen to a tape recording of a meeting, and she replied that neither you nor anyone else could listen to the tape. It was explained further that both the Town Clerk and the Supervisor said that only portions of meetings would be tape recorded.

In my opinion, tape recordings of open meetings are available for the reasons described below.

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 the Town Clerk employs a tape recorder in the performance of her official duties, I believe that a tape recording is clearly a "record" subject to the Freedom of Information Law.

And 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.

I would also like to point out that any person may in my opinion use a tape recorder at an open meeting, so long as the presence of a tape recorder does not unreasonably detract from the deliberative process.

In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt reasonable rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting theuse of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process (see attached, Special Report: Electronic Reproduction of Public Proceedings).

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to

> foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent the possibility of star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enought an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

In my opinion, the principle enunciated in Davidson remains valid, i.e., that a public body may prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. However, since a hand held, battery operated cassette tape recorder could not detract from the deliberative process, I do not believe that a rule prohibiting the use of such devices would be reasonable or valid.

Speaking from personal experience, I have given hundreds of presentations in the five years of my employment with the Committee. During many of the presentations, battery operated cassette recorders have been used. In many instances, I have known of their use only after the presentations have been given. Very simply, it is my contention that if one does not know of the presence of a tape recorder due to its unobtrusive character, it is impossible to argue that its use would in any way detract from the deliberative process.

Lastly, the only instance in which it would be appropriate for a public body to require that an individual turn off his or her tape recorder would in my opinion involve a situation in which a public body enters into executive session. However, such direction is likely implicit and unnecessary, for the public may be excluded from appropriate executive sessions [see Open Meetings Law, §100(1)].

I hope that 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-1519

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

May 13, 1980

Mr. Harold Kobliner
Chairman
The Board of Examiners
65 Court Street
Brooklyn, New York 11201

Dear Mr. Kobliner:

Thank you for sending a copy of your determination on appeal rendered under the Freedom of Information Law regarding a request by Mr. Kenneth Kimerling. Although I am not familiar with the nature of the records sought by Mr. Kimerling, I would like to make two points.

First, your letter indicates your belief that the Board of Examiners' test development procedures are classifiable as "trade secrets" and that "disclosure would cause substantial injury to the Board of Examiners". In my opinion, the "trade secrets" exception to rights of access appearing in §87(2)(d) of the Freedom of Information Law is applicable only in situations in which commerical enterprise is involved. The cited provision states 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..."

From my perspective, it is clear that the provision quoted above is intended to protect commercial enterprise, i.e., the private sector, which submits or is required to submit records to government. Consequently, I do not believe that §87(2)(d) can be cited justifiably by the Board as a ground for denial.

Second, you cited 5 U.S.C. §552a, the federal Privacy Act. I believe that the Privacy Act is applicable only to records in possession of federal agencies; it does not in my view extend to agencies of government in New York. As such, although you may concur with the principles expressed in the Privacy Act, I do not believe that they are of substantial relevance in New York.

I hope that 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: Kenneth Kimerling

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1520

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

May 14, 1980

Mr. Kenneth Singleton
#79A0831
Box 367
Dannemora, NY 12929

Dear Mr. Singleton:

I have recently received your letter of April 21 in which you asked for general information regarding the Freedom of Information Law. You wrote that you are particularly interested in gaining access to medical and administrative records pertaining to yourself.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation and an explanatory pamphlet on the subject. The pamphlet may be particularly useful to you, for it contains a sample letter of request.

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 thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

With respect to medical records, I have discussed the issue on several occasions with representatives of the Department of Correctional Services. I have been informed that, as a general rule, factual information, such as laboratory results, are made available, but advisory materials, such as opinions rendered by physicians, are withheld. If you request medical information, it is also suggested that you attempt to identify the particular types of information that you are seeking.

I hope that 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-1521

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

May 14, 1980

Mr. Michael DeRaddo
President
Waterloo Education Association
Skoi-Yase School
Washington Street
Waterloo, New York 13165

Dear Mr. DeRaddo:

I have received your letter of April 22, which again concerns your attempts to gain access to records of the Waterloo Central School District.

The focal point of your inquiry involves the questions of "who is the final determiner of what records can be made accessible and when will this determination be made?" The Freedom of Information Law and the regulations promulgated by the Committee state that the final administrative determination is made by the head of an agency or the person or body designated to determine appeals. The correspondence attached to your letter as well as copies of appeals transmitted by the Waterloo Central School District indicate that the Superintendent, Richard A. Conover, is the appeals officer. The determinations of the appeals officer are final, unless you seek to challenge his determinations in a judicial proceeding initiated under Article 78 of the Civil Practice Law and Rules.

It is noted that the Committee on Public Access to Records has only the capacity to advise with respect to the Freedom of Information Law; it has no power to compel compliance with the Law. Consequently, if you are dissatisfied with the determination rendered by an appeals officer, and if an opinion rendered by this Committee is not persuasive, your only course of action involves the initiation of a judicial proceeding. It is noted, too, that the Article 78 proceeding generally requires that the

petitioner, the member of the public who challenges governmental action, has the burden of proving that the action was unreasonable. Nevertheless, the Freedom of Information Law specifically states that the agency shall have the burden of proof. Section 89(4)(b) of the Law states that an agency must demonstrate that records withheld in fact fall within one or more of the grounds for denial appearing in §87(2)(a) through (h). Further, the state's highest court, the Court of Appeals, has held that an agency cannot merely assert a ground 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)].

Having reviewed the correspondence attached to your letter, I believe that several comments should be made with respect to the responses given by the School District.

First, as you are aware, the Freedom of Information Law states that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Further, §89(2)(b) lists for the purpose of guidance five examples of unwarranted invasions of personal privacy.

Second, although you are requesting records that identify public employees, it is important to point out that the courts have generally granted public employees a lesser right to privacy than members of the public whose identities appear in government records. In brief, the courts have found that records that identify public employees that are relevant to the performance of their official duties 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 2d 664 (Court of Claims, 1978)]. If, for example, disclosure would result in a permissible invasion of personal privacy, written consent of the public employees to whom the records relate would not in my opinion be required as a condition precedent to disclosure.

Third, the Superintendent wrote that disclosure of sick leave records "is considered an unwarranted invasion of personal privacy which could have a detrimental effect on an employee". I doubt that this basis for denial is sufficient. As noted earlier, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. It appears that the Superintendent has based the denial upon §89(2)(b)(iv), which states that an unwarranted invasion of personal privacy includes:

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

It is emphasized that in viewing the language in question the Court of Appeals found that each of the phrases contained within the cited provision must be proven to guarantee its application. While it might be argued that the information is of a personal nature and that disclosure might result in "personal hardship", I do not believe that it could be effectively argued that the information is irrelevant to the agency maintaining it (see Gannett, supra). On the contrary, I believe that attendance records are relevant to the work of the School District. Consequently, I do not believe that the basis for dential offered by the Superintendent is valid.

Fourth, some responses in the applications for records characterize the records sought as "privileged information" In this regard, the terms "privileged" or "confidential" have precise meanings in law. In my view, a record can be considered "confidential" or "privileged" only in situations in which there is specific statutory direction that prohibits disclosure of particular records. I do not believe that there is any statutory direction that could under the circumstances be cited to appropriately characterize the records in question as "privileged".

Lastly, one of the items of correspondence attached to your letter indicates that the District does not maintain certain records. I am not familiar with the specific records to which reference was made by identification of years. However, it is noted that a school district, for example, cannot destroy or otherwise dispose of records without the consent of the Commissioner of Education (see Public Officers Law, §65-b). In order to regularize the orderly disposition of records, the State Education Department has developed detailed series of schedules for the retention and disposal of specific records. It is suggested that it may be worthwhile to attempt to review retention and disposal schedules to determine the lengths of time particular records must be maintained.

I hope that 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: Richard A. Conover

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1522

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

May 14, 1980

Mr. Wallace Nolen
President
S & W Process Service
12 Chase Street
P.O. Box 647
White Plains, NY 10602

Dear Mr. Nolen:

As you are aware, I have received your letter of May 5 which concerns requests for records relative to income executions against particular individuals.

I would like to emphasize at the outset that neither the Freedom of Information Law nor provisions of the Judiciary Law and various court acts require either an agency or a court, for example, to create records in response to a request. However, both the Freedom of Information Law and specific court acts permit inspection of existing records.

It is also noted that the Freedom of Information Law is not applicable to the courts and court records. This is not to say, however, that court records are not generally available. On the contrary, there are broad access provisions found in the Judiciary Law and other court acts. For instance, with respect to the courts in general, §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."

In view of the foregoing, a court clerk in my opinion has an affirmative duty to search for or provide access to records in his or her possession.

Similarly, §2019-a of the Uniform Justice Court Act states that:

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

Again, the direction to provide access to records in possession of a justice court is clear.

With respect to your request directed to the Westchester County Sheriff's Office, I believe that the provisions of the Freedom of Information Law are applicable. As you are aware, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h).

To the best of my knowledge, the records in which you are interested have long been generally available. Moreover, the direction provided by §208 of the County Law appears to indicate that the records in question should be made available. Specifically, §208(2) states that:

> "[E]ach county officer shall have custody and control of all records, books, maps or other papers, required or authorized by law to be recorded, filed or deposited in his office; all other records, books, maps or papers shall be in the custody and control of such officer as the board of supervisors shall designate. It shall be the duty of each officer to keep and preserve the same. No such record, book, map or

> other paper, shall be sold, destroyed or otherwise disposed of, except pursuant to law."

Further, subdivision (4) of §208 of the County Law states that:

> "[E]xcept as otherwise provided by law and subject to reasonable rules and regulations of the officer have custody thereof, all records, books, maps or other papers recorded or filed in any county office, shall be open to public inspection, and upon request, copies shall be prepared and certified; and except where another fee is prescribed by law, such officer upon the payment of a fee of twenty cents for each folio, shall furnish such certified copy. Upon request and after diligent search, if no record be found, such officer shall be entitled to receive a fee of one dollar for certification thereof."

In addition, having reviewed the denial by Sheriff Delaney dated April 21, I do not believe that his response is reflective of compliance of the procedural aspects of the Freedom of Information Law. When an applicant is denied access to records, the regulations promulgated by the Committee [see attached regulations, §1401.7] state that the reasons for the denial must be given in writing and that the applicant must be apprised of his or her right to appeal. The response of April 21, however, merely states that the information requested is "hereby denied".

A copy of the regulations to which reference was made earlier will be sent to Sheriff Delaney.

I hope that 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: Sheriff Delaney
Town Justice - Town of Mt. Pleasant
Westchester County Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-492
FOIL-AO-1523

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

May 14, 1980

Mr. Joseph L. Guardino
[redacted]

Dear Mr. Guardino:

I have recently received your letter and the news clippings attached to it. Questions have been raised in conjunction with the Freedom of Information Law and the Open Meetings Law.

First, it is important to note that the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a village, are available, except those records of portions thereof that fall within one or more of the grounds for denial enumerated in §87(2)(a) through (h) of the Freedom of Information Law.

Under the circumstances, I believe that the records in which you are interested are available under both the Freedom of Information Law and the Village Law.

Specifically, §87(2)(g) of the Freedom of Information Law states that government 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 inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In this instance, the tentative budget, for example, may be characterized as "intra-agency material". Nevertheless, I believe that its contents consist largely of "statistical or factual tabulations or data" which should be made available. In addition, §5-508 of the Village Law provides that the public should have the capacity to inspect a tentative budget.

Second, you indicated that you were permitted to inspect the records in question, but that you were not provided with an opportunity to have a copy made. In this regard, I direct your attention to §89(3) of the Freedom of Information Law, which states that an agency shall provide a copy of accessible records "[U]pon payment of, or offer to pay, the fee prescribed therefore..." Moreover, it was held nearly sixty years ago that the right to copy is concomitant with the right to inspect [see e.g., Re Becker, 200 AD 178 (1922)].

Third, the articles attached to your letter indicate that you unsuccessfully sought to raise questions during a meeting. It is noted in this regard that the Open Meetings Law provides the public with the opportunity to attend and listen to the deliberations and decisions that go into the making of public policy (§95). The Open Meetings Law is silent, however, with respect to public participation. Therefore, although a public body may permit public participation at meetings, it need not. Nevertheless, the editorial appearing in the Warwick Advertiser apparently indicates that at one meeting, some members of the public were permitted to speak while another was ruled "out of order". From my perspective, when a public body permits public participation, it must do so based upon reasonable rules. Further, in my view, if one is permitted to speak, any person should be permitted to speak.

Lastly, you asked whether the Open Meetings Law requires the Village to publish an agenda prior to a meeting. There is no law of which I am aware that requires the preparation of an agenda. Nevertheless, under the provisions of the Freedom of Information Law, I believe that an agenda should be available as soon as it exists. It is suggested that you review §99 of the Open Meetings Law concerning notice.

As requested, enclosed are copies of the Freedom of Information Law, regulations that govern its procedural implementation, the Open Meetings Law, and an explanatory pamphlet that deals with both laws.

I hope that 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: Village of Warwick
Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1524

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

May 14, 1980

Ms. Rose Dominguez
Secretary
Patients Committee for Human Rights
Services and Medical Treatment
c/o 432-A Fourth Avenue
Brooklyn, New York 11205

Dear Ms. Dominguez et al:

I have recently received your letter of April 20 regarding rights of access to medical records.

You have indicated that you have unsuccessfully requested a copy of all of your medical records from the Beth Israel Medical Center and its "MMTP Unit".

In my opinion, although you may have no direct right of access to your medical records, there may be an indirect means of gaining access to the records.

It is noted that the Freedom of Information Law is applicable only to records in possession of government. Since the Beth Israel Medical Center is a private hospital, the Freedom of Information Law cannot be used as a means of obtaining your medical records.

Nevertheless, §17 of the Public Health Law provides in 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. Either the physician or hospital incurring the expense of providing copies of x-rays, medical records and test records including all laboratory tests pursuant to the provision of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expenses."

In view of the foregoing, it appears that the subject of medical records does not have a direct right of access to the records. However, the records must be furnished by a hospital to an examining, consulting or treating physician of your choice. That second physician has the capacity to disclose the contents of medical records 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/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1525

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

May 14, 1980

Mrs. Gloria D. Watkins
[redacted]

Dear Mrs. Watkins:

I have recently received your letter of April 22 concerning your unsuccessful attempts to gain access to records in possession of the Roosevelt School District.

Although you wrote that you do not expect this office to "do" anything at this time, I would like to offer the following comments.

First, you indicated that there has been a substantial lapse of time between the date in which a request was made and the response to your request.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Second, 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 of records fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

While I do not recollect the exact nature of the information in which you are interested, you mentioned that it concerns payroll records. In this regard, two points should be made. Section 87(3)(b) of the Law requires that each agency maintain a payroll record consisting of the name, public office address, title and salary of all officers or employees of the agency. Consequently, to the extent that past payroll records exist, they are clearly available. Moreover, §87(2)(g)(i) provides that "statistical or factual tabulations or data" found within intra-agency materials are accessible.

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

Sincerly,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board
Gerry Moore

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1526

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

May 15, 1980

Mr. Ernest Merritt
79A3996
Great Meadow Correctional Facility
Box 51 D-2-8
Comstock, New York 12821

Dear Mr. Merritt:

I have recently received your letter of April 24.

As requested, I have enclosed copies of the New York Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the New York Law and which have the force and effect of law, an explanatory pamphlet regarding the New York Freedom of Information Law, and the federal Freedom of Information Act.

It is noted that the New York Freedom of Information Law is applicable to records in possession of agencies of state and local government in New York. The federal Freedom of Information Act is applicable to records in possession of federal agencies.

Both statutes are based upon a presumption of access. For example, the New York Freedom of Information Law states that all records 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).

You have asked why you cannot obtain information regarding standards, directives and records pertaining to you. In this regard, it is suggested that you review the enclosed pamphlet closely. With respect to standards and directives, it is likely that such records are available, for §87(2)(g) provides access to inter-agency and intra-agency materials consisting of instructions to staff

that affect the public and final agency policy or determinations. Rights of access to records pertaining to you are dependent in great measure upon the regulations promulgated by the Department of Correctional Services. It is suggested that you seek to review those regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1527
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 15, 1980

Mr. Richard R. Doremus
Superintendent of Schools
Shoreham - Wading River
Central School District
Shoreham, New York 11786

Dear Mr. Doremus:

I have recently received your letter of April 23 and thank you for your interest in complying with the Freedom of Information Law.

Your inquiry concerns the scope of the exception for inter-agency and intra-agency materials and the assumption by the Board of Education that a consultant's evaluation of an education program does not consist of statistical or factual tabulations or data and therefore is unavailable to the public.

If my interpretation of the facts that you presented is accurate, I disagree with the positions expressed in your letter.

First, it is important to note that the Freedom of Information Law defines "agency" in §86(3) of the Law to mean state and municipal governmental entities performing a governmental function. Consequently, I believe that "inter-agency" materials include those records transmitted among or between two or more agencies. Similarly, the term "intra-agency" is in my view applicable to records transmitted among or between officials of a single agency.

If, for example, a consultant performs a study for a school district on a contractual basis, I do not believe that either the consultant or his or her firm could be considered an agency under §86(3). Therefore, it is my opinion that records transmitted from a consultant to a school district, for instance, could not be considered as "inter-agency" materials. Stated differently, if records are transmitted from outside of government to government, the exception for inter-agency or intra-agency materials cannot in my view appropriately be cited.

The exception in question is found in §87(2)(g) of the Freedom of Information Law. It 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 inter-agency and intra-agency materials may be withheld, portions of such materials consisting of 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.

Lastly, the contentions that I have expressed are in my opinion bolstered by a letter sent to me by Assemblyman Mark Siegel, the sponsor of the legislation to amend the Freedom of Information Law in 1977. The bill was eventually signed into law and became effective on January 1, 1978. Please note that one of the examples of the intent of §87(2)(g) appears at the bottom of the first page of his letter, a copy of which is attached. In a discussion of an alteration in the bill to amend the Freedom of Information Law, Assemblyman Siegel wrote that the use of the term "advisory" might be cited to withhold records accessible under the original Freedom of Information Law. To overcome that problem, the initial version of the bill was amended. In addition, Assemblyman Siegel wrote that:

> "...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."

In sum, assuming that a consulting firm outside of government transmits an audit, a survey or an evaluation analogous to that which you have described, §87(2)(g) may not in my opinion appropriately be cited to deny access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1528

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

May 16, 1980

Mr. Rick Remsnyder
Reporter
The Daily Freeman
79-97 Jurley Avenue
Kingston, NY 12401

Dear Mr. Remsnyder:

As you are aware, I have received your letter of April 25 concerning a denial of access to records by Ulster County.

According to your letter, you unsuocessfully attempted to gain access to "a report of activities in the city of Kingston's reassessment program from 1977-79." The report was prepared by "an Ulster County employee of CETA's Independent Monitoring Unit", and was withheld on the ground that it was compiled for law enforcement purposes and that disclosure would interfere with a law enforcement investigation. Consequently, §87(2)(e)(i) of the Freedom of Information Law was cited as a basis for withholding.

Your question is whether the report was justifiably withheld under the Freedom of Information Law.

In my view, based upon extant case law, the ground for denial cited is likely insufficient.

The New York 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 among eight grounds for denial appearing in §87(2)(a) through (h) of the Law.

One of the grounds for denial is §87(2)(e) which states that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> 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 judicial interpretations of both the original Freedom of Information Law enacted in 1974 and the amended Freedom of Information Law effective January 1, 1978, it has been held that "law enforcement purposes" exception found in §88(7)(d) of the original Law and §87(2)(e) of the amended Law may be appropriately asserted only by criminal law enforcement agencies [see e.g., Young v. Town of Huntington, 388 NYS 2d 978 (1976), and Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)]. From my perspective, a component of a CETA program does not likely constitute a "criminal" law enforcement agency. If my contention is accurate, §87(2)(e) could not be cited as a basis for withholding the records in question.

It is noted, however, that there may be other grounds for denial that might in part be relevant to the report.

For example, §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." You mentioned in your letter that the report likely makes reference to interviews of former employees and supervisors. If disclosure of the identities of those individuals would result in an unwarranted invasion of personal privacy, the identifying details could be deleted.

Further, §87(2)(g) of the Law states that government in New York may withhold records of 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 inter-agency or intra-agency materials may be withheld, 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 materials must be made available. What remains to be denied in §87(2)(g) would be information reflective of opinion, advice or impression, for example. To reiterate, however, statistics and facts found within inter-agency and intra-agency materials are accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Dwyer
Francis Murray
Thomas Roach
Joanne Slappo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1529

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

May 16, 1980

[redacted]

Dear [redacted]:

I have received your letter of April 25 in which you wrote that your application for a pistol permit was denied and that you are interested in learning of the reasons for disapproval of your application.

It is noted at the outset that the provision of law governing licenses to carry, possess, repair and dispose of firearms is §400.00 of the Penal Law, a copy of which has been enclosed for your consideration. While subdivision (5) of the cited provision states that an approved application "shall be public record", there is no language in §400.00 pertaining to rights of access to records leading to the disapproval of the application. Consequently, I believe that rights of access to the records in question are governed by the Freedom of Information Law (see attached).

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 among eight enumerated grounds for denial appearing in §87(2)(a) through (h).

In all honesty, I am not familiar with the types of records that may be developed in the course of an investigation to grant or deny an application for a pistol permit. Nevertheless, it is possible that one or more grounds for denial might in part be appropriately asserted.

For example, §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". If in the course of an investigation, acquaintances were interviewed, for instance, their identities could likely be protected under the privacy provisions.

Section 87(2)(e) states that records compiled for law enforcement purposes may be withheld under certain circumstances. However, since there was no "criminal" investigation, I doubt that any of the bases for withholding found within §87(2)(e) could be cited with justification.

The last possible ground for denial is §87(2)(g), which provides that government in New York 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 inter-agency and 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. Stated differently, statistics and facts, instructions to staff that affect the public, and policy or determinations found in records are accessible, but statements of impression, opinion, recommendation or advice, for example, may justifiably be withheld.

Also enclosed for your consideration is an explanatory pamphlet 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-1530

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

May 16, 1980

Ms. Kathleen Kenny
[redacted]

Dear Ms. Kenny:

As you are aware, I have received your letter of April 25. Your inquiry concerns attempts to inspect and copy records in possession of Community Board No. 2.

You have indicated that officials of Community Board No. 2 are not likely to permit you to inspect records, but rather that copies of certain records would be forwarded to you. You also indicated to me orally that there is apparently no records access officer for Community Board No. 2, and that you have been instructed not to enter the offices of the Board.

Several comments should be made with respect to the foregoing.

First, §87(2) of the Freedom of Information Law provides that an applicant has the capacity to inspect and copy all records, except those records that fall within one or more of the grounds for denial enumerated in pragraphs (a) through (h) of the cited provision. Further, the right to inspect is important, because in many instances after reviewing records, an applicant may decide that he or she does not want photocopies or that only particular records should be photocopied.

Second, I direct your attention to the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and with which each agency must comply by adopting its own regulations no more restrictive than those developed by the Committee.

It is noted that §1401.2 of the regulations requires that each agency designate one or more records access officers for the purpose of responding to requests for records. Further, §89(4)(a) of the Freedom of Information Law and §1401.7 of the regulations require the designation of an appeals person or body.

And third, with respect to the capacity to inspect the records at the offices of Community Board No. 2, §1401.3 of the regulations requires that each agency "shall designate the locations where records shall be available for public inspection and copying". In addition, §1401.4(a) requires agencies to:

> "...accept requests for public access to records and produce records during all hours they are regularly open for business."

In order to assist Community Board No. 2 in becoming familiar with the requirements of the Freedom of Information Law, copies of the Law, regulations and model regulations will be forwarded to Community Board No. 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/kk

cc: John M. Mullins, District Manager

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-496
FOIL-AO-1531

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

May 19, 1980

Donald R. Moy, J.D.
Staff Attorney
Medical Society of the
State of New York
420 Lakeville Road
Lake Success, New York 11040

Dear Mr. Moy:

I have received your letter of April 25 which raises questions concerning the interpretation of both the Freedom of Information Law and the Open Meetings Law.

You have indicated that under both the Joint Commission on Accreditation of Hospitals and the regulations promulgated by the New York State Health Department, the medical staff of a hospital is required to "organize and adopt by-laws, rules and regulations to establish a framework of self-government." Your question is whether, if it can be assumed that a municipal hospital is subject to the Open Meetings Law and the Freedom of Information Law, whether the medical staff and committees of the medical staff organized in a municipal hospital would also be subject to the two statutes.

In my opinion, one aspect of your question can be answered with relative ease, while the other is more difficult to determine.

First, as you are aware, §86(3) of the Freedom of Information Law defines "agency" in relevant part 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..."

In view of the foregoing, a municipal hospital is in my view clearly an "agency". Further, the medical staffs of municipal hospitals perform a governmental function for an agency when they are engaged in the performance of their official duties.

It is also noted that §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..." Since records developed by a medical staff and its component committees are in possession of and are created for an "agency" i.e., a municipal hospital, they are in my view subject to rights of access granted by the Freedom of Information Law.

As you are aware, this is not to say that all records in possession of an agency are available. Although the Freedom of Information Law is based upon a presumption of access, records or portions thereof falling within one or more of the grounds for denial enumerated in §87(2)(a) through (h) may be withheld. Under the circumstances, I believe that several of the grounds for denial may be relevant to records in possession of a medical staff.

For example, there may be situations in which medical records might be specifically exempted from disclosure by statute and therefore deniable under §87(2)(a) of the Freedom of Information Law. Similarly, portions of records that identify patients would be deniable on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Perhaps most important, however, in terms of the capacity to deny would be §87(2)(g) concerning inter-agency and intra-agency materials. For instance, it is likely that statements of medical opinion, advice, recommendations or suggestions might justifiably be withheld under the cited provision.

Nevertheless, to reiterate, it is my opinion that the records in possession of a municipal hospital are subject to the Freedom of Information Law.

With respect to the Open Meetings Law, the focal point of your question concerns the scope of the definition of "public body" appearing in §97(2) of the Law. "Public body" is defined to include:

> "...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 sub-committee or other similar body of such public body."

It has generally been advised that meetings among staff are not subject to the Open Meetings Law. In most instances, "staff" may constitute a loosely defined group of employees of an agency that does not operate as an identifiable "entity".

It is not entirely clear from your letter or the attached regulations whether the medical staff of a hospital is readily identifiable as an "entity" that acts as a body. In my opinion, if the medical staff is not an "entity" that collectively as "one" or as a "body", it would not in my view constitute a "public body" subject to the Open Meetings Law. However, if the medical staff can be identified as an entity acting collectively as a single "voice" or body, I believe that it would be a public body subject to the Open Meetings Law.

It is noted that the absence of specific quorum requirements found in by-laws or rules, for example, does not necessarily remove an entity from the scope of the Open Meetings Law. Section 41 of the General Construction Law has for decades defines "quorum" 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 and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

In view of the foregoing, any group of public officers or persons charged with a public duty to be performed or exercised by them jointly as a body, can only act by means of a quorum, the majority of the total membership. Further, if it is assumed that the medical staff functions as a "body", the remaining requirements of the definition of "public body" appearing in §97(2) of the Open Meetings Law would be met, for it engages in the performance of a governmental function for a governing body, the Hospital Board of Directors or perhaps the Board of the New York City Health and Hospitals Corporation.

The committees to which reference is made in the regulations promulgated by the State Health Department would in my view clearly constitute public bodies subject to the Open Meetings Law.

In sum, since the records of a municipal hospital are subject to the Freedom of Information Law, the records of medical staff are in my opinion also subject to rights granted by that Law. In addition, the medical staff to which you made reference could in my opinion be considered a "public body" if it is an identifiable entity that acts collectively as a body for a municipal hospital.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1532

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

May 19, 1980

Mrs. Gloria D. Watkins
[redacted]

Dear Ms. Watkins:

As you are aware, I have received your letter of April 25 regarding your efforts to gain access to records in possession of the Roosevelt School District.

You have asked for information concerning changes in payroll dates in 1977, the names of persons who provided authorization to change a payroll date, the reasons for the change in the payroll date, records indicating the last date on which the pay period was changed to enable employees to receive twenty-five checks instead of twenty-six checks during the course of the year, any procedures regarding the practice of "holding back" clerical and custodial employees' first pay check and a memorandum given to clerical and custodial employees in September, 1977 regarding a change in the pay date from September 9 to September 16. In response to your inquiries, the records access officer for the School District wrote that the District, to the best of her knowledge, does not have copies of the information sought.

Several points should be made with respect to the foregoing.

First, should the information exist in the form of a record or records, it is in my view available. In each instance, the information would consist of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations that would be available under §87(2)(g) of the Freedom of Information Law.

Second, enclosed for your consideration is a copy of the regulations promulgated by the Committee. They govern the procedural aspects of the Law and have the force and effect of law. In addition, each agency, which includes a school district, is required to adopt its own regulations no more restrictive than those promulgated by the Committee.

I direct your attention to §1401.2 of the regulations, which concerns the designation and duties of a records access officer. The last portion of §1401.2 pertains to a failure to locate records. In such situations, both §89(3) of the Law and §1401.2(b)(6) of the regulations provide that the records access officer

> "[U]pon 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."

Consequently, it is suggested that you seek a certification in conjunction with the provision cited above.

Third, although the Freedom of Information Law does not require an agency to create records in response to a request, §86(4) of the Law defines "record" broadly 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.

Further, the introductory language of §87(2) of the Freedom of Information Law requires that all records in possession of an agency be made available, except to the extent that records "or portions" thereof fall within one or more grounds for denial that ensue. As such, it is clear that an agency is required to review all records sought to determine which portions, if any, may justifiably be withheld. It is also clear that a portion of a record reflective of the information sought should be made available.

And fourth, assuming that the information that you are seeking had once existed in the form of a record or records, it is important to point out that a school district cannot destroy or otherwise dispose of records except in accordance with §65-b of the Education Law. In brief, the cited provision states that a school district or other unit of local government cannot destroy records without the consent of the Commissioner of Education. To regularize the disposal of records, the State Education Department has developed numerous schedules for the retention and disposal of records. It is suggested that you might want to obtain and review the relevant retention schedules to determine whether the records in which you are interested are required to be preserved.

As requested, I will transmit a copy of this response, my earlier letter to you and the Freedom of Information Law and regulations to Dr. Byas, Superintendent of Schools.

I hope that 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. Byas
Gerry Moore

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1533

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

May 20, 1980

Mrs. Roy Steinmetz
[redacted]

Dear Mrs. Steinmetz:

Thank you for your interest in the Freedom of Information Law. Having discussed the Law briefly with you, I realize that your request for records in possession of the East Moriches Union Free School District has precipitated a series of correspondence between Harold Trabold, attorney for the School District, and myself. To a great extent, the correspondence, as well as our disagreements, have focused upon personnel records of employees of the School District in relation to the protection of privacy.

As requested, I have enclosed the correspondence from Mr. Trabold as well as my responses.

I would like to take this opportunity to attempt to clarify the positions taken to date in relation to Mr. Trabold's contentions.

First, it is clear that the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as a school district, are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

Second, the term "record" is broadly defined by §86(4) of the Law 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..." Consequently, all records in possession of the School District are subject to rights of access granted by the Law.

Third, there is no specific exception for what may be characterized as "personnel records". On the contrary, with respect to all records, including personnel records, an agency is obliged to review all records requested to determine which portions, if any, may justifiably be withheld on the basis of the eight grounds for denial.

Fourth, the Freedom of Information Law states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Although it is reiterated that subjective judgments must in some instances be made regarding a determination as to whether disclosure of particular records would result in an unwarranted invasion of personal privacy, there have been numerous judicial decisions regarding the extent to which the exception regarding privacy may be asserted regarding records identifying public employees. Due to the extant case law, I believe that there is sufficient direction to avoid the necessity of balancing interests or weighing degrees of invasions of privacy in conjunction with controversy in which you were involved.

In the context of your request, it is my opinion that records identifiable to teachers of the district, other than transcripts, that indicate approval for courses, the names of courses and the number of credits granted, and verification of satisfactory completion of the courses are available. This contention is based upon several judicial decisions cited in my earlier letters to Mr. Trabold in which it was held that disclosure of records identifiable to public employees that are relevant to the performance of public employees' official duties 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 2d 664 (Court of Claims, 1978)]. Consequently, due to case law, I do not believe that it is necessary to make a subjective judgment regarding privacy, for the interpretation of the Law on the subject provides clear direction. Further, a point made in an earlier opinion should be reiterated, i.e., that records characterized as "personnel records" or deposited in a "personnel file" are not automatically shielded from disclosure.

Fifth, §89(2)(b) of the Freedom of Information Law lists five examples of unwarranted invasions of personal privacy, the first of which includes the "disclosure of employment, medical or credit histories or personal references of applicants for employment". In my opinion, none of the quoted language could justifiably be cited to withhold the records in which you are interested. Moreover, none of the remaining four illustrations of unwarranted invasions of personal privacy are in my view relevant under the circumstances.

Sixth, I believe that it is important to point out that records cannot be classified as "confidential" or "privileged" without some stautory basis for so doing. In my view, a record may be considered confidential or privileged only when an act of the State Legislature or Congress specifically precludes disclosure of particular records.

And lastly, it appears that denials of access to date have been based to some extent upon Part 84 of the regulations promulgated by the Commissioner of Education, which is entitled "Access to School Employee Personnel Records". It is indicated at the beginning of the regulations in question that they are based upon the Education Law, §207. In brief, the regulations appear to restrict access to school employee personnel records to members of the boards of education and specify that examination of such records may be accomplished only at executive sessions of a school board (see §84.2). Moreover, §84.3 restricts the use of information obtained from employee personnel records to purposes regarding assisting board members in fulfilling their legal responsibilities. As stated in an earlier opinion, Part 84 in my opinion is void to the extent that abridges rights granted by either the Freedom of Information Law or the Open Meetings Law. It is noted further that §207 of the Education Law states that any regulations promulgated by the Commission or the Board of Regents must be "[S]ubject and in conformity to the constitution and laws of the State..." In my view, since the Freedom of Information Law grants rights of access to records 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] and since the Open Meetings Law permits the holding of executive sessions only for purposes specified in §100(1) of that statute, Part 84 is invalid to the extent that it conflicts with either

statute. I would like to point out, too, that I have discussed Part 84 with an attorney for the State Education Department, who agrees that Part 84 is not intended to provide a blanket exemption regarding disclosure of personnel 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: East Moriches School Board
Harold Trabold, Esq.

bcc: Leo Davis

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1534

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

May 20, 1980

Mr. Irving Silver
[redacted]

Dear Mr. Silver:

I have recently received your letter of April 24 concerning a request for records directed to Joseph Sittner of the Department of State in New York City.

I have contacted Mr. Sittner on your behalf in order to obtain additional information concerning your request. At this juncture, it appears that some information that Mr. Sittner has was given to him orally. Since the Freedom of Information Law provides access to certain existing records, and since some of the information that you are seeking does not exist in the form of a "record", there are no records to be provided [see definition of "record", §86(4), Freedom of Information Law]. However, written records regarding the controversy will, according to Mr. Sittner, be made available to you.

Mr. Sittner has also informed me that the situation that you described is still in the process of being investigated. The outcome of the investigation is at this point unknown.

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: Joseph Sittner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1535

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

May 20, 1980

Mr. Forrest W. Holroyd
[redacted]

Dear Mr. Holroyd:

As you are aware, your letter of April 10 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.

In brief, your inquiry concerns your right to inspect files in possession of the New York State Department of Motor Vehicles that pertain to you. Your question is whether any of the information contained within the files might justifiably be withheld under the Freedom of Information Law.

To the best of my knowledge, as a matter of course, the Department of Motor Vehicles, upon payment of a fee, searches and makes available an abstract of an individual's driving record to the individual who is the subject of the record. Further, I believe that the information contained within the files constitutes a purely factual rendition of events that have transpired, such as accidents, violations or infractions, for example.

Further, as a general rule, 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 thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached).

It is noted, too, that the grounds for denial are based largely upon the effects of disclosure. For instance, §87(2)(e) of the Law states that an agency may withhold records compiled for law enforcement purposes under certain

specified circumstances. In this instance, if the records make reference to events that occurred nearly ten years ago, it is difficult to envision the manner in which any of the grounds for denial could justifiably be cited.

Enclosed for your consideration are copies of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and upon which agency's regulations implementing the Freedom of Information Law must be based and an explanatory pamphlet on the subject. The pamphlet contains sample letters of request and appeal 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-1536

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

May 21, 1980

Mr. James F. Hayes
[redacted]

Dear Mr. Hayes:

I have recently received your letter of April 26 regarding the chronology of events surrounding a request for records sent to the Department of Motor Vehicles under the Freedom of Information Law. Having reviewed the correspondence attached to your letter and having contacted a representative of the Office of Counsel at the Department of Motor Vehicles, I would like to offer the following comments.

As you are likely aware, each agency subject to the Freedom of Information Law is required to compile a "subject matter list" pursuant to §87(3)(c) of the Law. I was informed that the Department of Motor Vehicles does have a voluminous subject matter list and that it is in the process of being updated. Further, although the existing list is lengthy, copies can be made available upon payment of the requisite fees.

With respect to rules and regulations, the problem is not that the rules and regulations promulgated by the Department are not available, but rather that the volumes containing the rules are copyrighted and, consequently, cannot be reproduced as a whole. The regulations of the Department encompass hundreds of pages and may be inspected by reviewing the New York Code of Rules and Regulations, which is found in many law libraries. In addition, I was advised that copies of particular regulations are available free of charge. Consequently, if you are interested in specific regulations, it is suggested that you contact the Department once again and attempt to identify those portions of the regulations that you are seeking.

Lastly, I agree with the intimation made in your letter that no fee may be assessed for appealing a denial of access under the Freedom of Information Law. Apparently, a form developed by the Department is used to accomplish several purposes. Nevertheless, it is clear under §160.7 of the Department's regulations that no fee may be assessed for appealing a denial of access to Department records under the Freedom of Information Law. As you indicated, the fee to which reference was made on the form pertains to an appeal of an adverse determination regarding a traffic conviction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joyce Wrenn, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1537

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

May 21, 1980

Mr. Nathan Stambler
[redacted]

Dear Mr. Stambler:

I have received your letter of May 1 and thank you for your kind words.

As requested, enclosed is a copy of the regulations promulgated by the Committee. The regulations govern the procedural aspects of the Freedom of Information Law, and each agency in the state is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee.

You have asked whether there is any state agency that has "the power to compel a petty bureaucrat to obey the Freedom of Information Law without a resort to the Courts."

In this regard, there is no agency that has the authority to require government to comply with the Freedom of Information Law.

Nevertheless, as you are aware, the Committee prepares advisory opinions regarding the interpretation of the Freedom of Information Law at the request of any person. Although the opinions are not binding, they have in many instances been cited by the courts as the basis for judicial determinations. Consequently, I like to think that an advisory opinion rendered by this office often has the effect of persuading an agency to comply with the Law.

Moreover, I would like to point out that the Senate recently passed a bill that is now before the Assembly which if enacted would enable a court to award reasonable attorney fees payable by an agency to a person who substantially prevails in a proceeding brought under the Freedom of Information Law. I am hopeful that the legislation will be enacted. If it is signed into law, I believe that it would serve to deter unreasonable denials of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1538

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

May 21, 1980

Mr. Martin F. Horn
Assistant to the Commissioner
Department of Correctional Services
Albany, New York 12226

Dear Mr. Horn:

I have received your letter of May 19 and thank you for your interest in complying with the Freedom of Information Law.

According to your letter, Prisoners' Legal Services has requested that the Department of Correctional Services provide "a listing of the names and job titles of all employees at Coxsackie Correctional Facility". However, Counsel to the Department has suggested that a reason for requesting the information must be advanced and that disclosure of the information in question would result in an unwarranted invasion of personal privacy.

I disagree with the contentions expressed by Counsel and believe that the information sought is accessible in great measure, if not in toto.

First, and perhaps most important under the circumstances, is §87(3)(b) of the Freedom of Information Law, which states 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..."

The language quoted above represents one of the few instances in the Freedom of Information Law in which an agency is required to create a record. Consequently, a record reflective of the names, public office addresses, titles, and salaries of all employees of an agency, including the Department of Correctional Services and its components, must be compiled and should exist on an ongoing basis.

Second, the Freedom of Information Law is based upon a presumption of access. All records of an agency are available, except to the extent that records or portions of records fall within one or more among eight grounds for denial appearing in §87(2)(a) through (h) of the Law.

From my perspective, there is but one ground for denial that might conceivably be cited to withhold portions of a payroll listing.

Specifically, §87(2)(f) provides that an agency may withhold records or portions thereof which "if disclosed would endanger the life or safety of any person". As a general matter, it is unlikely that the disclosure of the name and title of a public employee could result in endangerment. However, in the rare situation in which an employee may be hired as an "undercover" agent, for example, it is possible that disclosure of his or her identity might result in endangering his or her safety. Even in that type of situation, since §87(2) enables an agency to withhold "portions" of records, the Department could in my view delete only those portions of a record which could result in endangerment. For instance, all identifying details regarding an agent might be deleted, while the remainder of the record would be accessible.

Third, with respect to privacy, it is true that §87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". However, payroll information had been found by the courts to be available long before the enactment of the Freedom of Information Law. Further, there have been interpretations of the Freedom of Information Law indicating that payroll information is clearly available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976), Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, as a general rule, 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 available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy

[Gannett supra; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection." [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

And finally, with respect to the interest of an applicant, one of the basic principles of the Freedom of Information Law is that accessible records should be made equally available to any person, regardless of status or interest [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. In short, the only question that may be raised by an agency when it receives a request is whether the records sought fall in whole or in part within one or more of the grounds 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: Patrick Fish
Sally Zanger

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1539

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

May 21, 1980

Mr. Timothy Dodson
Editor
Tri-States Publishing Company
84-88 Fowler Street
Port Jervis, New York 12771

Dear Mr. Dodson:

I have received both of your letters as well as the materials attached to them. Your inquiry deals with a denial of access to records by the City School District of the City of Port Jervis as well as the procedural implementation of the Freedom of Information Law by the District.

In brief, you have sought request forms, vouchers, receipts and other related materials regarding a trip made by the high school football coaches to Atlantic City for the purpose of attending a football clinic. According to a newspaper article, the records access officer of the District denied access on the basis that the records in question constitute intra-agency materials and expressed his belief that it is the responsibility of the District to "protect the staff from public scrutiny in terms of inspection of specific receipts". Most recently, the Superintendent of Schools upheld the initial denial on appeal by offering a brief statement of support of the decision rendered by Mr. Zelno, the records access officer.

In my opinion, the records in which you are interested are clearly available.

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 of records fall within one or more enumerated grounds for denial appearing in §87(2)(a) through (h) of the Law.

The correspondence attached to your letter indicates that School District officials have withheld the records on the basis of two grounds for denial, one of which was stated directly and the other of which was offered by implication.

With respect to the stated ground for denial, §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 emphasized that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, 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, I believe that request forms, vouchers, receipts and similar information all constitute "factual data" which is available. Therefore, although the materials sought might be characterized as "intra-agency" in nature, the contents of the records are in my view accessible. I would like to note my disagreement with Mr. Venezia's comment, as expressed in a newspaper article, that the public could have access to the "statistical end result". If that were the case, only final determinations would be available. Nevertheless, all statistical or factual tabulations or data found within inter-agency and intra-agency materials are available. This point is in my view bolstered by the statement of Legislative Declaration in §84 of the Freedom of Information Law which states in part that "[T]he 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." As such, it is clear

that the Legislature intended that documents leading to determinations be made available, as well as those reflective of determinations.

The ground for denial to which tacit reference was made 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". It is reiterated that the news article stated that Mr. Zelno felt that it is the District's responsibility to "protect the staff from public scrutiny in terms of inspection of specific receipts." In this regard, it is noted that the trend of judicial decisions regarding the privacy of public employees indicates that public employees enjoy a lesser right to privacy than the public generally. In terms of the Freedom of Information Law, the Committee has advised and the courts have upheld the notion that records identifying public employees that are relevant to the performance of their official duties 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 2d 664 (Court of Claims, 1978)]. Under the circumstances, if the taxpayers money was spent by the District for football coaches to attend a clinic in the performance of their official duties, the records relating to the trip and the expenditures are in my opinion available, even though they may identify particular employees.

Lastly, with respect to rights of access, §89(5) of the Freedom of Information Law states that nothing in the Freedom of Information Law shall be construed to limit or abridge existing rights of access granted by other laws or by means of judicial determinations. In this regard, I would like to point out that bills, vouchers, books of account and similar records have long been accessible under both §51 of the General Municipal Law and §2116 of the Education Law.

At this juncture, I would like to make reference to the procedural requirements of the Law. Section 89(4)(a) of the Law and §1401.7 of the regulations promulgated by the Committee, which have the force and effect of law, require both applicants for records and agency officials to follow a specific procedure. In this instance, I do not believe that an inquiry from the floor made during a meeting by a reporter could be considered as an appeal. As indicated

in the Committee's regulations, an appeal must be made in writing and directed to a designated appeals officer. Further, upon receipt of an appeal, the appeals officer or body must "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the records sought". In my view, the determination rendered on appeal dated May 7 rendered by the Superintendent did not fully explain the reasons for further denial, but merely asserted that he agreed with the initial denial. Consequently, the response on appeal was insufficient.

And finally, as requested, I have enclosed information regarding legislation that has passed the Senate and is now before the Assembly. In brief, if enacted, the legislation would enable a court to award reasonable attorney fees payable by an agency to a person who substantially prevails in a proceeding initiated 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/kk

cc: School Board
Arthur J. Venezia

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-497
FOIL-AO-1540

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

May 21, 1980

Ms. Louis Andress
[redacted]

Dear Ms. Andress:

As you are aware, I have received your most recent inquiry. I apologize for the delay in response.

Your first question is whether the opinion rendered in King v. Ambellan, 173 NYS 2d 98 (1958), has been overruled. In brief, the King case dealt with a situation in which a member of a school board sought information regarding particular students and was granted access.

In my view, statutes passed since 1958 make the result in the King decision questionable at best. Specifically, Congress has enacted the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment" (20 USC §1232g). The Buckley Amendment provides in a nutshell that educational records identifiable to particular students are confidential to all but the parents of the students. The Buckley Amendment also provides, however, that there may be situations in which prior consent by the parent is not required. Section 99.31 of the regulations promulgated by what was formerly the Department of Health, Education and Welfare provides that prior consent is not necessary if the disclosure is "to other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests." Having discussed the issue of prior consent with officials of the Department of Health, Education and Welfare, I have been informed that a school district, for example, may by means of policy designate particular district employees or officers who may inspect records based upon a legiti-

mate educational need. Consequently, if the District has established a policy pursuant to the Buckley Amendment in which District officials are identified for the purpose of inspecting education records without prior consent of the parents, you whould be able to determine which officials may inspect such records. If no such policy has been adopted, I believe that parental consent would be required prior to disclosure.

The second question pertains to dropout rates of public schools. You have asked whether there are any regulations promulgated by the Commissioner of Education on the subject and have indicated further that the Wappingers Central School District has advised that dropout rates are "not a record of the agency." In this regard, I have contacted the State Education Department on your behalf. I have learned that the State Education Department does indeed maintain information regarding dropout rates in public schools. To obtain the information in question relative to the Wappingers Central School District, it is suggested that you write to Dr. John Stiglmeier, State Education Department, Washington Avenue, Albany, New York, 12234. Dr. Stiglmeier can be reached by telephone at (518) 474-8716. Dr. Stiglmeier informed me that dropout rate information is provided as a matter of course on a daily basis.

Third, with respect to the request for teachers' year end reports, the records were withheld by Dr. Sturgis "based upon the fact that these records are deniable under the statute." You have contended that the rationale for the denial on appeal is insufficient. I agree with your contention, for §89(4)(a) requires that the person designated to determine appeals shall "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." In my view, a mere assertion that records are deniable is insufficient. It is noted as well that the state's highest court has found that an agency cannot merely assert a ground for denial and prevail. On the contrary, the agency must prove to a court that the harmful effects of disclosure described in one or more of the grounds for denial appearing in §87(2)(a) through (h) would in fact arise by means of disclosure.

Lastly, you have raised a question regarding the relationship between the Freedom of Information Law and the Open Meetings Law. In this regard, the Freedom of Information Law deals with access to records; the Open Meetings Law pertains to meetings of public bodies. There are many relationships between the two in terms of philosophy. In terms of specific connections, the only ones that come to mind concern minutes and voting records, which must be compiled under the Open Meetings Law and which must be made available under the Freedom of Information Law.

It is important to point out that there may be situations in which a discussion may properly be held during an executive session, but in which records related to the discussion might be accessible under the Freedom of Information Law. Similarly, there may be situations in which a subject might be required to be discussed during an open meeting, but in which records or portions of records relating to the discussion might justifiably be withheld under the Freedom of Information Law.

Enclosed for your consideration is a copy of the Committee's most recent annual report to the Legislature on the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education
Dr. Sturgis

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1541

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

May 21, 1980

Environmental Association
of Fort Johnson
P.O. Box 522
Amsterdam, New York 12010

Dear Members of the Environmental Association of Fort Johnson:

I have received your letter of April 30 as well as the materials appended to it. Although addressed to several persons, your letter is essentially an appeal directed to the Department of Environmental Conservation under the Freedom of Information Law.

It is noted at the outset that I have discussed your inquiry with a representative of the Office of Counsel of the Department of Environmental Conservation and have been informed that a determination on appeal will be rendered shortly.

The focal point of your request and the denial is §87(2)(g) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is important to note that the provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such materials must be made available.

Consequently, since all of the materials sought consist of inter-agency or intra-agency materials, I believe that the Department of Environmental Conservation is required to review the records sought in their entirety to determine which portions must justifiably be 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

cc: Richard Persico

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1542

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

May 22, 1980

Ms. Carol Wilczynski
The Palladium Times
211 Oneida Street
Fulton, NY 13069

Dear Ms. Wilczynski:

I have received your letter of May 5 in which you requested an opinion regarding a policy proposed by the Board of Education of the Mexico Academy and Central School District.

In my opinion, the proposed policy statement is unnecessary and may lead to violations of the Freedom of Information Law. I would like to offer the following comments.

First, the introductory language refers to a desire to "protect the District from unwarranted disclosure of information apparently not entitled to be released under Section 87 of the Public Officers Law". In this regard, it is important to note that the Freedom of Information Law is permissive. While §87(2) of the Law provides that certain categories of records may be withheld, there is nothing in the Law that requires that records falling within the grounds for denial must be withheld.

The only exception to that general rule is found in §87(2)(a) concerning records that are specifically exempted from disclosure by state or federal statute. In the context of a school district, the most important statutory exemption involves student records. Specifically, the federal Family Educational Rights and Privacy Act (20 USC §1232g) provides in brief that education records identifiable to particular students cannot be disclosed to third parties without the consent of the parents of the students.

Again, however, in most instances, the District would not be required to withhold records, but might have the capacity to do so pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law.

Second, reference is made to the "authority to classify information as not subject to release by reason of its apparent inclusion within the areas specified in Section 87(2) of such law..." In my view, classification of information as "confidential" conflicts with the general scheme of the Freedom of Information Law and I believe that the Law was intended to prevent just such actions by government in New York. Perhaps more important, however, is the specific language of the exceptions to rights of access. In reviewing the eight grounds for denial, it is clear that the majority are based upon potentially harmful effects of disclosure. In most of the exceptions, one can find an operative verb which describes a harmful effect of disclosure. Further, from my perspective, one of the strengths of the Law is that records that may justifiably be withheld today may become available tomorrow due to the language of the exceptions. For example, §87(2)(c) of the Law states that an agency may withhold records which if disclosed would "impair" collective bargaining negotiations. If a school district is engaged in collective bargaining negotiations now and disclosure would impair the negotiations, records may be withheld. However, when an agreement has been reached, the harmful effects of disclosure, i.e., the impairment of the collective bargaining process, disappears. As such, I believe that the classification of records as confidential or as deniable would likely lead to violations of the Freedom of Information Law.

Third, particular officials would be delegated to determine whether records should be classified as deniable. In my opinion, if that aspect of the proposed policy is carried out, it would effectively nullify the ability to appeal an initial denial of access as required by §89(4) of the Freedom of Information Law and §1401.7 of the regulations promulgated by the Committee, which have the force of law (see attached). In a similar vein, it appears that a majority vote of the Board of Education would be required to vote to release information classified as deniable. Again, I believe that such a procedure would nullify the appeals process envisioned by the Freedom of Information Law.

The last sentence of the proposed policy would prohibit Board members from releasing "deniable" information, without the consent of the majority of the Board of Education. Again, there may be situations in which a record might today be deniable and tomorrow accessible. In such a situation, I do not see how the restrictions sought in the last sentence of the proposed policy could be valid.

Lastly, it appears that the proposed policy represents an attempt to legislate beyond the scope of the Freedom of Information Law. In this regard, it is noted that a unit of local government, such as a school district, cannot adopt a policy, rule or regulation that conflicts with a statute passed by the State Legislature.

In order to assist the District and its Board in becoming familiar with their responsibilities under the Freedom of Information Law, copies of this letter as well as the Law, regulations, model regulations and an explanatory pamphlet will be sent to the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1543

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

May 22, 1980

Miss Helen Schulz
[redacted]

Dear Miss Schulz:

I have received your postcard in which you raised questions regarding rights of access to records.

As requested, enclosed are copies of the New York Freedom of Information Law, regulations that govern its procedural implementation and an explanatory pamphlet that may be particularly useful to you.

First, it is important to note that when a request is made, government is not required to stop its work and respond immediately. Nevertheless, there are procedures that must be followed concerning time limits for response with which an agency must comply.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Within the prescribed time limits, if copies of records are requested, they must be made available upon payment of the requisite fees as indicated by §89(3) of the Law.

If an agency official maintains that there are no records in existence analogous to information that you describe, you may request a certification in writing to that effect. In this regard, I direct your attention to §1401.2(b)(6) of the regulations, which states that an agency records access officer must upon request 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."

I hope that 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-1544

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

May 22, 1980

Dr. Isaac M. Traube
[redacted]

Dear Dr. Traube:

I have recently received your letter of May 5 concerning a request for information from the U.S. Department of Agriculture.

Please be advised that the Committee on Public Access to Records is responsible for giving advice only with respect to the New York Freedom of Information Law. The New York Law pertains to records in possession of agencies of government in New York State. Relevant under the circumstances, however, is the federal Freedom of Information Act, a copy of which has been enclosed for your consideration. That Act governs access to records in possession of an agency of the federal government.

I would like to point out that both the New York Freedom of Information Law and the federal Freedom of Information Act are based upon a presumption of access. In brief, all records are available, unless records requested fall within one or more grounds for denial.

However, it is also important to note that neither the federal Act nor the New York Law requires that an agency create a record in response to a request.

Your other question regarding the dismissal of an employee is beyond the scope of my expertise.

It is suggested that you might want to contact a federal civil rights agency or similar office. Perhaps you could locate the appropriate agency by contacting the Federal Government Information Center, which has a toll free number identified in your phone book under "U.S. Government".

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1545

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

May 22, 1980

Mr. Richard J. Agnusich
[redacted]

Dear Mr. Agnusich:

I have recently received your letter of May 2 concerning access to medical records pertaining to you in possession of the New York City Police Department.

In brief, you have indicated that you consider yourself to have been "forced" to submit to a medical examination by the Police Department. Further, after having been examined, you were refused a copy of the medical report.

I would like to offer the following comments.

First, assuming that the physician was employed by New York City, the report in question would constitute "intra-agency" material. If that is the case, the most relevant provision of the Freedom of Information Law would be §87(2)(g), which provides that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations should be made available.

In the context of the medical report, I believe that laboratory results and similar factual information should be available. However, advice, opinion, or recommendations, for example, would likely be deniable.

It is also noted that you may be able to gain indirect access to your medical folder. I have enclosed a copy of §17 of the Public Health Law, which states essentially that a patient, for example, has no direct right of access to medical records, but that a physician or hospital requesting medical records on behalf of a patient from another physician or hospital may gain access to the records. Consequently, a second doctor of your choice may have the capacity to gain access to your medical records from the doctor who conducted the examination.

I hope that 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: Rosemary Carroll

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1546

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

May 27, 1980

Mr. Arthur H. Samuelson
[redacted]

Dear Mr. Samuelson:

As you are aware, I have received your letter of May 7 in which you described a request for records compiled over a period of decades by the State Police regarding particular summer camps.

Since you wrote the letter, we have had numerous discussions and I would like to summarize the status of your request and provide advice regarding rights of access granted by the Freedom of Information Law.

First, it appears that three state agencies are or have been involved in your request for records. They include the Division of State Police, the Office of General Services and the State Archives, which is a component of the State Education Department.

At this juncture, the capacity to grant or deny access to the records in question in my view rests solely with the legal custodian of the records, the State Archives.

Although the records may have been compiled and developed by the Division of State Police, a lengthy process regarding the disposition of the records initiated in conjunction with §186 of the State Finance Law has culminated in a transfer of legal custody of the records to the State Archives. Further, while the records are in the physical possession of the Office of General Services at its records retention center, that office is merely a repository or storehouse for records.

I do not believe that the Office of General Services has the capacity to disclose or withhold records stored at the retention center. On the contrary, the authority rests solely with the agency that may be considered the legal custodian, on whose behalf the Office of General Services stores records.

Second, the records sought are in my opinion subject to the New York Freedom of Information Law in all respects. It is noted that §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..."

Moreover, the Law is based upon a presumption of access; all records of an agency 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. Although there have been discussions regarding the removal of the records in which you are interested, among others, from public scrutiny for a period of years. I believe that such an agreement would be void to the extent that it would abridge or in any way conflict with rights granted by the Freedom of Information Law.

In sum, I believe that your request should be directed to and can be answered only by the State Archives. As you are aware, I have contacted the State Archivist and his staff on your behalf.

Third, with respect to rights of access, there are but two grounds for denial that could in my view conceivably be cited to withhold the records or portions of the records sought.

Specifically, §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."

Since none of the records pertain to ongoing investigations, I believe that it is unlikely that any of the bases for withholding stated in §87(2)(e) could justifiably be cited to deny access.

The other exception to rights of access that may be relevant is §87(2)(b) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Without having seen the records, I cannot provide clear direction with respect to the breadth of the capacity to withhold. Nevertheless, I have been led to believe that many of the records consist of published documents that were widely disclosed to the public at large when the events to which the articles relate occurred. I do not see how a denial with respect to those records could be justified. In other instances, additional records may identify particular individuals. In those cases, since the Law permits an agency to withhold records "or portions thereof", I believe that only identifying details could be deleted. The remainder of the records should in my opinion be made available.

It is also important to emphasize that the Freedom of Information Law is permissive. While an agency may withhold records that fall within one or more of the grounds for denial, there is no requirement that an agency must withhold those records. In this case, I believe that the records have been preserved due to their historical value. As such, it would appear that the privacy considerations related to such records might be minimized.

I hope that I have been 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: Dr. Edward Weldon

bcc: Rena Button

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1547

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

May 29, 1980

Ms. Marilyn Youngs
[redacted]

Dear Ms. Youngs:

As you are aware, I have received your letter regarding rights of access to vouchers and related records apparently in possession of Cattaraugus County.

In response to your request, the records access officer for Cattaraugus County wrote that your request was denied on the grounds that the information in question could not be considered a "record" as defined in "Public Affairs Law", §86, and that even if the voucher may be considered a "record", disclosure would result in "an invasion of privacy". You have asked for my assistance in gaining access to the information on your behalf.

In this regard, it is noted at the outset that the Committee has no authority to compel compliance with the Freedom of Information Law. On the contrary, the authority of the Committee is restricted to providing advice either orally or in writing.

With respect to rights of access, I have no knowledge of whether records reflective of the information that you are seeking do in fact exist. However, it is important to point out 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 or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the definition quoted above, if Cattaraugus County has information analogous to that which you have requested, in my view, such information would constitute a "record" subject to rights of access.

Second, it is true that disclosure of a voucher that identifies a particular individual might if disclosed result in "an invasion of privacy" as the records access officer indicated in her letter. Nevertheless, §87(2)(b) and 89(2)(b) of the Freedom of Information Law permit an agency to withhold records or portions thereof when disclosure would result in an "unwarranted" invasion of personal privacy. There are many instances in which disclosure of records results in an invasion of privacy. However, it is clear that the Law envisions the withholding of records when invasions of personal privacy would be severe or "unwarranted".

Further, in my opinion, vouchers in possession of a municipality, such as a county, have long been and generally continue to be accessible to the public. As a matter of fact, I believe that I indicated in the past that §51 of the General Municipal Law has for decades provided public access to "vouchers" and similar documents in possession of counties, cities, towns, villages, school districts and their components.

I hope that 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: Sharon C. Fellows

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1548

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

May 29, 1980

Robert H. Cohen, Esq.
724 Midtown Plaza
Syracuse, New York 13210

Dear Mr. Cohen:

I have received your letter of May 22 and appreciate your interest in compliance with the Freedom of Information Law.

According to your letter, the Board that you represent, a regional planning board, is involved in a proposal to "establish and operate an industrial waste exchange clearinghouse." You have written further that:

> "[D]ata would be compiled from voluntary subscribers and coded to mitigate against inadvertant disclosures. Inquiries as to availability and nature of waste materials would be channeled directly to the source by agency staff. Assuming that the records created from this activity were not subject to public access under the Freedom of Information Law because of an exempt status, ie. trade secret, would such status also preclude other agencies, ie. local, state or federal, from having a right to access?"

I would like to offer several points with respect to your inquiry.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. In short, all records of an agency, such as the Board, 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.

Second, as you indicated, the ground for denial that would most likely be applicable with respect to the information in question is §87(2)(d), which states 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..."

I believe that it is important to point out that the exception quoted above is flexible. This point is expressed by means of the standard found within §87(2)(d); i.e., that records may be withheld when disclosure of trade secrets would result in "substantial injury to the competitive position" of the corporation that submitted information. In terms of the flexibility of the standard, rapidly advancing technology may make today's trade secret tomorrow's general knowledge. When such a situation occurs, the harmful effect of disclosure essentially disappears.

Third, the Freedom of Information Law is permissive. While an agency may withhold records falling within one or more of the grounds for denial, there is no requirement that such records must be withheld. In the case of records reflective of industrial waste, there may be situations in which an agency might want to disclose to another agency, for instance, in the public interest, notwithstanding a finding that information constitutes a trade secret.

Fourth, in my view, a promise of confidentiality could not effectively be made. From my perspective, as well as that of the courts, the only bases for denial in the Freedom of Information Law are those appearing in §87(2)(a) through (h) [see e.g., Doolan v. BOCES, 2nd Supervisory District of Suffolk County, 48 NY 2d 341 (1979)]. Consequently, an agreement to restrict disclosure based upon a promise of confidentiality would in my opinion be invalid to the extent that it abridges rights granted by a statute such as the Freedom of Information Law.

And fifth, state or municipal agencies requesting information from another agency, such as the Board that you represent, have no greater rights of access than the public generally. Nevertheless, as we discussed, records that might be characterized as deniable are in some instances disclosed to other agencies based upon the notion that records are

requested by an agency in order that the agency can perform its official duties. Stated differently, if a second agency has a "need to know" to perform its duties, the agency in possession of the information may disclose, for there is no restriction upon the capacity to disclose. As such, in a technical sense, I do not believe that an agency in possession of deniable information would be required to disclose that information to another agency under the Freedom of Information Law. Nevertheless, to reiterate, there may be situations in which it might be in the public interest 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

Robert J. Freeman
Executive Director

RJF/kk

cc: Carmen Melero

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1549

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

May 30, 1980

Mr. Louis J. Fascia
Louis J. Fascia Floor
Covering Co.
502 Broadway
Mechanicville, New York 12118

Dear Mr. Fascia:

I have received your letter of May 27 in which you expressed a contention that you were improperly denied access to records by the Records Access Officer of the City of Mechanicville.

You have indicated that you requested requisition forms, vouchers and similar information regarding a carpet installed at City Hall.

In this regard, I would like to point out that the Mayor has contacted me with respect to your request. He has informed me that the records in which you are interested have not yet come into the possession of the City of Mechanicville. Since the City does not have the records that you are seeking, there are no records to provide as yet. Consequently, I do not believe that the response given by the Records Access Office could be considered a denial.

Further, the Mayor also informed me that when the records that you are seeking come into the possession of the City of Mechanicville, they will be made available. In my opinion, his response was entirely consistent 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

Robert J. Freeman
Executive Director

RJF/kk

cc: Mayor Fascia

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1550

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

June 2, 1980

Ms. Linda M. Nelson
Assistant General Counsel
District Council 37
140 Park Place
New York, NY 10007

Dear Ms. Nelson:

I have received your letter of May 28 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence appended to it, District Council 37 has requested computer tapes from the New York City Board of Elections "containing the list of all registered voters". In response, it was indicated that the Board of Elections would charge one cent ($.01) per name for the computer tapes. You have contended that the fee of one cent per name exceeds the actual cost of reproduction and constitutes a constructive denial of access.

I agree with your contentions.

First, it is important to note that the Freedom of Information Law defines "record" expansively in §86(4) to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the definition, it is clear that computer tapes and discs constitute "records" subject to rights of access granted by the Freedom of Information Law.

Second, the provisions of the Freedom of Information Law read in conjunction with various sections of the Election Law clearly indicate that voter registration lists are available for public inspection and copying [see e.g., Election Law, §3-220 and 5-602].

Third, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may assess a fee of up to "twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other records, except when a different fee is otherwise prescribed by law".

Under the circumstances and based upon the means by which the one cent fee has been considered by the Board of Elections, there is no other provision of law regarding the cost that may be assessed for reproduction of the information contained within the registration list. Consequently, I believe that the fee assessed by the Board of Elections must be based upon "the actual cost" of reproduction.

And fourth, my opinion is in my view consistent with the direction provided by subdivision (2) of §5-602 of the Election Law. The cited provision requires that voter registration lists be published and that copies "shall be sold at a charge not exceeding the cost of publication". I believe that the cited provision generally makes reference to printed pamphlets. In this case, the information is stored on a computer tape. Nevertheless, I believe that the direction is clear that a Board of Elections must charge for reproducing voter registration lists on the basis of the actual cost of reproduction.

For the reasons expressed above, I do not believe that the Board of Elections can assess a fee of one cent per name. On the contrary, the fee for reproducing the computer tapes containing the voter registration information that you are seeking must in my opinion be based upon 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: Frank X. Gargiulo
William J. Cro

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1551

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

June 2, 1980

Mr. Claude Phillips
[redacted]

Dear Mr. Phillips:

As you are aware, I have received your letter of May 5 in which you requested an advisory opinion under the Freedom of Information Law.

In brief, your letter and the correspondence attached to it describe what you consider to be problems relative to responses to requests made under the Freedom of Information Law by the City of Troy. You have contended that Mr. Brier, the Records Access Officer, has disregarded the time limits for response required by the Freedom of Information Law and that no grounds for denial have been offered with respect to information that you are seeking which has not yet been produced.

It is important to note at the outset that the Freedom of Information Law grants access to records. It does not require agencies to create records in response to a request for information. Consequently, if the information in which you are interested does not exist within a record or records maintained by the City of Troy, the City has no obligation to create a record on your behalf.

It is also noted, however, 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 or the state legislature, in any physical form whatsoever..."

As such, if the City of Troy maintains possession of the information in which you are interested, it is likely that the information found within one or more "records".

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of the receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In terms of the substance of your request, assuming that the information that you are seeking exists in the form of a record or records, I believe that all of it should be available. Vouchers, contracts, resolutions and budgetary materials are all generally accessible.

Although some of the activities to which you made reference may have transpired prior to the passage of the Open Meetings Law, the Freedom of Information Law since 1974 has required that public bodies create a voting record identifiable to each member in every instance in which a vote is taken [see current Freedom of Information Law, §87(3)(a)]. Therefore, if any votes were taken relevant to the subjects that you have described, voting records indicating the manner in which each member voted must be made available.

With respect to the burden upon the City of Troy in locating the information in which you are interested, a recent decision dealt with an argument that it is difficult to find information within the requisite time limits. However, in Matter of United Federation of Teachers v. New York City Health and Hospitals Corp. (Sup. Ct., New York Cty., NYLJ, May 28, 1980), the court found that:

> "...without merit is the argument that it would be difficult for HHC, with its depleted and diminished staff, to sift through its records, locate the information sought, and redact, where necessary, any identifying personal details. Indeed, this alleged defense is tacit recognition of the discoverability of the information sought. Were the court to recognize the 'defense' of a shortage of manpower by the agency from which disclosure is sought, it would thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the Act."

Lastly, it is clear that the only bases for denial of access to records are those found in §87(2)(a) through (h) of the Freedom of Information Law. Moreover, the state's highest court, the Court of Appeals, has held that an agency cannot merely assert a ground for denial and prevail; on the contrary, it must demonstrate that the harmful effects of disclosure described in §87(2) would indeed arise [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 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:jm

cc: Robert Brier

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1552

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

June 3, 1980

Mr. George Pollog
[redacted]

Dear Mr. Pollog:

I have recently received your letter of May 7 in which you requested information pertaining to the state and federal Freedom of Information Acts.

It is noted that the federal Freedom of Information Act, 5 U.S.C. §552, applies only to records in possession of federal agencies. A copy has been attached for your consideration.

Also attached is the New York Freedom of Information Law, which is applicable to agencies of state and local government in New York.

The structure of the two laws is similar, for both provide in brief that all records are available, except those records or portions thereof that fall within one ore more enumerated categories of deniable information.

Also enclosed is a pamphlet published by this Committee which describes the New York Freedom of Information Law. The pamphlet contains sample letters of request and appeal that would for the most part be applicable to requests directed to a federal agency. I would like to point out, however, that although the time limit for response under the New York Law is five business days, it is ten business days under the federal Act.

Finally, enclosed is a copy of §255 of the Judiciary Law, which deals with access to court records in general. It is emphasized that there are numerous other provisions in various court acts pertaining to access to specific court records. If you have any questions concerning access to records of a particular court, I would be pleased to assist you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1553

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

June 3, 1980

Mr. Peter Szikszay
Peter's Quality Tree Service
357 Villa Avenue
Buffalo, New York 14216

Dear Mr. Szikszay:

Let my congratulate you on your efforts and in your eventual success in gaining access to the records that you have been seeking.

I appreciate your transmittal of a model form that you devised for the purpose of making requests and appeals under the Freedom of Information Law. I would like to make several comments with respect to your proposed form.

Fist, since the Law went into effect in 1974, this Committee has consistently advised that an applicant for records is not required to complete a form prescribed by an agency. On the contrary, it has been advised that any request made in writing that reasonably describes the records sought should suffice. The reason for such advice is obvious. For instance, if you, a resident of Buffalo, are seeking access to records in possession of an agency in Albany, why should you be required to write to Albany, ask for a form, have the agency send the form to you, you fill it out and then send it back to Albany? Very simply, it takes too much time.

Second, the form contains lines for a signature and for the identity of a principal. In this regard, who you are or represent is irrelevant to rights of access. As the Committee has advised and as the courts have found, accessible records should be made equally available to any person, regardless of status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165].

And third, the form contains a number of boxes that may be cited for the purpose of identifying a ground for denial. In my view, the reasons indicated are likely based upon the original Freedom of Information Law. The amended Law, which went into effect on January 1, 1978, lists eight grounds for denial. Two of the eight are included in the boxes that may be checked off on your form; but the remaining grounds are not present.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1554

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

June 3, 1980

Ms. Lisa Siano
Freedman & Weisbein
114 Old Country Road
Mineola, New York 11501

Dear Ms. Siano:

I have received your letter of May 7 in which you raised questions regarding the legality of release of "confidential financial statements of proprietary institutions."

According to your letter, the Bureau for Proprietary Vocational Schools of the State Department of Education released confidential financial statements required to be submitted by vocational institutions, which are profit-making enterprises. Your question is whether a request for such records should be denied under the Freedom of Information Law.

In my opinion, there is no provision in the Freedom of Information Law that would require that the documents in question be withheld. The Law is permissive; although §87(2) of the Law provides that an agency may withhold certain records, there is nothing in the Law that requires that records must be withheld.

Second, from my perspective, the only ground for denial that might be raised is §87(2)(d), which states 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..."

The key question that must be asked with respect to the provision quoted above is whether disclosure would "cause substantial injury to the competitive position of the subject enterprise." I do not know whether the Education Department could demonstrate that the harmful effects described in §87(2)(d) would arise as a result of disclosure. It is also noted in this regard that §89(4)(b) of the Freedom of Information Law requires that in a judicial proceeding to challenge a denial of access, the agency prove that the records withheld in fact fall within one or more of the grounds for denial listed in §87(2).

And third, you characterized the records in question as "confidential". In my view, the term "confidential" has a precise meaning. I believe that the term is appropriately cited only in instances in which a statute specifically prohibits government from disclosing particular records. In such instances, §87(2)(a) of the Freedom of Information Law would be applicable, for it provides that an agency may deny access to records that are "specifically exempted from disclosure by state or federal statute."

In sum, there is no provision of law of which I am aware that would preclude an agency from disclosing. And further, it is in my view questionable whether any of the grounds for denial in the Freedom of Information Law could appropriately be asserted to withhold the records in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1555

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

June 4, 1980

Mrs. Sulamit Karger
Robert Fulton Houses
419 West 17th Street
Apartment 17H
New York, NY 10011

Dear Mrs. Karger:

I have recently received your letter of May 12 as well as the correspondence attached to it.

I would like to emphasize at the outset that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. In all honesty, I am not sure of what type of assistance I can provide you. Nevertheless, assuming that you are interested in obtaining records from government, I can offer you the following advice.

First, the Freedom of Information Law is based upon a presumption of access. All records in possession of government in New York are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached).

Second, the regulations promulgated by the Committee, which govern the procedural aspects of the law and have the force and effect of law, require each agency to designate one or more "records access officers". The records access officers are responsible for coordinating an agency's response to request for records made under the Freedom of Information Law.

And lastly, enclosed for your consideration is a pamphlet which describes both the Freedom of Information and Open Meetings Laws. Its contents may be particularly useful to you, for it contains sample letters of request and appeal.

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-1556

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

June 4, 1980

Ms. Geraldine Ann Jannone
[redacted]

Dear Ms. Jannone:

I have received your most recent letter concerning your difficulty in gaining access to records.

It is reemphasized at the outset that although court records may generally be available, they are not subject to the Freedom of Information Law. Section 86(3) of the Freedom of Information Law specifically exempts the "judiciary" from the scope of the Law.

Nevertheless, I have enclosed a copy of §255 of the Judiciary Law, which provides in brief that a clerk of a court is obliged to search for and provide access to all records in his or her possession. I would like to point out that the clerk is responsible not only for making records available, but also for certifying to the "correctness thereof". As such, if you do not feel that a complete copy of a record in which you are interested has been made available, it is suggested that you request a certification to the effect that the entire records has indeed been made available.

With respect to your request directed to the District Attorney, as I intimated in my initial letter to you, I cannot provide specific direction regarding rights of access, for I am unfamiliar with the contents of the records in which you are seeking. However, it appears that the Office of the District Attorney has not followed the time limits for response prescribed by the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgement of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Enc.

cc: James Generoso
District Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1557

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

June 4, 1980

David Corbin, Esq.
1100 Park Avenue
New York, NY 10028

Dear Mr. Corbin:

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

It is important to emphasize at the outset that there are several access laws in which you may be interested. For example, the New York Freedom of Information Law, a copy of which is attached, deals with access to records in possession of state and local government in New York. The state of New Jersey has also enacted a statute concerning access to records which is applicable to records in possession of government in New Jersey. In all honesty, although I know that such a law has been enacted in New Jersey, I am not familiar with its contents. Similarly, there is a federal Freedom of Information Act, a copy of which is attached, concerning access to records in possession of federal agencies.

Consequently, if you are interested in records in possession of the Federal Aviation Administration, the federal Freedom of Information Act is the statute that determines rights of access to those records.

With respect to the Port Authority of New York and New Jersey, I would like to point out that the Port Authority represents an unusual case with regard to access to records. As bi-state agency, neither the New York nor the New Jersey access statutes is applicable to the records of the Port Authority. The reason for the absence of

coverage of either statute is that neither New York nor New Jersey has the capacity to pass a law that affects another state. Nevertheless, I believe that the Port Authority's Board of Directors has established a policy concerning access to records which is generally consistent with the provisions of the New York Freedom of Information Law.

Also enclosed for your consideration is an explanatory pamphlet concerning the New York Freedom of Information Law that may be useful 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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1558

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

June 4, 1980

Roger Nick Beilenson, Esq.
Beilenson and Rosin
202 Mamaroneck Avenue
White Plains, New York 10601

Dear Mr. Beilenson:

I have recently received your letter of May 20. As requested, enclosed are copies of the Committee's second annual report to the Governor and the Legislature on the Freedom of Information Law, as well as a pamphlet that may be useful to you.

You indicated that you are particularly interested in the ability of a plaintiff involved in a case pertaining to false imprisonment and malicious prosecution to obtain the case file with respect to a completed criminal proceeding from a local police department.

Without greater knowledge of the circumstances, I do not feel that I can provide you with specific direction. Nevertheless, I would like to offer the following comments.

First, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law. In addition, the majority of the grounds for denial are presented in terms of the effects of disclosure. For instance, §87(2)(e) of the Law states that an agency may withhold records or portions thereof that are compiled for law enforcement purposes, but only when disclosure would result in one or more among four harmful effects described in (i) through (iv) of the cited provision.

Second, although the courts are not subject to the Freedom of Information Law [see definitions of "judiciary" and "agency" in §§86(1) and 86(3) respectively], court records are generally available (see e.g., Judiciary Law, §255). Consequently, there may be situations in which police records submitted into evidence during a trial would be available from a court clerk.

Third, if a charge is dismissed in favor of an accused, the records pertaining to the case might be sealed pursuant to the provisions of §160.50 of the Criminal Procedure Law.

And fourth, personnel records of police officers are accorded special protection under §50-a of the Civil Rights Law. In brief, §50-a of the Civil Rights Law provides that personnel records of police officers that are used to evaluate performance toward continued employment or promotion are confidential.

If after having reviewed the index to advisory opinions attached to the report, you find that there are opinions of particular interest, please identify them by number or by key phrase, and I will be happy to send them to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1559

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

June 5, 1980

Mr. Frederic C. Foster
Department of Law
County of Suffolk
Veterans Memorial Highway
Hauppauge, New York 11787

Dear Mr. Foster:

I have received your most recent letter which concerns the propriety of your denial regarding a request for a list of home improvement contractors licensed in Suffolk County.

According to your letter, the Department of Consumer Affairs initially denied access and the denial thereafter was appealed to you as appeals officer. You indicated that after reviewing §89(2)(b)(iii) of the Freedom of Information Law, you contacted the applicant to seek an assurance that the list requested would not be used for commercial purposes. Nevertheless, no such assurance was provided and the denial was upheld on appeal.

In my opinion, the request was properly denied.

Section 89(2)(b)(iii) of the Freedom of Information Law states that an unwarranted invasion of personal privacy includes:

> "...sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

From my perspective, the purpose of the provision quoted above is obvious. The Freedom of Information Law is intended to enable the public to gain access to records relevant to the accountability of government. The Law is not in my view intended to enable commercial enterprise to seek mailing lists or their equivalent to be used for commercial purposes.

It is emphasized that, as a general rule, the purpose for which a request is made is irrelevant. The Committee has advised and the courts have upheld the notion that accessible records should be made equally available to any person without regard to status or interest.

Nevertheless, §89(2)(b)(iii) represents the only internal conflict in the Freedom of Information Law, for "purpose" is stated as an issue and as a potential basis for a denial.

Due to the language of §89(2)(b)(iii), I believe that it is entirely appropriate to request that an applicant for a list of names and addresses provide the purpose for which the list is sought. Under the circumstances, since no assurance was given that the list would be used for other than commercial or fund-raising purposes, it would appear that disclosure would indeed result in an unwarranted invasion of personal privacy and therefore could justifiably be withheld under the Freedom of Information Law.

As requested, enclosed are two advisory opinions that deal with similar issues.

I hope that 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-1560

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

June 5, 1980

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

Dear Barbara:

Thanks for sending a copy of the editorial. It looks as though the attorney fees bill will indeed pass.

I tried to reach you by phone today without success. However, with respect to your question of access to lists of foster parents sought by a foster parent association, I have contacted the Department of Social Services on your behalf. It was generally agreed that in most instances disclosure of a list of names of foster parents or similar lists would result in an unwarranted invasion of personal privacy under the Freedom of Information Law [see §87(2)(b)]. Further, even though the motive of a foster parent association might be completely honorable, an unfavorable precedent could be set if such lists could be required to be disseminated to the public generally.

Nevertheless, I was informed that the Department of Social Services is often willing to assist various groups in disseminating information to those who benefit by receipt of the information. It is suggested that you call Tom Murray, an attorney for the Department of Social Services, to attempt to arrange an agreement under which the privacy of foster parents could be protected, while concurrently disseminating the information regarding grants to the appropriate people.

Mr. Murray can be reached at (518) 474-8737. If you would like to write to him, your letter should be addressed to Mr. Murray at the Office of Counsel, Department of Social Services, 40 North Pearl Street, Albany, New York, 12243.

I hope that 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: Tom Murray, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1561

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

June 6, 1980

Mr. Louis Goldberg
[redacted]

Dear Mr. Goldberg:

I recently received your letter of May 12 concerning a denial of access to records of the Office of Health Systems Management.

According to your letter, although you obtained several of the records sought, some of the records requested were denied on the ground that they constitute "intra-agency memoranda which express only non-final opinions of the staff" of the Patient Advocate Office.

Without having seen the records in question, I cannot provide you with specific direction. Nevertheless, if the records in question are in fact reflective only of opinion, the denial was in my opinion justified.

Relevant under the circumstances is §87(2)(g) of the Freedom of Information Law (see attached), which provides that government 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. Inter-agency and intra-agency materials may be withheld except to the extent that they contain statistical or factual data, instructions to staff that affect the public or final agency policy or determinations. Under the circumstances, if the memoranda that were withheld are reflective solely of opinion, as opposed to factual data or final determinations, for example, the denial was in my view consistent with the Freedom of Information Law.

With respect to the absence of a response to an appeal, all that I can suggest is that §89(4)(a) of the Freedom of Information Law requires that the head of the agency or the person designated to determine appeals render a determination within seven business days of the receipt of an appeal.

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

cc: Melinda Bass

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1582

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

June 6, 1980

Mr. Ralph Clinton Davidson
[redacted]

Dear Mr. Davidson:

I recently received your letter of May 8 in which you requested information regarding the Children's Aid Society of New York.

I have made several inquiries on your behalf and have learned that the Children's Aid Society is a charitable corporation which is required to file a financial statement with the Bureau of Charities Registration at the Department of State. I have obtained and enclosed virtually all of the information in possession of the Bureau of Charities Registration. It is free of charge.

With respect to your request for a copy of the charter, the Children's Aid Society was incorporated on January 10, 1855, and the Corporate Records Division of the Department of State maintains the charter on microfilm. There are a number of pages and a copy of the entire charter may cost approximately ten dollars. In all honesty, I doubt that the charter will be of particular value to you due to its age. Nevertheless, if you would like a copy, you should transmit your request with a blank check to the Division of Corporations, Department of State, 162 Washington Avenue, Albany, New York, 12231. The check should be made out to the Department of State.

It is noted that although the Freedom of Information Law provides that an agency may charge up to twenty-five cents per photocopy, the Department of State is required by statute to charge fifty cents per photocopy. Further, if you want the charter to be certified, there is an additional fee of two dollars for certification.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1563

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

June 9, 1980

Mr. Paul R. Gordon
[redacted]

Dear Mr. Gordon:

I recently received your letter of May 14 concerning your attempts to gain access to records from the New York State Department of Civil Service.

It is noted at the outset that I have contacted Mrs. Ethel Noiseux and Mr. Anthony Constanzo, which whom you apparently have had a great deal of correspondence. Both have informed me that you have received or have had the opportunity to review virtually all records pertaining to your suggestion made in 1973 as well as records reflective of any of the procedures followed by the Department in response to suggestions. In short, based upon my discussions with Mrs. Noiseux and Mr. Constanzo, you have received any and all records that are pertinent to the controversy.

Since you have been involved in judicial proceedings on the subject, I would conjecture that any materials relevant to the issue that you have raised would be contained within the court records. In this regard, it is suggested that you seek to review the court records to determine whether information may have been submitted to the court that will assist you.

Although the courts and court records are not subject to the Freedom of Information Law, as a general rule, §255 of the Judiciary Law requires that a court clerk make available all records in his or her possession.

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
cc: Anthony Constanzo

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1516

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

June 9, 1980

Ms. Gail C. Pocock
Director
Education Designs for Justice
17 Masse Place
Suite 25
Batavia, New York 14020

Dear Ms. Pocock:

I have received your letter of May 15 in which you requested an advisory opinion under the Freedom of Information Law.

Your letter and the correspondence attached to it indicate that your request for records in possession of the Genesee County Sheriff reflective of the dates of incarceration and release and the reason for discharge of inmates has been denied. According to the response contained on the application for the records, access was denied on the grounds that the records are confidential, that disclosure would result in an unwarranted invasion of personal privacy and that "daily records contain names of unsentenced persons and youthful offenders classifications".

In my opinion, the information in which you are interested, assuming that it exists, is available in great measure, if not in toto.

First, it is important to note 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 the Office of the Sheriff, are available, except to the extent that records or portions of records fall within one or more grounds for denial found in §87(2)(a) through (h) of the Freedom of Information Law.

Second, the Freedom of Information Law grants access to existing records. Stated differently, if information sought does not exist or cannot be found in an existing record or records, an agency has no obligation to create a record on your behalf. However, if the information in which you are interested is found in one or more records, it is subject to rights of access granted by the Law.

Third, the initial basis for withholding cited by the Sheriff is that the records in question are "confidential". I disagree, for the word "confidential" in my view has a precise legal meaning in New York. Records may be considered "confidential" only if a statute specifically precludes an agency from disclosing particular records. In such circumstances, the Freedom of Information Law preserves exemptions from disclosure by means of §87(2)(a). The cited provision states that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". There is no statute of which I am aware that requires the records in question to be kept "confidential".

Fourth, the next basis for denial involves the contention that disclosure would result in "an unwarranted invasion of personal privacy" under §87(2)(b) of the Freedom of Information Law. Although it is clear that you have not requested names of persons to whom the information relates, even if you did request the names, I believe that disclosure would not in most instances result in an unwarranted invasion of personal privacy.

One of the grounds for denial in the Freedom of Information Law concerns records compiled for law enforcement purposes. Specifically, §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."

From my perspective, it is doubtful that any of the harmful effects of disclosure described in the language quoted above would arise with respect to the records in question. Further, it is in my view likely that the records sought were not compiled for law enforcement purposes, but rather in the ordinary course of business. If that is the case, §87(2)(e) could not be cited as a ground for denial.

In addition, booking records, the records of arrest created by arresting agencies, have long been available. If a booking record is available, I cannot see how the records in which you are interested could justifiably be withheld.

The last basis for denial concerns the contention that the daily records contain names of "unsentenced persons and youthful offender classifications". Again, the fact that a person may be unsentenced does not in my opinion automatically remove records pertaining to that person from the scope of rights of access. If a person has been arrested or indicted, as a general rule, the records of the arrest and the indictment are available. Further, it is important to point out that the law regarding the sealing of records pertaining to possible or adjudicated youthful offenders has been changed. Under §720.15 of the Criminal Procedure Law, it is now clear that only a judge can determine that a person is a youthful offender. Law enforcement authorities do not have the capcity to do so. Further, the sealing requirements do not pertain to situations in which a felony offense has been charged.

In sum, I believe that the information in which you are interested is available, particularly if the names of the persons to whom the records relate are not being sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Sheriff Roy J. Wullich

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1515

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

June 9, 1980

Mr. Lee W. Stemmer
[redacted]

Dear Mr. Stemmer:

As you are aware, I have received your letter of May 14 in which you indicated that the Town Board of the Town of Pompey recently passed a resolution prohibiting the use of tape recorders at its meetings. The three members of the Board voting in favor of the resolution contended that tape recordings could result in abuse, for "statements made and recorded could be removed from their proper context". You have asked for an opinion regarding the propriety of the resolution.

In my view, a resolution that generally prohibits the use of all tape recording devices is overbroad and unreasonable.

In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt reasonable rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule

prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process (see attached, Special Report: Electronic Reproduction of Public Proceedings).

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent the possibility of star chamber proceedings!...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

In my opinion, the principle enunciated in Davidson remains valid, i.e., that a public body may prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. However, since a hand held, battery operated cassette tape recorder could not detract from the deliberative process, I do not believe that a rule prohibiting the use of such devices would be reasonable or valid.

Speaking from personal experience, I have given hundreds of presentations in the five years of my employment with the Committee. During many of the presentations, battery operated cassette recorders have been used. In many instances, I have known of their use only after the presentations have been given. Very simply, it is my contention that if one does not know of the presence of a tape recorder due to its unobtrusive character, it is impossible to argue that its use would in any way detract from the deliberative process.

The only instance in which it would be appropriate for a public body to require that an individual turn off his or her tape recorder would in my opinion involve a situation in which a public body enters into executive session. However, such direction is likely implicit and unnecessary, for the public may be excluded from appropriate executive sessions [see Open Meetings Law, §100(1)].

Lastly, with respect to the contention that portions of a tape recording could be "removed" from their proper context, I believe that the same would be true with respect to any record. There are many situations in which a particular aspect of a lengthy record is quoted or used out of text. What if the Town receives a hundred page audit and a person decides to use or cite items on pages 42 and 43 out of context? That potentiality would not remove the audit from rights of access granted under the Freedom of Information Law, and I cannot see how a distinction could justifiably be made between that situation and situations that might arise with respect to the use of a tape recording.

I hope that 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: Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1516

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

June 9, 1980

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

Dear Mr. Sheehan:

I have received your most recent letter regarding the Freedom of Information Law.

The correspondence attached to your letter indicates that the news media is apparently permitted to review certain reports on a daily basis at the offices of the Binghamton Police Department while you have been prevented from doing the same.

In this regard, all that I can suggest is that the Committee has advised and the courts have upheld the notion that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Consequently, I believe that the reports provided to the news media should be made available to any person requesting the same records.

You have also indicated that the Chief of Police has refused to answer letters addressed to him or to see you.

In this regard, there is no law of which I am aware that requires a public official to speak or meet with a person seeking an interview. Similarly, there is generally no requirement that a public official respond to letters received by the public. Nevertheless, under the Freedom of Information Law, when a request for records is made, government has an obligation to respond. If Chief Rall is the designated records access officer, he is in my view responsible for insuring that a response to a request is given within the requisite time limits. If the Chief is not designated as a records access officer, some other person should be responsible for responding to requests for records directed to him.

I hope that 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: Chief Rall

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1567

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

June 10, 1980

Mr. Baxter Floyd
74 A 1805
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Floyd:

I have received your letter of May 22 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry focuses upon rights of access to reports pertaining to "exhausted" police investigations and, specifically, in New York City, form DD-5. You have indicated that the DD-5 contains information reflective of fact and/or reliable sources.

It is noted initially that without greater knowledge of the specific contents of the records in question, I cannot provide specific direction. Nevertheless, I offer you the following comments.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, which includes a police department, are available, except to the extent that records or portions of records fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law. In my opinion, several of the grounds for denial might be applicable, depending upon the contents of the records.

The first ground for denial that may be applicable 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."

It is emphasized that the language quoted above is based upon the effects of disclosure. In many instances, if an investigation has been terminated or if a case has been closed, the harmful effects of disclosure described in §87(2)(e) would essentially disappear. Nevertheless, with respect to the "reliable sources" to which you made reference, §87(2)(e)(iii) enables an agency to withhold records compiled for law enforcement purposes which if disclosed would "identify a confidential source" even after an investigation has been terminated.

A second ground for denial that might conceivably be applicable is §87(2)(f), which states that an agency may withhold records or portions thereof that:

> "if disclosed would endanger the life or safety of any person..."

The reason for the exception cited above is obvious.

The last ground for denial that may be applicable is, as you indicated, §87(2)(g). That provision states that government 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 language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

I would like to point out that although factual information found within inter-agency or intra-agency materials is generally available, if the same information could be denied under one or more of the other grounds for denial, the information may be withheld, notwithstanding its characterization as "factual".

Lastly, it is important to note that records concerning an investigation may in some instances be sealed. For instance, §160.50 of the Criminal Procedure Law provides that certain records be sealed if a charge against an accused has been dismissed in favor of the accused.

As requested, enclosed are copies of the latest indices to advisory opinions rendered under the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1568

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

June 10, 1980

Mr. Daniel A. Groff
[redacted]

Dear Mr. Groff:

I have received your letter of May 20 in which you described a situation concerning a parcel of land granted to one Roeloff Jansen in 1636. You have raised questions regarding the ancestors of Jansen as well as the ownership of the property to day.

In all honesty, I have no idea whether anything could "be gained" to follow up on the matter. Nevertheless, I would like to offer the following comments.

First, genealogical records are generally available. However, the source of genealogical information may be difficult or perhaps in some cases impossible to locate. If you are interested in making a genealogical search, there are three offices that might be able to assist you. First, the Bureau of Vital Records at the State Health Department might be able to lead you to an appropriate source. I believe that its genealogical records date back to approximately 1880. Another possible source is the State Archives, which is part of the State Education Department. And third, records of births, deaths and marriages occurring in New York City are maintained by the New York City Health Department.

With respect to the land, perhaps the easiest way to determine who owns the land in question would involve a review of the assessment information in possession of the New York City Assessor. By locating the land on a map and determining which current addresses are included within the parcel, you could determine from as assessment roll who the current owners of the property are.

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-1569

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

June 10, 1980

[redacted]

Dear [redacted]:

As you are aware, I have received your letter in which you suggested that I could consent to the release of clinical records in possession of the Central New York Psychiatric Center.

It is noted that the Committee on Public Access to Records has only the capacity to give advice with respect to the Freedom of Information Law; it does not have the authority to compel an agency either to disclose or withhold particular records.

Under the circumstances, the records in which you are interested pertaining to your great grandfather are subject to the provisions of §33.13 of the Mental Hygiene Law, a copy of which has been enclosed. In brief, the cited provision states that clinical records identifiable to patients that are maintained at facilities of the Department of Mental Hygiene are confidential, except in situations described in §33.13. I direct your attention to subdivision (c)(1) and (4). The provisions cited state that information about patients and records pertaining to patients may be released "pursuant to an order of a court of record" and

> "...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."

Under the second means of obtaining records, I believe that you could write to the Commissioner of the Office of Mental Health and request that particular aspects of clinical records pertaining to your great grandfather be disclosed. It is suggested that you specify that you are not interested in learning of the psychiatric diagnosis, treatment or condition of your great grandfather, but rather that you are seeking information that may enable you to engage in a genealogical study of your family. I believe that your request for consent by the Commissioner should be transmitted to William A. Carnahan, Deputy Commissioner and Counsel, Office of Counsel, Office of Mental Health, 44 Holland Avenue, Albany, New York 12229.

With respect to the second issue that you raised relative to vital records, records of marriage, birth and death, the governing statutes are §§4173 and 4174 of the Public Health Law (regarding birth and death records) and §19 of the Domestic Relations Law (regarding marriage records). In each of those statutes, there is direction to the effect that vital records are available upon a demonstration that the records are being sought for judicial or other "proper purposes". The problem is that the phrase "proper purpose" is undefined. Nevertheless, in my opinion, a request for records sought in conjunction with a genealogical search constitutes a "proper purpose". As such, I believe that the records in possession of the Town of Brookhaven in which you are interested should be made available.

Finally, as I indicated to you orally, local registrars of vital records maintain duplicate copies of birth, death and marriage records. The original records are maintained by the Bureau of Vital Records at the State Health Department. It is suggested that you may want to write to that office, which is located at the Empire State Plaza, Tower Building, Albany, New York 12237.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Donna M. Horrigan
Town Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1570

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

June 11, 1980

Mr. Louis Milburn
#71-A-0356
Drawer "B"
Stormville, NY 12582

Dear Mr. Milburn:

I have received your letter of May 24 in which you have raised questions regarding the response to a request for records made by the New York City Police Department. You indicated that some of the information that you requested has indeed been provided, but that other aspects of your request have been denied.

Without having the capacity to view the records that have been withheld, I cannot give you specific advice regarding the propriety of the denial. However, I would like to offer the following comments.

It is noted initially that since some of the records sought were made available, it would appears that the New York City Police Department has made a good faith effort to provide an appropriate response.

Further, assuming that the information withheld on the basis of §87(2)(g) of the Freedom of Information Law does constitute factual data or is reflective of a determination, it is possible that other grounds for denial might be cited. For instance, §87(2)(e) states that records compiled for law enforcement purposes may be withheld under certain circumstances.

I would also like to take the opportunity to comment with respect to your request of June 1 which was also addressed to the New York City Police Department, a copy of which was transmitted to this office by Mr. Reers. My only comment with respect to that request is that the Freedom of Information Law provides access to certain existing

records. Stated differently, the Law does not require an agency to create a record in response to a request. I have no knowledge as to whether the information requested in your letter of June 1 exists in the form of a record or records. However, it is possible that some of the information that you have sought does not exist as a record and might involve the creation of a record by the New York City Police Department, which is not 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

cc: Richard L. Reers

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1571

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

June 11, 1980

Mr. V. Lawrence Piton
International Archives, Inc.
P.O. Lock Box 29
Elmhurst, Illinois 60126

Dear Mr. Piton:

Your letter addressed to the Secretary of State of New York and the Department of State's "Identification Card Section" has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

You have requested forms that are used to apply for personal identification cards for minors, senior citizens and "any other category of persons that can obtain such a card in your state."

To the best of my knowledge, there are no forms analogous to those in which you are interested, for there is no requirement of which I am aware that individuals carry or use personal identification cards.

Further, if there was such a requirement and if a governmental agency in New York maintained such cards or lists of names and addresses of persons holding the cards, it is likely that the cards and the lists could be withheld 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)].

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-1572

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

June 11, 1980

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

I have received your latest letter, which concerns attempts to gain access to information from the Division of Criminal Justice Services.

First, you have asked whether a governmental department receiving LEAA funds is subject to the state Freedom of Information Law or the federal Freedom of Information Act. In this regard, the New York State Freedom of Information Law is applicable to records in possession of entities of state and local government in New York. Consequently, if the records in which you are interested are in possession of a state agency, such as the Division of Criminal Justice Services, or a county, for example, rights of access would be governed by the New York Freedom of Information Law. If the records sought are in possession of a federal agency, the statute that governs rights of access is the federal Freedom of Information Act (5 U.S.C. §552), a copy of which is attached.

Your second question concerns the identity of the individual to whom an appeal made under the Freedom of Information Law should be addressed at the Division of Criminal Justice Services. The head of the Division of Criminal Justice Services is Commissioner Frank Rogers. As the head of the Division, either Commissioner Rogers or his designate would respond to appeals made under the Freedom of Information Law.

Lastly, you have intimated that if a request is not answered within five business days of its receipt, you can assume that the request has been denied. I agree with your contention, for, according to §1401.7(c) of the Committee's regulations, a failure to respond within the requisite time limits constitutes a "constructive" denial that may be appealed.

With respect to the time limits for response to requests in general §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access.

When an appeal is made, the appeals person has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: John J. Biggins

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1523

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

June 12, 1980

Ms. Harriet Schwartz
[redacted]

Dear Ms. Schwartz:

I recently received your letter of May 29. Your inquiry concerns the means by which you may obtain rules, regulations, and procedures regarding maximum security prisons generally, and the Bedford Hills Correctional Facility for Women in particular. In addition, you are interested in obtaining related information pertaining to correction officers, administration, inmates, et cetera.

It is emphasized at the outset that the Committee on Public Access to Records is responsible only for giving advice with respect to the Freedom of Information Law. The Committee is not a repository of records and it does not have the authority to compel an agency to comply with the Freedom of Information Law.

Nevertheless, it is suggested that much of the information in which you are interested is likely contained within the New York Code of Rules and Regulations. The Code contains the regulations promulgated by all state agencies, and a specific volume contains the regulations promulgated by the State Department of Correctional Services. The rules and regulations can likely be found in a sizable law library or perhaps in the libraries of various municipalities or courts.

In addition, it is suggested that you contact the State Department of Correctional Services. In my view, the office that most likely maintains the information that you are seeking is the Office of Counsel. If you wish to write to that office, the address is Office of Counsel, Department of Correctional Services, State Campus, Correctional Services Building, Albany, New York 12226. If you would like to telephone the office, the number is (518) 457-8180.

It is noted in closing that §87(2)(g) of the Freedom of Information Law in relevant part provides access to materials developed by an agency that consist of instructions to staff that affect the public and final agency policy or determinations. Therefore, since it appears that you are requesting records reflective of the procedures and policies developed by the Department of Correctional Services, they are in my view accessible.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations governing its procedural implementation, 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/kk

Encs.

cc: Sherri St. John

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1574

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

June 12, 1980

Mr. Jaime Condido
76-A-2717
Box 51
Comstock, New York 12821

Dear Mr. Condido:

I have received your letter of May 28, which concerns a fee of twenty-eight dollars for photocopies of seven pages assessed by the clerk of the Supreme Court, Bronx County.

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)(4) states that a clerk may charge:

> "[F]or preparing only, or preparing and certifying a copy of an order, record or other paper entered or filed in his office, in the counties within the city of New York, four dollars, and in all other counties, one dollar for each page or portion of a page measuring up to nine inches by fourteen inches."

Since you requested copies of seven pages, the clerk of the court in my view appropriately assessed a fee of twenty-eight dollars.

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-1525

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

June 12, 1980

Ms. Bridget C. Willox
[redacted]

Dear Ms. Willox:

I have received your letter of May 29 in which you asked how you can obtain information regarding a situation in which you and others were delayed by immigration officials upon your return from England.

Please note that the Committee on Public Access to Records is responsible only for advising with respect to the New York Freedom of Information Law. That law is applicable only to records in possession of units of state and local government in New York.

In my view, it is likely that the information in which you are interested, if it exists, is in possession of a federal agency. Consequently, the federal Freedom of Information Act is the statute that would be most applicable. I have enclosed a copy for your consideration.

Based upon the information that you provided, it would appear that one of two federal agencies might have the information that you are seeking. The first would be the Immigration and Naturalization Service, which has an office in New York City at 26 Federal Plaza. If you wish to telephone that office, the number is (212) 349-8735. The other federal agency that might have the information in which you are interested is the Department of State, which also has offices at 26 Federal Plaza in Manhattan. The phone number there is (212) 264-1292.

Lastly, if there are written procedures analogous to those in which you are interested, I believe that they are likely available under the federal Freedom of Information 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
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1576

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

June 13, 1980

Mr. Richard A. Conover
Superintendent of Schools
Waterloo Central School District
9 East River Street
Waterloo, New York 13165

Dear Mr. Conover:

Thank you for your kind words, for sending the regulations of the Waterloo Central School District and for your interest in complying with the Freedom of Information Law.

Having reviewed the regulations, I believe that they are consistent with those promulgated by the Committee on Public Access to Records in all respects.

However, I would like to make the following comment with regard to the "subject matter list".

According to both §87(3)(c) of the Freedom of Information Law and the regulations, the subject matter list is required to make reference by category in reasonable detail all of the records of an agency. The Law does not require that every record of an agency be listed, but rather that reference to categories of records be identified, whether or not they are available. The attachment that you sent represents a partial list of "available" records.

A potentially useful vehicle for the development of a subject matter list may be schedules for the retention and disposal of records developed by the State Education Department. As you are likely aware, the State Education Department has prepared numerous, detailed schedules indicating the lengths of time during which particular records may be retained. From my perspective, in many

instances, the retention schedules are far more detailed than a subject matter list must be. However, a review of the retention schedules might provide a helpful basis for preparing the subject matter list to be maintained 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1577

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

June 13, 1980

Ms. Doris Wenger
[redacted]

Dear Ms. Wenger:

I have received your most recent letter concerning rights of access granted by the Freedom of Information Law.

As I understand your inquiry, two questions have been raised. The first concerns work sheets developed by the State Department of Audit and Control generated in the process of preparing an audit. The second is whether a bank is required to provide public access to records that relate to a governmental entity.

With respect to bank records, the Freedom of Information Law is applicable only to records in possession of an "agency" as defined in §86(3). A bank is clearly not an agency and therefore is not required to produce any of its records under the Freedom of Information Law, notwithstanding its relationship to government.

With regard to the work sheets developed by the Department of Audit and Control in the preparation of an audit, I have enclosed a recent decision rendered by the Supreme Court in Nassau County. In brief, the court held that the work papers of a field auditor of the Department of Audit and Control developed in preparation of an audit of a town are available. Assuming that you are interested in obtaining analogous records, I believe that the decision would be applicable to your situation. It is noted that the decision of the Supreme Court has been or will likely be appealed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1578

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

June 13, 1980

Mr. Joseph Schuster
[redacted]

Dear Mr. Schuster:

I have received your letter of May 18 in which you described problems in gaining access to records regarding a proceeding that was initiated years ago.

Although I doubt that I can help you, I would like to offer the following comments.

First, as indicated to you in an earlier letter, state agencies can dispose of records only in accordance with applicable provisions of law. Your question in January dealt only with the existence of a record in possession of the Department of Law in which name and address of a former employee might be found. While such a record might indeed be kept, portions of such a record might not be available.

The Freedom of Information Law provides that an agency may withhold records or portions of records when disclosure would result in an unwarranted invasion of personal privacy. As a general rule, it has been advised by this office and affirmed by the courts that the home addresses of public employees need not be made available on the ground that disclosure would result in an unwarranted invasion of personal privacy. As a matter of fact, §87 (3)(b) of the Freedom of Information Law requires the compilation of a payroll record in which public employees' public office addresses must be included. That provision represents a clarification of the original language enacted in 1974 that required that the payroll record include reference to the "address"; which addresses, home or business, was not specified.

Second, the records in which you are interested may have been disposed of in accordance with law. From my perspective, that eventuality may be likely, for the proceeding in which you are interested was closed several years ago.

And third, even if the records do exist, it is questionable how useful they would be to you or any other person. In short, it is possible that the statute of limitations regarding the initiation of a proceeding has rund by this time.

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-1579

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

June 13, 1980

Mr. Peter W. Brush
[redacted]

Dear Mr. Brush:

I have received your letter of May 31 in which you requested guidance with respect to the Freedom of Information Law. In addition, you have asked whether a public employee has the right to view material in his or her own personnel file.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation, and an explanatory pamphlet on the subject and a pocket guide to the Law.

With respect to your question regarding the personnel file, 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 thereof fall within one or more grounds for denial found in §87(2)(a) through (h) of the Law.

In my opinion, there may be two possible grounds for denial that might appropriately be raised regarding the contents of the personnel file.

First, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". Further, §89(2)(b) lists five example of unwarranted invasions of personal privacy. The first example includes "personal references of applicants for employment". Therefore, if, for example, a person transmitted to a personnel office a reference concerning you, I believe that the reference would be deniable

on the ground that disclosure would result in an unwarranted invasion of personal privacy. In other instances, there may be situations in which individuals other than yourself are identified and in which disclosure might result in an unwarranted invasion of personal privacy.

The second basis for denial that may be relevant is §87(2)(g). 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..."

In essence, the provision contains a double negative. An agency may deny access to inter-agency or intra-agency materials, except to the extent that they consist of any of the items listed in subparagraphs (i.), (ii.) and (iii.). As such, statistical or factual data, such as time sheets, payroll information and the like are accessible. Similarly, if, for example, an employee has been involved in a disciplinary proceeding which has resulted in a determination, the determination would be accessible. Nevertheless, records or portions thereof in the nature of advice, recommendation or impression, for example, are likely deniable.

In terms of intent, Assemblyman Mark Siegel, the Assembly sponsor of the amended Freedom of Information Law, wrote that §87(2)(g) was intended to be interpreted as follows:

> "[F]irst, it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they

> are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff need not be made available."

It is noted that there may be provisions contained in collective bargaining agreements that expand upon rights of access granted by the Freedom of Information Law. For instance, I have been informed that there are some collective bargaining agreements which require that all information contained in a personnel file be made available to the subject of the file. In such cases, the contractual provisions would provide rights of access in excess of those granted by the Freedom of Information Law.

In sum, a personnel file is not in my view deniable in toto. On the contrary, rights of access are dependent largely upon the contents of such a file.

I hope that I have been 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-1580

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

June 17, 1980

Mr. Roy J. Smiley
[redacted]

Dear Mr. Smiley:

I have received your letter of June 4 in which you have asked for an opinion under the Freedom of Information Law.

You wrote that it is your belief that all police agencies in this state must make the name and address of the operator of a motor vehicle available when they are given a license plate number and a description of a particular car. Although police agencies are not required to do so, you can obtain the information in question by another means.

It is noted that the Freedom of Information Law provides access to existing records. Stated differently, an agency, such as a police department, need not create records in response to a request.

In this instance, a police department would not have records indicating the owner of a vehicle identified by means of a license plate number. However, the State Department of Motor Vehicles does maintain such information. To obtain information regarding the identity of the owner of a vehicle by means of the license plate number, you should direct your request to the nearest office of the State Department of Motor Vehicles. That department is permitted to charge a fee for searching and reproducing records pursuant to §202 of the Vehicle and Traffic Law.

You asked whether a police department would have records indicating whether a particular individual has a "police record". In most instances, local police departments do not maintain a "criminal history record" on individuals. Criminal history information is generally maintained by the State Division of Criminal Justice Services. In addition, I would like to point out that the criminal history information is disclosed by the Division only to law enforcement agencies or to the subject of a criminal history records upon production of proof of identity.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1581

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

June 18, 1980

Mr. Ronald Kermani
Albany Times-Union
645 Albany-Shaker Road
Albany, New York 12212

Dear Mr. Kermani:

I have received your letter of June 3 and the correspondence attached to it. The materials include five appeals that you made following denials of requests for records directed to city, county and federal departments. You have asked for an advisory opinion with respect to each denial.

The first area of inquiry concerns a request directed to the Albany County CETA Office relative to an initial determination to disallow costs rendered by the federal Department of Labor under the Employment and Training Act. In response, the City Clerk wrote that the report would be withheld until a final determination is made by the Department of Labor.

It is important to note 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 those records or portions thereof that fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Freedom of Information Law.

In this situation, you requested a letter or report transmitted from a federal agency to an Albany County office. From my perspective, it appears that the rationale for the denial is based upon §87(2)(g) of the Freedom of Information Law, which provides that certain inter-agency and intra-agency materials may be withheld. Nevertheless, I do not believe that the record or records in question could be characterized as "inter-agency or intra-agency".

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 thereof, except the judiciary or the state legislature."

The language quoted above clearly indicates that the term "agency" under the New York Freedom of Information Law means only entities of state and municipal government; it does not include federal agencies. Similarly, for the purposes of the federal Freedom of Information Act, the definition of "agency" appearing in 5 USC §551 pertains only to federal agencies. As such, an agency of government in New York is not an "agency" under the federal Freedom of Information Act, and an agency of the federal government is not an "agency" under the New York Freedom of Information Law. As such, the records transmitted from the Department of Labor to Albany County could not in my view be considered "inter-agency materials" that are deniable.

The only other ground for denial in the New York Freedom of Information Law that might be applicable to the records in question 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". In his response of May 15, the City Clerk wrote that the records transmitted to the County "contained the names of employees".

Although it is possible that disclosure of the names might result in an unwarranted invasion of personal privacy, it is also possible that disclosure would result in a permissible invasion of personal privacy. It is emphasized that the courts have found that public employees enjoy a lesser right to privacy than members of the public generally. Further, 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

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)].

Without knowing more about the contents of the report or the context in which the names have been provided, it would be inappropriate to conjecture as to the propriety of disclosing or withholding the names. Nevertheless, since §87(2) of the Freedom of Information Law enables an agency to withhold records "or portions thereof" falling within the grounds for denial, only identifying details, i.e., the names, could be deleted to protect privacy.

The second area of inquiry pertains to a request for the same records described in the initial controversy directed to the Office of the County Clerk. A response was forwarded by Michael D. Malone, Commissioner of the Albany County Department of Employment & Training, to Guy Paquin, the County Clerk. In a letter dated May 9, Mr. Malone wrote that the County Attorney's Office advised that:

> "...since the records you seek are records of the United States Department of Labor and are relevant to an ongoing investigation by them and further, since the issues raised therein are likely to be the subject of litigation, a release of said records by the County would be inappropriate. I would suggest that you make your request to the United States Department of Labor."

I would like to make several comments with respect to the foregoing.

First, although the records in question may have been generated by the United States Department of Labor, they are subject to the New York Freedom of Information Law, for they are in possession of an "agency" as defined in §86(3).

Further, §86(4) of the Freedom of Information Law defines"record" to include:

> "...any information kept, help, filed, produced or reproduced by, with or for an agency of the state legislature, in any physical form whatsoever..."

Based upon the definition of "record", records in possession of an agency are subject to rights of access, whether or not the agency produced or generated the records.

Second, Mr. Malone wrote that the records are "relevant to an ongoing investigation" by the Department of Labor. There is no indication that the records pertain to a criminal investigation or that they were compiled for law enforcement purposes. Consequently, it is doubtful that they could be withheld under the "law enforcement purpose" exceptions in either the New York Freedom of Information Law [§87(2)(e)] or the federal Freedom of Information Act [5 USC §552(b)(7)]. It is noted, too, that the "law enforcement purposes" exception to rights of access may, according to case law rendered under the original and the current versions of the Freedom of Information Law, be asserted only by a criminal law enforcement agency [see e.g., Broughton v. Lewis, Sup. Ct., Albany Cty. (1978), Young v. Tn. of Huntington, 388 NYS 2d 978(1976)].

Third, Mr. Malone wrote that the issues raised in the records "are likely to be the subject of litigation". Many records may likely discuss issues that may later be litigated, but that factor alone does not exclude them from rights of access. If records have been prepared for litigation, they would be exempt from disclosure under the Civil Practice Law and Rules, §3101. However, it appears that the records in question were prepared in the ordinary course of business and, as such, could not likely be shielded from disclosure based upon a contention that litigation might arise [see e.g., Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234, and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165].

The third area of controversy concerns a request directed to the regional office of the United States Department of Labor. In response, the Public Disclosure Officer noted that "[Y]our request is denied as being vague and non-specific as to the nature of the disallowed costs and the period to which it applied."

Since the Committee on Public Access to Records is charged with the responsibility of advising with respect to the Freedom of Information Law, I do not feel that it is appropriate to comment with respect to the substance of the denial offered by the Public Disclosure Officers of a federal agency.

For the same reason as expressed above, the Committee's responsibility to advise only with respect to the New York Freedom of Information Law, I do not feel that it would be appropriate to comment regarding the second response to your request offered by the United States Department of Labor.

Lastly, you requested two audits in possession of Albany County. The first was prepared by Urbach, Kahn and Werlin regarding the County CETA Program. The second concerns an audit of the Albany County Jail following the resignation of Sheriff McNulty.

With respect to the first, you were advised that the audit was prepared for litigation and therefore is exempt. With respect to the second, the audit was denied on the ground that disclosure

> "...would impair present or imminent collective bargaining negotiations and because the materials are inter-agency or intra-agency materials not statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations."

Without knowing more about the background of the compilation of the audit prepared by Urbach, Kahn and Werlin, I cannot provide specific direction. Nevertheless, I would like to offer the following observations.

First, as indicated previously, material prepared for litigation is deniable, for it is considered confidential under §3101 of the Civil Practice Law and Rules. Such material would also be deniable under §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute.

However, as also indicated earlier, it is possible that an audit may relate or be relevant to litigation, but that it may not have been specifically prepared for litigation.

There have been many instances in which records relevant to litigation have been made available when the records were not prepared for litigation [see e.g., Burke v. Yudelson, supra].

Moreover, as you are aware, the existing Freedom of Information Law represents an amended version of the original Freedom of Information Law enacted in 1974. In brief, the original Law granted access to particular categories of records to the exclusion of all others. In contrast, the amended Law provides that all records are available, except those falling within one or more of the grounds for denial. It is noted that "internal and external audits and statistical or factual tabulations" constituted one of the categories of accessible records under the original Law [§88(1)(d)]. In addition, the language concerning audits was considered by the sponsor of the bill to amend the Freedom of Information Law, Assemblyman Mark Siegel. In a letter addressed to me dated July 21, 1977, following the passage of the amendments, Mr. Siegel discussed the intent of §87(2)(g) concerning inter-agency and intra-agency materials. In relevant part he wrote that:

> "My original bill would have permitted an agency to deny access to records or portions thereof that 'are non-final or purely advisory drafts or papers.' Several problems were raised with respect to that language. Specifically, in some instances it would be difficult to determine whether a particular record is 'non-final.' More importantly, the term 'advisory' could have been interpreted in a manner that would permit a denial of access to records that are accessible under the existing Freedom of Information Law. For example, 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" (see attached letter).

To ensure that such records should continue to be available, the bill was altered to make reference to "inter-agency and intra-agency materials", which would not include an audit prepared by a third party outside of government. In view of the foregoing, it is clear that the sponsor of the Freedom of Information Law intended to maintain the legislative direction of the original statute regarding access to audits. The audit performed by Urbach, Kahn and Werlin could not be considered "inter-agency or intra-agency" in nature, for the audit was transmitted from an entity outside of government to an agency.

With regard to the second audit, you have not indicated who prepared it. However, one of the bases for denial again concerns §87(2)(g). The cited provision states that government 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 cited provision contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. Although I am not familiar with the audit in question, it would in my view be highly unlikely that it does not contain a significant amount of "statistical or factual tabulations or data". Moreover, if it was prepared by an agency of government, it might constitute a "final determination" that would be available. Again, if it was prepared by a person or firm outside of government, it could not be considered either inter-agency or intra-agency.

The remaining ground for denial that was cited is based upon §87(2)(c), which states that an agency may withhold records or portions thereof that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations..."

In all honesty, I have no idea what the effect of disclosure would be regarding "present or imminent" collective bargaining negotiations. Nevertheless, it is emphasized that an agency has the burden of proving in a judicial proceeding that records withheld fall within one or more of the grounds for denial listed in the Law. Moreover, the Court of Appeals has held on two occasions that an agency cannot merely assert a ground for denial and prevail; 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, 48 NY 2d 341].

I hope that 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: T. Garry Burns
Marie A. DiLello
Philip T. DiPace
Joseph Dolan, Jr.
Richard H. Liebman
Michael D. Malone
Solicitor of Labor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1582

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

June 18, 1980

Ms. Geraldine Ann Jannone
[redacted]

Dear Ms. Jannone:

I have received your letter of June 6, which again concerns your attempts to gain access to records in possession of the District Attorney of Westchester County.

Based upon the letter sent to you by John R. Dinin, an Assistant District Attorney, it appears that his office is willing to permit you to inspect the records in which you are interested and to have copies made upon payment of the appropriate fees. It is noted in this regard that §89(3) of the Freedom of Information Law states that an agency must prepare copies of accessible records upon payment of or offer to pay the requisite fees. Stated differently, an agency can require payment in advance of copying.

Notwithstanding Mr. Dinin's letter, you wrote that you have been unable to arrange a mutually convenient time in which you can inspect the records. All that I can suggest is that you telephone Mr. Dinin in an attempt to schedule a specific date and hour in which the records might be inspected.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: John R. Dinin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1683

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

June 19, 1980

Mr. Irving Silver
[redacted]

Dear Mr. Silver:

I have received your latest letter and the correspondence attached to it concerning a request directed to the Department of State under the Freedom of Information Law.

According to your letter and the materials, you apparently feel that the Freedom of Information Law has been violated due to the deletion of certain details from the records provided and the fee of fifty cents per page for copying assessed by the Department.

As requested, I will transmit your complaint to Secretary of State Paterson.

With respect to your contentions, I would like to offer the following comments.

First, as you are aware, the Freedom of Information Law permits an agency to charge no more than twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by law" [§87(1)(b)(iii)]. In this regard, §96(3) of the Executive Law requires that the Department of State charge fifty cents per page "[F]or a copy of any paper or record not required to be certified or otherwise authenticated..." Consequently, I believe that the fee of fifty cents per page assessed by the Department was entirely legal.

Second, with regard to the deletions made in the records provided, it is noted that §87(2)(b) of 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". Further, §89(2)(b) of the Freedom of Information Law permits an agency to "delete identifying details" which if disclosed would result in an unwarranted invasion of personal privacy. Having reviewed the documents in question, it appears that the Department has deleted identifying details based upon the provisions cited above.

Lastly, you have questioned the capacity of employees of the Department of State to investigate. Please be advised in this regard that I believe that the employees of this Department do all that is possible to carry out their duties responsibly and in compliance with law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Secretary Basil A. Paterson

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1584

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

June 19, 1980

Mrs. Pat Montemorano
[redacted]

Dear Mrs. Montemorano:

I have received your letter of June 9 and the appeal attached to it directed to the appeals officer of the Clyde Savannah Central School District.

Your letter and the appeal indicate that you have requested a copy of the budget approved by the School Board including the worksheets that led to its preparation. In response, you were informed that the documents requested do not exist. You have indicated further that the worksheets that you are seeking had existed in April.

I would like to offer several comments with respect to the situation.

First, 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 of the grounds for denial listed in §87(2)(a) through (h) of the Law. In my view, to the extent that the records that you are seeking exist, they are available.

Second, you wrote that the only existing document regarding the budget consists of a single page. In this regard, §1716 of the Education Law states in relevant part that:

> "[I]t shall be the duty of the board of education of each district to present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each. The amount for each purpose estimated necessary for payments to boards of cooperative education services shall be shown in full, with no deduction of estimated state aid..."

Based upon the provision quoted above, it is clear that a board of education must complete a "detailed statement". Although I have not seen the one page statement to which you made reference, it appears unlikely that it could be considered "detailed".

Third, the records in question, to the extent that they exist, are in my view available under the Freedom of Information Law, §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 language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. Under the circumstances, although the budget materials may be considered as "intra-agency" materials, their contents consist of "statistical or factual tabulations or data" that are available and they might be reflective of a final determination.

Fourth, the state's highest court, the Court of Appeals, held years ago that "budget worksheets" are accessible [see Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)].

And fifth, with respect to the contention by the District that the materials that you are seeking no longer exist, I would like to direct your attention to §65-b of the Public Officers Law. In brief, §65-b states that a school district and other units of local government cannot destroy or otherwise dispose of records without the consent of the Commissioner of Education. In order to regularize the disposal of records, the Commissioner has developed a series of schedules for the retention and disposal of records. It is suggested that you might want to review the schedules in question to determine whether the records sought were disposed of in compliance with applicable provisions.

Lastly, as you indicated in your appeal, §89(4)(a) of the Freedom of Information Law requires that an agency transmit copies of appeals and the determinations that ensue to the Committee. Having reviewed our files, the District has not transmitted either the appeal or the determination to this office.

I hope that 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: Fred Goodrich
Clyde Savannah School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

FOIL-AO-1585

June 19, 1980

Michael J. Lavery, Esq.
[redacted]

Dear Mr. Lavery:

I have received your letter of June 2 and apologize for the delay in response. As requested, enclosed is a copy of the Committee's second annual report to the Governor and the Legislature on the Freedom of Information Law.

Your inquiry concerns the status of the Rent Stabilization Association of the City of New York and the Conciliation and Appeals Board under the New York Freedom of Information Law.

It is noted that I have discussed the matter with several persons on your behalf, including Counsel to the Rent Stabilization Association.

In my view, the Rent Stabilization Association is not an "agency" under the Freedom of Information Law, but the Conciliation and Appeals Board is subject to the Law.

Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

Based upon my discussions with various individuals, the Rent Stabilization Association is not an agency, for it is not a "governmental entity". On the contrary, the Association is a private, voluntary entity that has a relationship with government, but which is not itself government.

Having discussed the matter with Mr. Richard Gordon, Counsel to the Association, I was informed that the Association provides a great deal of information on an ongoing basis by telephone, but that its records are generally not disclosed except by means of a subpoena. If you are interested in gaining information from the Association, Mr. Gordon offered to discuss such an inquiry with you. He can be reached at (212) 944-4723.

The Conciliation and Appeals Board is apparently the quasi-judicial arm of the New York City Department of Housing Preservation and Development. As such, it is my view 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/kk

Enc.

bcc: Richard Gordon

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1586

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

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XECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 23, 1980

Mrs. Frances Mercier
[redacted]

Dear Mrs. Mercier:

I have received your letter of June 10 in which you requested assistance in gaining access to information from the Village of Yorkville.

According to your letter, your next door neighbor had a garage built which in your view is too close to your property and in violation of the building permit granted to the neighbor by the Village. You indicated further that you contacted Mayor Roback and Scott Creaser, the Village Attorney, and requested their "findings" regarding the proximity of the garage to your property line. Apparently a surveyor inspected the property. To date, you have indicated that you have had no response from Village officials.

In all honesty, I do not know what types of "findings" may have been reached or the nature of the records that may exist. Further, it is emphasized that the Freedom of Information Law grants access to existing records. Therefore, the Village is not obligated to create records in response to a request for information. Nevertheless, to the extent that records do exist concerning the controversy, they are in my opinion likely available in great measure, if not in their entirety.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as a village, 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. Based upon the information that you have provided, it does not appear that any of the grounds for denial could appropriately be cited to withhold records that exist. In fact, one

of the grounds for denial would likely direct that existing information on the subject be made available. Specifically, §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 provisions quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, records developed by the Village could be considered "intra-agency" materials. However, it is likely that their contents consist of "statistical or factual tabulations or data" that should be made available.

Lastly, you wrote that you have received no response from Village officials. In this regard, §89(3) of the Freedom of Information Law provides that an agency may require that a request reasonably describing the records sought be made in writing. If you have not directed a request in writing to the Village, it is suggested that you do so. Enclosed is an explanatory pamphlet regarding the Freedom of Information Law that may be useful to you.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access,

and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of a request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Mayor Roback
Scott Creaser

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1587
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 25, 1980

Ms. Harriet Schwartz
[redacted]

Dear Ms. Schwartz:

Your letter addressed to Secretary Paterson 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.

I would like to thank you for your thoughtful note regarding my earlier letter to you. All that I can add is that this office attempts to respond to inquiries as fully and efficiently as possible.

You have requested "rules and regulations (procedures) for medium-security prisons, specifically Bedford Hills Correctional Facility for Women", as well as information regarding "Correction Officers, Administration, and Inmates". In response, I offer you the following comments.

First, the Department of Correctional Services is likely a more appropriate source of information concerning the records sought than the Department of State, which has no authority with respect to activities pertaining to corrections. The only documentation in possession of the Department of State related to your inquiry is found in Title 7 of the New York Code of Rules and Regulations, which is entitled "Corrections".

I have reviewed Title 7 on your behalf and believe that it contains sixty to seventy pages of regulations in which you might be interested. However, it is noted that the Executive Law, §96(3), requires the Department of State to charge fifty cents per photocopy. The same information may be obtained at a cost of twenty-five cents per page from the Department of Correctional Services and perhaps even less from various law libraries.

It is noted, too, that the direction provided by the regulations in question is not as expansive as one might anticipate. For instances, although one provision in the regulations makes reference to the Bedford Hills Correctional Facility (§100.80), that provision merely states that:

> "(a) There shall be in the department an institution to be known as Bedford Hills Correctional Facility, which shall be located at Bedford Hills in Westchester County, New York, and which shall consist of the property under the jurisdiction of the department at that location.
>
> (b) Such institution shall be a correctional facility for females 16 years of age or older.
>
> (c) Bedford Hills Correctional Facility shall be classified as a medium security correctional facility, to be used for the following functions:
>
> (1) general confinement facility;
>
> (2) reception center for:
>
> (i) all females committed to the custody of the department, by any court in this State, under indeterminate sentence or reformatory sentence;
>
> (ii) all females of whatever age who have been, or who hereafter are, committed or transferred to or placed in an institution for the retarded in the department pursuant to committment or order of any court of this State; and
>
> (iii) all females committed as juvenile delinquents or wayward minors who are committed, transferred to or placed in the care or custody of the department; and
>
> (3) detention center."

Enclosed for your consideration is the table of contents of the regulations promulgated by the Department of Correctional Services. Based upon your letter, it appears likely that you may be interested in Chapters II, III, V and VI.

It is suggested that you direct a request to the records access officer at the Department of Correctional Services. Further, in addition to the regulations, it is suggested that you request administrative staff manuals and statements of policy related to your areas of interest.

Lastly, if you would like copies of the regulations at fifty cents per page, please contact me. However, in all honesty, the statutory fee required to be assessed by this Department is higher than that of other agencies, and it is suggested once again that your request for the regulations can be fulfilled less expensively by another agency.

In any future correspondence, please provide a telephone number where you can be reached. I tried to reach you today without success to explain the contents of this letter.

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-1588

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

June 25, 1980

Hon. Frank Aloi
Mayor
Village of Portville
Portville, NY 14770

Dear Mayor Aloi:

As you are aware, 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 correspondence concerns an extremely broad request made under the Freedom of Information Law, and your question is whether you are required to respond to such a request, particularly in view of the fact that the Village of Portville operates with parttime personnel.

Without considering rights of access to the information sought, it is important to point out that the Freedom of Information Law requires that an applicant for records "reasonably describe" the record or records in which he or she is interested [see Freedom of Information Law, §89(3)].

Under the circumstances, it appears that several aspects of the request attached to your letter failed to reasonably describe the records in which the applicant is interested. For instance, in a letter dated April 22, the applicant requested "[T]he complete files on the village compensation insurance starting with the fiscal year 1980-81 and going back as far as I find necessary"; a similar request was made with respect to CETA projects. From my perspective, when receiving such broad requests, a Village official must raise questions regarding which aspects of records pertaining to CETA projects are included within the request and how "far back" is the re-

quest intended to cover. Does the request concern persons hired for CETA projects, how much money was spent, what types of projects there might have been, etc.? The point is that if one cannot determine by means of the request which records have been sought, the request would not in my opinion have "reasonably described" the records sought. Stated differently, if you cannot determine which records have been requested, the applicant has failed to meet his burden of reasonably describing the records. In a case in which records requested are not reasonably described, it is suggested that the applicant be contacted in order to obtain greater specificity or particularity regarding the records sought.

It should be added, however, some aspects of the requests appear to have met the requirement that the requests reasonably describe the records sought. For instance, a request was made for the "complete file including the audit on the Federal HUD grant of $200,000 for the water system." In that situation, the applicant has not requested files regarding federal grants generally, but rather the file with respect to a particular federal grant dealing with a particular project, i.e., the water system. As such, if Village officials have the capacity to determine the nature of records sought, it would appear that such a request would comply with the standard in the Freedom of Information Law.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits during which requests for records must be answered. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request with five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and 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
Executive Director

RJF:jm

Encs.

cc: George Braden

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1589

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

June 26, 1980

[redacted]

Dear [redacted]

As you are aware, I have received your letter dated May 20, which was received by this office on June 12.

Your inquiry concerns information relative to a report of child abuse. You requested several items of information on the subject from the New York City Department of Social Services and the New York State Child Abuse and Maltreatment Center, which is part of the State Department of Social Services.

Having reviewed the package of correspondence attached to your letter, I believe that it is unlikely that any records exist relative to your inquiry. As indicated in a letter addressed to you dated March 18, an assessment of a report of child abuse was made and no credible evidence was found regarding the report. Subsequently, the report was considered "unfounded" and all information that in any way identified persons cited in the report has been expunged by both the New York State Child Abuse and Maltreatment Register and the local child abuse protection service. As such, any information that may have existed apparently no longer exists. If that is the case, it would appear that the response offered by the Director of Child Protection Services on March 20 was appropriate.

In short, although the information sought may once have existed, apparently it no longer exists. Therefore, I do not feel that the responses to your requests could be considered denials of access to records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: James S. Cameron

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1590

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 26, 1980

David M. Dutko, Esq.
Assistant Corporation Counsel
City of Binghamton
City Hall
Binghamton, New York 13901

Dear Mr. Dutko:

I have received your letter of June 12 in which you requested confirmation of our conversation regarding access to "media reports".

According to your letter, the initial issue "is whether a written request for access to a particular record may be waived only for certain persons". Stated differently, if the news media is permitted to inspect particular records without filing a written request, may an agency compel a "private citizen" to file a written request for the same records?

As you are aware, both §89(3) of the Freedom of Information Law and §1401.5(a) of the Committee's regulations state that an agency may require that a request be made in writing. Nevertheless, the cited provision of the regulations states that an agency "may make records available upon oral request".

In my view, since the Freedom of Information Law provides that accessible records 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], it would be inappropriate to require one person to submit a written request for a particular record, while waiving that requirement when the same record is requested by members of the news media. In short, if a record is made available upon oral request to one person, the same record should be made available to any person upon oral request.

Second, if "records are set aside at the main police desk, on a 24-hour basis for news media inspection", you have asked whether the agency may compel a private citizen to inspect the same records "only during regular civilian business hours at the Police Records Department desk?" My response to this question must be analogous to the response to the first. Very simply, the identity of an applicant or the person whom an applicant represents is irrelevant in terms of rights of access. The only question that may be raised under the Freedom of Information Law is whether records sought are available. Consequently, if particular records are set aside to be viewed on a 24-hour basis, I do not believe that an agency can restrict rights of access to those records by distinguishing categories of applicants as representatives of the news media and others. Therefore, if records are set aside for 24-hour viewing by the news media, they must in my opinion be made available for viewing for the same period for any person who seeks to inspect 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

cc: Mayor Libous

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS
FOIL-AO-1591
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 26, 1980

Mr. John P. Kulund
[redacted]

Dear Mr. Kulund:

I have received your letter of June 12 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, your pistol license was revoked by the Suffolk County Police Department. During the hearing following the revocation in which you sought to renew your pistol license, you had indicated that you were informed that "several people made derogatory statements" pertaining to you. You have asked whether the Freedom of Information Law provides you with a right to inspect the "whole" contents of the statements, files, and other records used or prepared in the investigation, which has been closed.

In my opinion, although there may be portions of the "file" that may be available to you, there are also aspects of the file which in my view are deniable.

It is noted that the provision of law that specifically deals with licenses to carry, possess, repair, and dispose of firearms is §400.00 of the Penal Law. Having reviewed that statute, it appears that it contains no direction regarding disclosure of the records used or created in conjunction with an investigation. Consequently, I believe that rights of access under the circumstances are governed by the Freedom of Information Law.

In brief, 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 appearing in §87(2)(a) through (h) of the Law.

In my view, there may be as many as four grounds for denial that might appropriately be cited to withhold certain aspects of the records in question.

Perhaps the most important ground for denial 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". Based upon the situation that you described, if there are statements made by individuals concerning you that may be derogatory, for example, or even favorable, I believe that such records may be withheld to the extent that disclosure would identify the individuals who made the statements. If a name, for instance, could be deleted from a statement, perhaps the remainder of the statement could be made available. If, however, deletion of the name alone would not serve to protect the identity of the person who made the statement, the entire statement could in my opinion justifiably be withheld. Similarly, other records in which members of the public may be identified could in my view be withheld to the extent that disclosure would result in "an unwarranted invasion of personal privacy."

The second ground for denial that might be appropriately raised is §87(2)(e), which states that an agency may withhold records compiled for law enforcement purposes under the circumstances specified in the cited provision. Although it is questionable whether §87(2)(e) may be asserted to withhold any of the records, it is possible that the records might "identify a confidential source" and be withheld on that basis. To that extent, I believe that the records may be withheld.

A third 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..."

The provision quoted above contains what in effect is a double negative. Although inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations are available. Under the circumstances, if, for example, the officials of the Police Department or the County transmitted memoranda or similar materials reflective of opinion, advice, suggestion, or recommendation, such materials could in my view be withheld.

Lastly, you mentioned that there was reference to a psychiatric evaluation during the hearing but that it was found later that no such record had been produced. Assuming that such a record had been produced, it would in my opinion have been confidential due to the provisions of §33.13 of the Mental Hygiene Law. Consequently, such records would fall within the scope of §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute."

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

cc: Suffolk County Police Department

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1592

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

June 26, 1980

Mr. Peter A. Szikszay
Peter's Quality Tree Service
357 Villa Avenue
Buffalo, New York 14216

Dear Mr. Szikszay:

I have received your letter of June 13 and your model applications for public access to records.

Although I am in general agreement with the forms that you have devised, I would like to offer the following comments.

First, at the top of the page, you have cited not only the existing New York Freedom of Information Law, but also the original Freedom of Information Law of New York and the federal Freedom of Information and Privacy Acts. In this regard, the only citation that is applicable in my opinion concerns the current Freedom of Information Law. That law as originally enacted in 1974 was repealed when the amendments to the Law took effect on January 1, 1978. In addition, the federal Freedom of Information and Privacy Acts apply only to records in possession of federal agencies. They have no application with respect to records in possession of state or local government in New York. Moreover, although the grounds for denial appearing in the federal Freedom of Information Act are similar to those in its New York counterpart, there are distinctions. As such, the list of grounds for denial would not be applicable to either of the federal Acts.

Lastly, at the end of the page you have made reference to the capacity to a "3-Man Board as provided for by Statute". Although the Freedom of Information Law does require that there be an appeals person or body, the 3-man board in Erie County was created by the enactment of local legislation. In this regard, local legislation cannot be considered a "statute". In my view, a statute can consist only of an act passed either by the State Legislature or by Congress.

I hope that 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-1593

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

June 27, 1980

Mr. Douglas A. Coon
[redacted]

Dear Mr. Coon:

I have received your letter of June 18 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have been denied access to "cash flow statements" by Mr. Drake of the Kenmore-Town of Tonawanda School District.

In my opinion, to the extent that the records in which you are interested exist, they are clearly available.

It is noted at the outset that the Freedom of Information Law grants access to certain existing records. Stated differently, an agency is not required to create records in response to a request. However, if the information sought does exist in the form of one or more records, it is subject to rights of access.

Further, 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 appearing in §87(2)(a) through (h) of the Law.

Under the circumstances, I believe that one of the grounds for denial essentially directs that the information in question be made available. Specifically, §87(2)(g) of the Law states that government 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. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In this instance, cash flow statements could likely be considered "intra-agency materials". However, I believe that their contents would consist entirely of "statistical or factual tabulations or data" that must be made available.

Lastly, §89(5) of the Freedom of Information Law states that nothing in the Freedom of Information Law shall be construed to limit or abridge rights of access granted by other provisions of law or by means of judicial determination. In this regard, other provisions of law, specifically §2116 of the Education Law and §51 of the General Municipal Law, have long granted access to the records in which you are interested.

Enclosed for your consideration is a copy of a bill to amend the Freedom of Information Law that has passed both houses of the Legislature and is now before the Governor for signature.

I hope that 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. Drake

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1594

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

June 30, 1980

Mr. David Anderson
Appeals Officer
SUNY College of Environmental
Science and Forestry
Syracuse, New York 13210

Dear Mr. Anderson:

I have recently received a copy of a letter of appeal directed to you by Alice F. Steckiewicz.

According to the appeal, the records initially denied pertain to salaries of specific individuals at specific grades and copies of announcements of professional vacancies used prior to appointments.

In my opinion, each of the records sought, or portions of accessible records, should be made available.

Section 87(2)(b) of the Freedom of Information Law requires that each agency maintain a payroll record consisting of the names, public office addresses, titles and salaries of all employees of an agency. Consequently, the salary information requested is in my opinion available.

With respect to the forms in question, I believe that they, too, are available, assuming that the request is simply for the forms, rather than documents completed by applicants for positions. This contention is based upon §87(2)(g) of the Freedom of Information Law, which grants access to statistical or factual data, instructions to staff that affect the public, or agency policy or determinations found within intra-agency materials. Under the circumstances, it would appear that the announcements constitute factual data; they are likely reflective of the policy of the agency; and in addition, it is possible that they are reflective of instructions to staff that affect the public. Under any of those three situations, the announcement forms would in my opinion be available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Alice F. Steckiewicz

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS
FOIL-AO-1595
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 30, 1980

Mr. Wilber Hawkins
Superintendent
Hicksville Public Schools
Administration Building
Division Avenue
Hicksville, New York 11801

Dear Mr. Hawkins:

Thank you for sending a copy of your determination on appeal following a denial of access to records sought by Robert Zaleski.

Mr. Zaleski apparently has requested copies of transcripts made with respect to grievance proceedings relative to two employees of the Hicksville School District. In response, you denied access on the grounds that "the requested information is a matter of litigation and as such does not come under the provisions of the Freedom of Information Act."

Without knowing more about the contents of the transcripts in question, it would be inappropriate to conjecture as to the propriety of withholding them from public view. Nevertheless, it is noted that the basis for denial that you offered is not in my opinion justifiable.

As you are likely aware, §87(2) of the Freedom of Information Law contains eight grounds for denial. It is possible that one or more of those grounds for denial could be cited to withhold the transcripts in whole or in part. However, their relationship to litigation does not represent any of the grounds for denial.

There have been many instances in which records related to litigation have been available [see e.g., Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165]; unless records are prepared for litigation, they cannot in my opinion be considered exempt from disclosure.

Moreover, the state's highest court has held on two occasions that the capacity to withhold records is restricted to the eight grounds for denial listed in §87(2) of the Freedom of Information Law, none of which specifically pertain to records that relate to litigation [see e.g., Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979); Doolan v. BOCES, 2nd Supervisory District of Suffolk County, 48 NY 2d 341 (1979)].

In view of the foregoing, it is suggested that you might want to review both the records and the grounds for denial to determine the extent to which any of the grounds might be applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

cc: Robert Zaleski

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-513
FOIL-AO-1596

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

June 30, 1980

Mr. David Sylvester
The Knickerbocker News
645 Albany Shaker Road
Albany, New York 12212

Dear Mr. Sylvester:

As you are aware, I have received your letter of June 17 in which you requested an "advisory ruling" regarding possible violations of the Open Meetings Law in the situations that you described.

It is noted at the outset that the Committee does not issue "rulings". On the contrary, the Committee has the capacity to issue only advisory opinions.

With respect to the first situation described, you wrote that on June 16, the members of the Albany Common Council "met in a closed door session in the Albany City Clerk's office at 7 p.m. before the regularly scheduled council meeting started at 8 p.m.". You indicated further that "[T]he session was not announced by public notice, and had not been convened by a vote of the council as a duly authorized executive session." A reporter for the Knickerbocker News requested admission but was denied by the Assistant City Corporation Counsel, Gary Stiglemeier. Based upon information provided by a member of the Council, there was a minimal amount of discussion and the matters considered were characterized as routine. Your question is whether the gathering held prior to the regularly scheduled meeting fell within the scope of the "attorney-client relationship".

In my opinion, based upon your description of the situation, the gathering convened by the Common Council at 7 p.m. on June 16 was a "meeting" that should have been convened open to the public and preceded by notice given in accordance with the provisions of §99 of the Open Meetings Law.

It is noted that matters which appropriately fall within the scope of the attorney-client relationship are in my view outside the scope of the Open Meetings Law. Specifically, §103(3) of the Open Meetings Law states that the Law does not apply to "any matter made confidential by federal or state law". Stated differently, when a matter is exempt from the Open Meetings Law, it is as though that statute does not exist. In the case of the attorney-client relationship, when such a relationship has been invoked, it is considered confidential under §4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would be confidential under state law and exempt from the Open Meetings Law.

Nevertheless, the mere presence of an attorney does not in my opinion alone result in the initiation of a privileged relationship. From my perspective, the privilege is applicable only when a client seeks the professional advice of an attorney acting in his or her capacity as an attorney.

It has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, Sup., 9 NYS 243; Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board seeks the legal advice of an attorney acting in his or her capacity as an attorney.

In your letter, you indicated that the Common Council did not seek legal advice from the Assistant Corporation Counsel, nor did the Assistant Corporation Counsel offer advice of a legal nature. If your rendition of the facts is accurate, no attorney-client relationship was established and the matters discussed could not have been considered exempt from the Open Meetings Law on the ground that the discussion was privileged.

Contrarily, for the following reasons, I believe that the discussions to which you made reference should have been conducted in full view of the public during an open meeting.

First, the definition of "meeting" appearing in §97(1) of the Open Meetings Law has been interpreted expansively by the courts. Specifically, the state's highest court, the Court of Appeals, held in Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978), that the definition is applicable to any situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized. Further, an amendment to the Open Meetings Law that became effective on October 1, 1979 essentially codifies the direction provided by the Court of Appeals.

Second, the term "executive session" is defined by §97(3) of the Law to mean that portion of an open meeting during which the public may be excluded. In addition, it is clear that an executive session can be convened only after having convened an open meeting. Section 100(1) of the Open Meetings Law states in relevant part 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 sahll be taken to appropriate public moneys..."

In view of the foregoing, a public body must take three steps before it can enter into an executive session. A motion to enter into executive session must be made during an open meeting; the motion must identify in general terms the subject matter intended for discussion in executive session; and, a majority vote of the total membership of a public body must be carried in order to enter into an executive session. Based upon your letter, none of those steps was taken.

And third, §100(1)(a) through (h) of the Open Meetings Law specifies and limits the areas of discussion that may appropriately be considered during an executive session. Based upon the facts described in your letter, none of the grounds for executive session could justifiably have been cited to exclude the public from the deliberations initiated at 7 p.m. on June 16.

It is important to point out, too, that the Open Meetings Law requires that notice of the time and place of all meetings be given to the public and the news media. If a meeting is scheduled at least a week in advance, §99(1) of the Open Meetings Law requires that notice be given to the news media (at least two) and posted for the public in one or more designated, conspicuous 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 the public in the same fashion as described in subdivision (1) "to the extent practicable" at a reasonable time prior to the meeting. As such, notice of the meeting of June 16 should in my opinion have indicated that the meeting would commence at 7 p.m.

The second situation that you described concerns the Albany Board of Building and Zoning Appeals. You wrote that the Board decides its zoning cases "in private conversations before the board meeting starts each Monday". You wrote further that "[N]o formal vote based on a formal motion is taken in a public meeting even though the published legal notice of the decision states that decisions are based on formal motions with formal votes."

In this instance, a different exemption from the Open Meetings Law is central to the issue. Section 103(1) of the Law states that the Open Meetings Law does not apply to "judicial or quasi-judicial proceedings..."

It has long been held that the deliberations of zoning boards of appeals regarding applications may be considered "quasi-judicial". In my opinion, to the extent that a city zoning board of appeals deliberates with respect to an application, the deliberations are "exempt" from the Open Meetings Law.

Nevertheless, the leading judicial determination relative to the issue drew a line of demarcation between what may be considered quasi-judicial and what might be properly characterized as quasi-legislative or administrative in nature.

In the Appellate Division determination of Orange County Publications v. Council of the City of Newburgh, supra, the Court stated 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 (see Matter of Hecht v. Monaghan, 307 NY 461; see, also, Jewish Reconstructionist Synagogue of North Shore v. Incorporated Vil. of Roslyn Harbor, 40 NY 2d 158). Accordingly, pursuant to subdivision 1 of section 103 of the Public Officers Law, the deliberations of the Newburgh Board of Zoning Appeals as to the zoning variances are not subject to the Open Meetings Law" (id. 60 AD 2d 417).

Consequently, although the deliberations of a city zoning board of appeals may be considered exempt from the Open Meetings Law on the ground that they are "quasi-judicial", the announcement of the decision and the vote of the members of the Board could not be considered quasi-judicial and therefore must be conducted during an open meeting.

Lastly, the third situation that you described concerns the alleged failure of the Albany Board of Assessment Review to keep a record of its votes. In this regard, I direct your attention to the Freedom of Information Law, which has been in effect since September 1, 1974.

The applicable provision of the Freedom of Information Law relative to your question is §87(3)(a), which states that:

> "[E]ach agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

According to the definition of "agency" appearing in §86(3) of the Freedom of Information Law, an agency includes a "board" such as the Board of Assessment Review. Consequently, in each instance in which the Board votes, a record must be compiled which indicates the manner in which each member voted. Further, the cited provision effectively precludes secret ballot voting.

I hope that 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 Stiglmeier, Corporation Counsel
Albany Board of Building and Zoning Appeals
Albany Board of Assessment Review
Common Council

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1597

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

July 1, 1980

Mr. Louis Goldberg
[redacted]

Dear Mr. Goldberg:

I have received your letter of June 17 in which you have suggested that a hearing must be granted with respect to an appeal made under the Freedom of Information Law.

In my opinion, neither the Freedom of Information Law itself nor the regulations promulgated by the Committee require that a hearing be held in which an appellant has the opportunity to present his or her points of view.

Specifically, §89(4)(a) of the Freedom of Information Law states that:

> "[A]ny person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor 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 record the reasons for further denial, or provide access to the record sought."

In view of the foregoing, all that is required of an appeals person or body is that a determination be rendered within seven business days of receipt of an appeal fully explaining the reasons for affirmance of a denial, or that the records be made available.

Although §1401.7 of the regulations promulgated by the Committee uses the word "hear", there is nothing in the regulations that permits an appellant or requires an agency to hold an adversary hearing in which a person denied access to records would have the ability to speak or otherwise present his or her case.

Further, it is clear that the burden of withholding records under the Freedom of Information Law rests upon an agency. In order to appeal a denial, an appellant need merely indicate in writing the date and location of a request, the records that were denied and his or her name and return address. In turn, the agency is responsible for reviewing the records sought in their entirety and rendering a final determination within seven business days of the receipt of an appeal.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

cc: Kearney Jones

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1598

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

July 1, 1980

Mr. Joseph Fournier
77-A-3575
Box B
Clinton Correctional Facility
Dannemora, New York 12929

Dear Mr. Fournier:

I have received your letter of June 16 in which you requested an advisory opinion concerning a number of related issues.

You asked initially whether the Freedom of Information Law is applicable to the office of a county attorney. In my view, the office of a county attorney clearly falls within the definition of "agency" appearing in §86(3) of the Freedom of Information Law. Since "agency" is defined to include any municipal office "or other governmental entity performing a governmental...function for...any one or more municipalities thereof", the office of a county attorney is in my opinion clearly an "agency" subject to the Law.

Further, since "record" is defined to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever...", all records of a county attorney are subject to rights of access granted by the Law.

You have asked by implication whether the "opinions, memoranda, documents and/or litigation papers" prepared by a county attorney are accessible. In my view, there may be several grounds for denial with respect to such records.

First, if a county attorney prepares a memorandum in his capacity as an attorney for county officials, I believe that the memorandum would likely be confidential, for it would be subject to the attorney-client privilege (see Civil Practice Law and Rules, §4503). As such, it would be "specifically exempted from disclosure" by state statute and deniable under §87(2)(a) of the Freedom of Information Law.

Second and similarly, to the extent that a county attorney's office maintains material prepared for litigation or an attorney's work product, such records would in my view be exempt from disclosure under §3101 of the Civil Practice Law and Rules. Consequently, such records would also be deniable under §87(2)(a) of the Freedom of Information Law.

And third, §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 provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations are available, such materials consisting of statements of advice, opinion, recommendation, etc., are in my opinion deniable.

In view of the foregoing, although the records of a county attorney are subject to rights of access, it is in my opinion clear that they may in many instances be justifiably withheld.

The next area of inquiry concerns the scope of rights of access with respect to "motion papers in prior proceedings involving county agencies..." From my perspective, as a general rule, once records, such as motion papers, are served upon a court, a court clerk is responsible for providing access to such records. In such instances, §255 of the Judiciary Law would most often be applicable. The cited provision 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 of 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."

Lastly, you have asked whether records available from a county clerk on request must be made available from a county attorney who has possession of the same records.

In my opinion, if records are available from one source, there is no reason why the same records should not be made available if they are in possession of a second source. Nevertheless, from a technical point of view, it might be argued that certain records, such as those discussed in the first portion of this opinion, might justifiably be withheld, notwithstanding their availability if sought from another source.

I hope that I have been 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

OML-AO-514
FOIL-AO-1599

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

July 1, 1980

Mr. Leonard B. Wachsman
[redacted]

Dear Mr. Wachsman:

I have received your letter and the correspondence attached to it and apologize for the delay in response.

You raised questions initially regarding "budgeted monies allotted" to the Bronx District Attorney, including records indicative of "bonuses and other gratuties". You wrote that your request, which was not attached, has never been answered.

I must admit that I do not know exactly what kinds of records you are seeking. Nevertheless, I can offer the following direction.

First, §87(3)(b) of the Freedom of Information Law requires that each agency create a payroll record identifying every officer or employee by name, public office address, title and salary.

Further, in my view, changes in salary relative to particular individuals would of necessity have to be reflected in a payroll record. Consequently, if an increase in salary has been accorded to a particular employee, the payroll record should indicate that increase.

Second, §87(2)(g) of the Law grants access to "statistical or factual tabulations or data" found within inter-agency and intra-agency materials. Under the circumstances, if you are seeking information regarding the breakdown of budget expenditures for a particular agency, for example, such information would in my view constitute statistical or factual data that is available.

And third, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

It is noted that the Freedom of Information Law grants access to certain existing records. Therefore, if "information" is requested that does not exist in the form of a record or records, an agency is not required to create a new record in response to a request. I would like to point out, however, that §86(4) of the Law defines "record" broadly to include "any information...in any physical form whatsoever..." in possession of an agency. Consequently, if information sought is readily retrievable from a computer, that information constitutes a "record" subject to rights of access.

Another issue identified in your correspondence concerns a request for "the complete time and leave statement" of a particular employee for a specific period of time. In response to your request, the Administrative Assistant District Attorney wrote that such information "is not discoverable under the Freedom of Information Act but on the other hand is protected by the federal Privacy Act."

I disagree with the contention expressed by the Administrative Assistant District Attorney. First, in order to avoid any confusion, access to records in possession of agencies of government of the State of New York are subject to the Freedom of Information Law, which is found in Article 6 of the Public Officers Law. Access to records in possession of federal agencies is governed by the federal Freedom of Information Act, which is found in 5 USC §552. Similarly, the federal Privacy Act is applicable only to federal agency records (see 5 USC §552a). Consequently, the federal Privacy Act cannot be cited as a basis for withholding records in possession of an "agency" as defined by §86(3) of the New York Freedom of Information Law. Further, there is no statute in New York that is analogous to the federal Privacy Act.

With respect to the records sought, I believe that a "time and leave statement" is available in great measure, if not in toto.

First, a time and leave statement would in my view constitute an intra-agency document consisting solely of factual data.

Second, the only ground for denial which in my view might be applicable is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof the disclosure of which would result in an unwarranted invasion of personal privacy. Although the records sought might identify a particular employee, the courts have held on several occasions that public employees enjoy a lesser right to privacy than members of the public generally. 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 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 2d 664 (Court of Claims, 1978)]. Contrarily, records that identify public employees which are not relevant to the performance of their official duties are deniable, for disclosure in such cases would result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977]. In my opinion, based upon extant case law, numerical figures indicating the amount of time accrued as well as leave

time used would be available. Particulars concerning the reasons for taking leave might, however, be withheld. If, for example, the reasons for a medical leave were indicated, such information could in my opinion be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Lastly, apparently you have asked to address a particular board with respect to a grievance. In this regard, I direct your attention to the Open Meetings Law. Although the Open Meetings Law generally permits the public to attend and listen to the deliberations of public bodies, except when an executive session is proper or an exemption from the Law is applicable, nothing in the Open Meetings Law confers a right upon the public to participate at a meeting. If a public body chooses to permit public participation, it may do so by means of reasonable rules. It is suggested that you seek to contact any board that you wish to determine the appropriate means by which you may do so.

In the future, when an advisory opinion is sought, it is suggested that you indicate the particular types of records in which you are interested or which have been denied. In all honesty, it has been difficult in this case to follow the chronology of events and the correspondence that you transmitted.

I hope that 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: Peter Grishman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1600

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

July 1, 1980

Mr. Thomas E. Sawdey, Jr.
72-C-116
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

Dear Mr. Sawdey:

I have received your letter of June 18. You have asked how you can obtain a copy of your "institutional records", including "everything that the Department of Corrections has on file" about you.

I would like to offer several comments with respect to your inquiry.

First, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the Department of Correctional Services, are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

Second, despite the rights of access granted by the Law, it is possible that several of the exceptions to rights of access might be applicable. For example, internal memoranda that are reflective of opinions, advice, or recommendations would be deniable under §87(2)(g) concerning inter-agency and intra-agency material. It is also possible that some records may have been compiled for law enforcement purposes and may be deniable under §87(2)(e).

Third, rather than making a broad request for all records pertaining to you, it is suggested that you attempt to narrow your requests to particular areas of records. It is noted also that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. From my perspective, a request seeking all records pertaining to you would not conform to that standard.

Lastly, you should expect responses to requests within the periods specified in the Freedom of Information Law and the regulations promulgated by the Committee.

In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In order to make a request, it is suggested that you send a letter to the "Records Access Officer", Department of Correctional Services, State Campus, Correctional Services Building, Albany, New York 12226. It is suggested, too, that you write "Freedom of Information Law Request" on the outside of your envelope to insure that your letter is transmitted to the appropriate person.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1601

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 1, 1980

Ms. Norma H. Fatone
Status Committee
Citizens Forum
75 Fourth Street
Troy, NY 12180

Dear Ms. Fatone:

I have received your letter of June 18 in which you indicated that your request for copies of expense vouchers in possession of the City of Troy has been constructively denied. Your request was dated June 9.

In my opinion, the vouchers in which you are interested are clearly available. First, from my perspective, one of the grounds for denial in the Freedom of Information Law specifically directs that such records be made available.

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. While certain aspects of inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the vouchers in question could be considered "intra-agency materials". Nevertheless, their contents likely consist solely of "statistical or factual tabulations or data" that are available. Further, once payment has been made, the vouchers might be reflective of final determinations.

Additionally, §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abridge rights of access granted by other provisions of law or by means of judicial determination.

In this instance, there is another provision of law which has for decades granted access to vouchers. Section 51 of the General Municipal Law has long stated that "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts..." in possession of a municipality are available.

I would like to point out that your request of June 9 apparently seeks information regarding the reasons for the purchase of rental of particular services. In this regard, it is important to note that the Freedom of Information Law does not generally require an agency to create records in response to a request. Consequently, if there is no record indicating the reason for the purchase or rental of services, such a record need not be created. Nevertheless, based upon my experience working in government, any time a request is made for the purchase of goods or services, the purpose or reason must be stated. I would conjecture that the same might be true with respect to the City of Troy.

Lastly, as you are aware, the Freedom of Information Law provides specified time limits for responses to requests that have been described fully to you in earlier correspondence. Although I have been informed by the records access officer for the City of Troy that he has received numerous requests within recent months, the volume of requests does not in my view constitute a valid ground for failure, at the very least, to acknowledge receipt of the request in conjunction with §1401.5(d) of the Committee's regulations. Further, in my view, it is likely that vouchers are prepared and collected by a municipality in the ordinary course of business and are filed in a central location. As such, it is difficult to envision why response to a request for vouchers should take an inordinately long period of time.

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: Robert Brier

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1602

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

July 2, 1980

Ms. Mary Cheasty Kornman
Barrett, Smith, Schapiro,
Smith & Armstrong
26 Broadway
New York, NY 10004

Dear Ms. Kornman:

I have received your letter of June 24 in which you requested an advisory opinion under the Freedom of Information Law.

You wrote that you have received an inquiry regarding whether "an agency which denies access to records under a FOIL exemption must list or describe each such record, and give a detailed statement of the reasons for the denial."

In my opinion, there is nothing in the New York Freedom of Information Law that requires an agency to list the records that have been denied. Section 89(3) of the Law describes the manner in which an agency must respond to a request and merely states in relevant part that the agency must make the records sought available, or "deny such request in writing..." Further, the regulations promulgated by the Committee, which have the force and effect of law, state that:

> "[D]enial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" [see attached regulations, §1401.7(b)].

In view of the foregoing, although an agency must provide the reason for a denial, there is no requirement that each record withheld be described or that a detailed statement of the reasons for a denial be given.

It is noted that the responsibilities of an agency regarding a denial made pursuant to an appeal are more expansive. Section 89(4)(a) requires that the head of an agency or whomever has been designated to render determinations on appeal shall "fully explain in writing to the person requesting the records the reasons for further denial..." Therefore, in the case of an appeal determination in which an initial denial is upheld, a detailed statement must be given.

Lastly, I would like to make a point that is unrelated to the substance of your inquiry. You referred to "exemptions" under the Freedom of Information Law. While I do not want to be overly technical, I believe that the term "exemption" is misleading. In my view, that term by implication would mean that a record must be withheld. Nevertheless, the Freedom of Information Law is permissive; while an agency may withhold records falling within one or more categories of grounds for denial appearing in §87(2)(a) through (h) of the Law, it need not. Consequently, it is suggested that the capacity to deny under the Freedom of Information Law is based upon "a ground for denial" rather than an "exemption".

I hope that 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-1603

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

July 2, 1980

Mr. Lawrence Phillips
[redacted]

Dear Mr. Phillips:

I have received your letter of June 23 which concerns a denial of access to a request for records that was addressed to the District Disclosure Officer of the Internal Revenue Service.

It is emphasized at the outset that the Committee on Public Access to Records is an agency of New York State government and is responsible for advising only with respect to the New York Freedom of Information Law. Since the records that you are interested in obtaining are in possession of a federal agency, the New York Freedom of Information Law is of no effect and the controversy is beyond the scope of the capacity of this office to provide specific advice.

Nevertheless, I would like to offer the following comments.

First, although you did not attach a copy of the letter of denial issued by the District Disclosure Officer, apparently he wrote that the denial was appropriate on the ground that "such disclosure would frustrate our enforcement of the law". From my perspective, that statement without more does not conform to any of the bases for denial that appear in the federal Freedom of Information Act.

Second, it is suggested that you appeal the denial to the appropriate official. In this regard, I am sure that the District Disclosure Officer would be willing to provide you with the name and the address of the person to whom an appeal should be directed under the federal Freedom of Information Act.

Lastly, enclosed for your consideration is a copy of the federal Freedom of Information Act and a portion of a citizen's guide on the use of the Act published by the House Committee on Governmental Operations.

If all else fails, it is suggested that you contact your Congressman.

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-1604

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

July 2, 1980

Paul J. Monsell, Esq.
Village Attorney
Village of Mamaroneck
Village Hall
Mamaroneck, New York 10543

Dear Mr. Monsell:

As you are aware, your letter of June 16 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 is whether a written opinion issued by you acting in your capacity as the Village Attorney of the Village of Mamaroneck is available under the Freedom of Information Law.

In terms of background, you indicated in your letter that a resident of the Village raised several complaints relative to the procedures used by the budget officer and the Village Board of Trustees in enacting the budget. In response to those complaints, as the Village Attorney, you were requested by the Board to prepare "an opinion memo" for its consideration.

In my view, the memorandum is deniable for two reasons.

First, as you intimated in your letter, I believe that a municipal board and its counsel may engage in an attorney-client relationship. In this regard, it has long been held that such a relationship may exist and that it is operable when a municipal board seeks the legal advice of an attorney acting in his or her capacity as an attorney [see e.g., People ex rel. Updyke v. Gilon, Sup., 9 NYS 243; Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. From my perspective, when an attorney-client relationship exists and when communications are made pursuant to that relationship, such communications may be considered privileged

under §4503 of the Civil Practice Law and Rules. Further, §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". Since §4503 of the Civil Practice Law and Rules makes confidential the communications transmitted pursuant to an attorney-client relationship, I believe that the memorandum in question would be deniable under §87(2)(a) of the Freedom of Information Law.

Second, a memorandum transmitted from you as Village Attorney to the Village Board of Trustees would clearly constitute an intra-agency document. In this regard, §87(2)(g) of the Freedom of Information Law states that an agency, such as the Village, 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 statistical or factual data, instructions to staff that affect the public or final agency policy or determinations found within inter-agency or intra-agency materials are available, portions of such materials consisting of advice, recommendation, suggestion and the like are in my view deniable.

Under the circumstances, the memorandum likely consists of advice or "opinion" which is deniable 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/kk

cc: George Braden

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1605

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

July 2, 1980

Mr. Robert E. Frey
[redacted]

Dear Mr. Frey:

I have received your letter of June 19 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, questions were raised regarding the propriety of the budget process used by the Village of Mamaroneck Board of Trustees at meetings held in March or April. In response to those questions, the Village Attorney was directed by the Board of Trustees to research the questions and render an opinion. Most recently, in response to an inquiry as to whether the attorney had rendered an opinion, he gave "a summary" of the opinion at an open meeting, which was characterized as a "fair and accurate representation" of his written opinion. However, in response to a request for the attorney's written opinion, a denial was offered based upon the attorney-client privilege and the contention that the opinion "constitutes pre-decisional information prepared to assist the decision making process" which is not "a final agency determination or policy".

In fairness to both you and the Village Attorney, I feel compelled to inform you that he also asked for an advisory opinion regarding the same controversy. The question raised in his letter was somewhat narrower than that described in your letter, for there was no indication given that the substance of his written opinion was reported orally at an open meeting. I have enclosed a copy of my response to the Village Attorney for your consideration, and I will transmit a copy of this response to the Village Attorney.

As indicated in my letter to the Village Attorney, I believe that a municipal board and its counsel may engage in an attorney-client relationship, which is privileged. The question, however, under the circumstances that you have described is whether the privilege has been waived.

Although I have been unable to locate any judicial determination that would be applicable to the specific situation that has occurred, it would appear that the privilege has been waived. It has been held that in situations in which the subject matter of a communication between an attorney and his client was known to a third party, the privilege would not exist [Re Krup, 173 Misc. 578, 18 NYS 2d 427 (1940)]. Further, in a more recent decision, the Appellate Division found that:

> "[I]n general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

In view of the foregoing, the written opinion was made in accordance with the standards necessary to constitute an attorney-client relationship; nevertheless, by disclosing the substance of an opinion at an open meeting, I believe that the privilege was waived by the client, the Village Board of Trustees. Consequently, in accordance with the facts as you described them, I do not believe that the opinion of the Attorney could be withheld on the ground that it is subject to the attorney-client privilege.

Notwithstanding the possible waiver of the privilege, there is a second ground for denial which may nonetheless be applicable. As you indicated in your letter, the Freedom of Information Law provides that all records in possession of an agency are available, except to the extent that one or more of the grounds for denial appearing in the Law may appropriately be asserted [see attached Freedom of Information Law, §87(2)(a) through (h)]. Moreover, the term "record" is broadly defined by §86(4) of the Freedom of Information Law 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..." Consequently, the opinion, whether accessible or deniable, is a "record" subject to the Freedom of Information Law.

The exception to rights of access that is relevant in this situation is §87(2)(g). The cited provision states that government 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 inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. Since the Village Attorney is an employee of the Village Board of Trustees, the opinion constitutes an "intra-agency" document. To the extent that it contains statistical or factual information, instructions to staff that affect the public, or statements of agency policy or determinations, it is available. Contrarily, to the extent that it contains advice, recommendation, suggestion and the like, it is in my view deniable. It is noted further that if the advice contained within the memorandum has essentially been adopted as the policy of the Village Board of Trustees or has been ratified as a determination of the Village Board of Trustees, it has in my view likely become 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

Enc.

cc: Paul J. Monsell
Village Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1606

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

July 2, 1980

Ms. Geraldine Ann Jannone
[redacted]

Dear Ms. Jannone:

As you are aware, I have received your letter of June 23 in which you explained your inability to gain access to records from the Clerk of the City Court of New Rochelle. You have indicated further that although many requests have been made, no response has been given by the Clerk, Mr. James Generoso.

Based upon our telephone conversation and a review of your letter addressed to Mr. Generoso, I would like to make the following comments.

First, while the Freedom of Information Law does not apply to the courts and court records, I believe that the general direction provided by that statute may be helpful to you. Specifically, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records in which he or she is interested. In your letter to the Clerk, you requested copies of "any and all records" that pertain to you. In this regard, it is possible that the court records may not be filed based upon the name as an identifier. They may be filed on the basis of an index number or date, for example. Consequently, rather than requesting all records pertaining to you, it is suggested that you renew your request and provide as much information as possible to the Clerk in order to assist him in locating the records pertaining to you. For instance, I am sure that you are familiar with either the specific or general dates of the controversy to which the records may relate; you may have knowledge of an index number. In my opinion, you should supply any identifying information in your possession in order to assist the Clerk in locating the records.

Second, if your efforts continue to result in a failure to obtain copies of the records, as suggested by telephone, it is suggested that you contact the Office of Court Administration and express a complaint to that 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
Executive Director

RJF:jm

cc: James Generoso

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1602
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 2, 1980

Mr. John Hairston
76-A-3528 10-2
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Hairston:

I have received your letter of June 20 in which you requested an advisory opinion under the Freedom of Information Law.

Your letter indicates that you have requested copies of your indictment from both the Supreme Court Clerk, Westchester County, and the Westchester County District Attorney. Notwithstanding your efforts, you have not yet received a response. In my opinion, the indictment is accessible from either the Office of the District Attorney or the Clerk of the Supreme Court.

Although you may believe that the record in question is in possession of only the District Attorney, from my perspective, it is likely that it is found within the court records in the files pertaining to your case. If my contention is accurate, I believe that the indictment would be available under §255 of the Judiciary Law. The cited provision 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."

If indeed the indictment is in possession of only the District Attorney, it is in my opinion available from that office under 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 office of a district attorney, are available, except to the extent that records or portions thereof fall within one or more ground for denial appearing in §87(2)(a) through (h) of the Law.

In my opinion, none of the grounds for denial could appropriately be cited to withhold the indictment, particularly due to the fact that the case and any investigation pertaining to it have been closed. Further, case law indicates that the records in possession of the office of a district attorney are subject to the Freedom of Information Law in all respects [see New York Public Interest Research Group v. Greenberg, Sup. Ct., Albany Ct., April 27, 1979].

Lastly, 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 requests within specified time limits. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and 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/kk

Enc.

cc: Westchester County District Attorney
Clerk, Supreme Court, Westchester County

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1608

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

July 3, 1980

Richard S. Redlo
Assistant Attorney General
Department of Law
Albany, New York 12224

Dear Mr. Redlo:

I have received your recent letter in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, Prisoners' Legal Services has requested a voluminous number of records in possession of the Commission on Corrections. As you are aware, I am familiar with the request and prepared an advisory opinion on the subject some time ago. Since the issuance of that opinion, the Commission "has agreed in principle" to provide Ms. Sally Zanger of Prisoners' Legal Services with most of the records sought in an effort to settle the controversy. However, a lack of staff coupled with the pressure of other duties effectively preclude the Commission from supplying the documents in toto at the present time. You have indicated that the Commission is willing to develop "a timetable agreement" under which the records will be provided to Ms. Zanger over a period of time in order to avoid disruption of the "vital functions" of the Commission. You have asked whether such an agreement would be permissible under the Freedom of Information Law.

In my opinion, if such an agreement can be reached between the Commission on Corrections and Prisoners' Legal Services, it would be legal and consistent with the Freedom of Information Law.

Although the Freedom of Information Law and the regulations promulgated by the Committee prescribe specified time limits for response to a request, in view of the size of the request and the time and cost that might be expended in a legal contest, it would in my view be reasonable and appropriate to arrange to supply the records on a piecemeal basis over a period of time. From my perspective, one of the

purposes of the Freedom of Information Law is to avoid litigation, which should be necessary only as a last resort in a controversy in which an accord cannot be reached. In this case, it appears that an agreement based upon your suggested would solve the problem in a manner more favorable to each of the parties than litigation.

I hope that 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: Sally Sanger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1609

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

July 3, 1980

Mr. Dan Jacobs
Editor
The Millerton News
Millerton, NY 12546

Dear Mr. Jacobs:

I have recently received your letter in which you requested an advisory opinion regarding a response to a request for records issued by the Department of Agriculture and Markets.

According to the letter sent by the Department, you requested a number of records regarding the investigation of Albert Mendel and Son, Inc. The Department has agreed to provide access to a voluminous number of records and has invited you to examine and seek copies of those records at the Department during regular business hours. However, some of the records that you requested have been denied "including the subpoenas therein, and also the transcripts or notes of testimony..." given by particular individuals in the course of the investigation.

Although I disagree with some of the bases for withholding offered by the Department, I concur in great measure with the result of the determination.

The first ground for denial cited by the Department is §87(2)(e)(i), (ii), and (iii). The cited provision 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..."

In my opinion, the propriety of withholding under the provision quoted above is questionable. In judicial decisions rendered under both the original Freedom of Information Law and the amended statute, it was held that the "law enforcement purposes" exception may be cited as a basis for withholding only by criminal law enforcement agencies [see Young v. Town of Huntington, 388 NYS 2d 978 (1976); and Broughton v. Lewis, Sup. Ct., Albany Cty., (1978)]. While it is not clear that the Department of Agriculture and Markets could be considered a "criminal" law enforcement agency, many of the provisions of the Agriculture and Markets Law, and particularly Article 3 concerning investigations, have many of the trappings of a criminal proceeding. For example, witnesses may be granted immunity; penalties may be leveled for violations of Department rules or orders; there exists a possibility of prosecution; persons may be subpoenaed to provide sworn testimony; any person who testifies falsely in an investigation or proceeding of a department "shall be guilty of perjury". In view of the foregoing, it is in my view possible that a court might consider that many of the records developed in the course of an investigation or proceeding may be "compiled for law enforcement purposes" and might if disclosed interfere with a law enforcement investigation or deprive a person of an impartial adjudication, for example. Nevertheless, I must admit that there is no specific judicial determination concerning the status of the records in question under the Freedom of Information Law.

From my perspective, there exists another ground for denial in the Freedom of Information Law that was not cited by the Department in its denial which may nonetheless be appropriate at least in part. Specifically, §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". It has been advised in the past that in some instances disclosure of the identity of witnesses or records that would effectively disclose the identity of witnesses might justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. While I am not familiar with the records in question, it is possible that §87(2)(b) could appropriately be cited to withhold records or portions of records that have been denied under other grounds for denial city by the Department.

Section 73(4) of the Civil Rights Law was also cited as a basis for withholding. The cited provision states that:

> "[A] complete and accurate record shall be kept of each public hearing and a witness shall be entitled to receive a copy of his testimony at such hearing at his own expense. Where testimony which a witness has given at a private hearing becomes relevant in a criminal proceeding in which the witness is a defendant, or in any subsequent hearing in which the witness is summoned to testigy, the witness shall be entitled to a copy of such testimony, at his own expense, provided the same is available, and provided further that the furnishing of such copy will not prejudice the public safety or security."

In my view, there is no specific language in the provision quoted above that could be employed as a vehicle for withholding records. Consequently, I disagree with the contention that some of the records could be withheld under the Civil Rights Law, §73(4).

The last basis for denial is §3101(c) of the Civil Practice Law and Rules. That provision states that "[T]he work product of an attorney shall not be obtainable". Stated differently, the work product of an attorney may be considered confidential and exempt from disclosure. In this regard, §87(2)(a) of the Freedom of Information Law provides that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". Therefore, to the extent that records sought fall within the scope of §3101(c) of the Civil Practice Law and Rules, such records would be exempt from disclosure under state statute.

In sum, while I may disagree with some of the bases for withholding expressed by the Department, it would appear that the determination is in great measure reasonable. It is suggested that you review the records that have been offered to you and perhaps discuss the matter of the remaining records that have been denied at that time and in accordance with this opinion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles J. Pugliese

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1610

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

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THOMAS H. COLLINS
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(ECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 8, 1980

Dr. Harold Kobliner
Chairman
The Board of Examiners
The Board of Education of
the City of New York
65 Court Street
Brooklyn, NY 11201

Dear Dr. Kobliner:

Thank you for sending a copy of your determination on appeal regarding a request for records dated June 5 submitted by Alice Ryen of the Public Education Association.

While I do not have the benefit of viewing the records sought by Ms. Ryen, I would like to offer the following comments.

First, as indicated in earlier correspondence, while some of the records or portions of records might justifiably be denied, I cannot envision a court upholding your denial on the basis of §87(2)(e) of the Freedom of Information Law. As you are aware, the cited provision pertains to records compiled for law enforcement purposes. From my perspective, the records are in all likelihood compiled in the ordinary course of business and not for law enforcement purposes. Further, it is unlikely that disclosure would interfere with any particular law enforcement investigation or judicial proceeding. In addition, if your contention were to be upheld, virtually all records prepared by any unit of state or local government could be considered to have been prepared for law enforcement purposes. In short, I simply cannot see any justification for citing §87(2)(e) as a basis for withholding, particularly in view of the case law rendered to date in which the courts have found that the cited provision may be invoked 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)].

Second, you have denied access to "job descriptions" which you have indicated are used by the Board of Examiners in the validation materials. In my opinion, a job description is reflective of the policy of an agency with respect to its creation of parameters that must be present with respect to a particular title. Consequently, I believe that it is accessible under §87(2)(g)(iii), which states that inter-agency or intra-agency materials, constitutes agency policy are available. It might also be argued that the job descriptions used by the Board of Examiners are reflective of instructions to staff that affect the public.

This contention is in my view bolstered by a statement of legislative intent prepared by the sponsor of the amendments to the Freedom of Information Law in 1977. In a letter addressed to me by Assemblyman Mark Siegel following the passage of the amendments to the Freedom of Information Law, he described his intent with respect to §87(2)(g).

In relevant part, Mr. Siegel wrote that:

> "[T]he basis intent of the quoted provision is twofold. First, it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing any statistical or factual information, policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency or 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."

I believe that the job descriptions used in the validation studies effectively constitute the "secret law" of the Board, for they are apparently used as a basis for the creation of policy or for making determinations.

And third, it appears that much of the documentation sought by Ms. Ryen falls within the scope of §87(2)(g) of the Freedom of Information Law. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials, which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is important to point out that the language quoted above contains what in effect is a double negative. Although certain aspects of inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Further, I believe that it is the obligation of an agency to review the contents of inter-agency and intra-agency materials in their entirety to determine which portions are accessible and which portions may justifiably be withheld. In many instances, a single record may contain both advisory material that is deniable and statistical or factual material which in my view should be made available. It is noted that the introductory language of §87(2) provides that an agency may withhold "records or portions thereof..." As such, it is clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part.

With respect to your contention that some of the records may be withheld due to their "inaccuracy and unreliability", I do not believe that those factors are relevant. From my perspective, since the Law provides access to factual tabulations as well as statistical tabulations or data, projections, for example, which may be unconfirmed and perhaps misleading are nonetheless available if they are statistical in nature [see e.g., Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)].

I hope that 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: Alice Ryen

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1611

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

July 8, 1980

Mr. Vaul B. Dallas, Jr.
[redacted]

Dear Mr. Dallas:

I have recently received your letter in which you requested information regarding the Committee, the Freedom of Information Law, and guidelines regarding the deletion of identifying details designed to protect personal privacy.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern the procedural implementation of the Law, an explanatory pamphlet on the subjectand a pocket guide to the Freedom of Information Law. In addition, I have enclosed the text of an article that may be useful to you.

The central function of the Committee involves providing advice to any person having a question pertaining to either the Freedom of Information Law or the Open Meetings Law. Advice is provided orally by telephone or in writing. In order to obtain a written opinion, a letter briefly describing a situation, real or hypothetical, is sufficient.

Lastly, although the Law provides that the Committee may promulgate guidelines regarding the deletion of identifying details to protect privacy, no guidelines have been developed. The Committee has opted not to devise such guidelines for several reasons. First the Committee members do not feel that they can impose their subjective judgments in the area of privacy, for one reasonable person might consider that disclosure of a particular record would result in a permissible invasion of personal privacy, while an equally reasonable person might contend that disclosure of the same record would result in an unwarranted invasion of personal privacy. Second, there are thousands of records

in possession of state and local government that identify individuals. Consequently, the task of developing such guidelines would be immense. And third, in many instances, the custodian of records are more familiar with the effects of disclosure of particular records that the Committee. As such, they are often in a better position to gauge the effects of disclosure.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1612
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 9, 1980

Mr. Nathan Zausmer
Counselor at Law
Top of the Enclosed Mall
24 School Street
Glen Cove, NY 11542

Dear Mr. Zausmer:

I have received your letter of July 3.

As requested, enclosed are copies of the New York Freedom of Information Law, regulations developed by the Committee that govern its procedural implementation, an explanatory pamphlet and a pocket guide to the Law.

You have raised a question regarding the rights of citizens under the Law, as well as the rights of elected government officials.

In this regard, as a general rule, the Law provides and the courts have upheld the notion that accessible records should 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]. From my perspective, public officials have no greater rights of access to records than the public generally. However, by means of example, if a member of a municipal board receives direction from the board to engage in a particular study and seeks access to records in the performance of his or her official duties on behalf of the board, I believe that access should be unrestricted, unless there is some statutory provision that directs to the contrary.

I hope that I have been 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-1163

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

July 9, 1980

Mr. Louis Milburn
#71-A-0356
Drawer B
Stormville, New York 12582

Dear Mr. Milburn:

I have received your letters of June 12 and June 16 and apologize for the delay in response.

With respect to your first letter, you have questioned the policy of the New York City Police Department with respect to the retention of its records and have asked the Committee to contact the Police Department to obtain its views regarding what constitutes "factual data".

First, with regard to the retention of records, I believe that the New York City Department of Records and Information Services, a newly created office, is responsible for consulting with New York City agencies to determine the lengths of time that particular records must or should be kept. In addition, I have been informed that the Department of Records and Information Services reviews records to determine whether they should be preserved due to their historical nature or value and develops schedules for the retention and disposal of records of New York City Department. Unless I am mistaken, an agency of the City of New York, such as the Police Department, cannot destroy or otherwise dispose of records without consulting with and following the procedures developed by the Department of Records and Information Services.

Second, I am not sure of the Police Department's interpretation of what constitutes "factual data". Nevertheless, in terms of §87(2)(g) of the Freedom of Information Law, according to the Assembly sponsor of the amendments to the Freedom of Information Law, factual data is intended to mean, very simply, factual information, as opposed to information in the nature of advice, suggestion, impression and the like.

Your letter of June 16 concerns a request directed to the Office of the District Attorney of Bronx County. Apparently, you have been denied access to records on the ground that the records "were acquired during the course of a criminal investigation" and that they "are not obtainable on the Freedom of information act". It is noted that the Freedom of Information Law as originally enacted in 1974 was altered substantially by means of amendments that went into effect on January 1, 1978. Under §88(7)(d) of the original statute, an agency could withhold any "investigatory" files compiled for law enforcement purposes". As such, if a record was initially compiled pursuant to an investigation, it was forever deniable.

The amended Law, however, is based upon a presumption of access. All records of an agency are available, except those records or portions thereof that fall within one or more grounds for denial listed in §87(2). Further, the majority of the grounds for denial are written in terms of effects of disclosure.

The exception in the amendmed statute most closely related to the former §88(7)(d) is §87(2)(e), 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 adjudiciation;
>
> 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."

Based upon the provision quoted above, it is clear that some records compiled for law enforcement purposes may become accessible if, for example, an investigation has been closed or a case has otherwise been terminated. Nevertheless, there may be other instances in which records compiled for law enforcement purposes might continue to be deniable even though a case or investigation might be closed. For instance, if a record compiled for law enforcement purposes contains the identity of a confidential informant, the portion of such record that would tend to disclose the informant's identity may continue to be withheld.

Without greater knowledge of the specific contents of the records in which you are interested, it would be inappropriate to conjecture as to rights of access. Nevertheless, I hope that the foregoing will be helpful to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF/kk

bcc: Bronx County District Attorney
Rosemary Carroll

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1614

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

July 9, 1980

Mr. Larry Campbell
#79-C-29
135 State Street
Auburn, NY 13021

Dear Mr. Campbell:

I have received your letter of June 23 concerning your request for a copy of the statement required to be filed by Prisoners' Legal Services under §496 of the Judiciary Law.

It is noted initially that Prisoners' Legal Services is not in my opinion an "agency" subject to the Freedom of Information Law. Consequently, I do not believe that it is required to disclose its records in the same manner as an agency that falls within the coverage of the Freedom of Information Law.

However, as you indicated, §496 of the Judiciary Law requires that Prisoners' Legal Services:

> "...shall file with the appellate division department in which its principal office is located a statement describing the nature and purposes of the organization, the composition of its governing body, the type of legal services being made available, and the names and addresses of any attorneys and counselors-at-law employed by the organization or with whom commitments have been made."

The cited provision also states that updated information:

> "...shall be furnished the appropriate appellate division on or before July first of each year and the names and addresses of attorneys and counselors-at-law who rendered legal services during that year shall be included."

In view of the foregoing, it is suggested that you request the information required to be filed under §496 of the Judiciary Law from the appropriate Appellate Division.

Further, Mr. David C. Leven, Executive Director of Prisoners' Legal Services of New York in his letter of June 17 offered to provide additional specific information that you may want but which has not been provided. From my perspective, Mr. Leven's offer was courteous and kind. I would suggested that if you desire more information regarding Prisoners' Legal Services, you contact Mr. Leven once again.

I hope that 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 C. Leven

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1615

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

July 9, 1980

Mrs. Patricia Cullen
[redacted]

Dear Mrs. Cullen:

I have received your letter of June 26 in which you requested information regarding the "position or title [of] a Mr. Francis K. Stubbolo", who apparently is employed by the Brentwood School District No. 12.

Although you may have been informed that this office has access to the information in question, I would like to point out that the Committee on Public Access to Records is responsible only for advising with respect to the Freedom of Information Law. The Committee does not have the capacity either to gain access to records on behalf of members of the public or to compel compliance with the Freedom of Information Law.

Nevertheless, the information in which you are interested is in my opinion clearly available.

Specifically, §87(3)(b) of the Freedom of Information Law (see attached) provides that each agency, which includes a school district, is required to maintain and make available a payroll record indicating the name, public office address, title and salary of all officers or employees of the agency. Therefore, if Mr. Stubbolo is indeed employed by the District, the payroll record required to be maintained would include reference to Mr. Stubbolo's title.

It is suggested that you submit a written request to inspect the payroll record of the Brentwood School District required to be compiled under §87(3)(b) of the Freedom of Information Law, and that your request be directed to the District's "Records Access Officer".

I have enclosed a copy of an explanatory pamphlet that contains a sample letter of request and which may be particularly 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.

cc: Brentwood School District No. 12

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1616

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

July 9, 1980

Ms. Lelah Davis Ritzel
[redacted]

Dear Ms. Ritzel

I have received your letter of June 25 in which you described your efforts to gain access to genealogical records.

In all honesty, it is possible that the records that you are seeking might not exist. However, I would like to provide you with the following "leads" which may result in locating the records.

It is noted initially that access to vital records, such as birth, death and marriage records is not governed by the Freedom of Information Law. Access to marriage records is governed by §19 of the Domestic Relations Law; access to birth and death records is governmed by Article 41 of the Public Health Law. In each instance, those statutes provide that the records in question may be made available upon a showing of judicial or other "proper purposes." While the phrase "proper purpose" is not defined, I believe that a request for genealogical records such as those that you are seeking would be reflective of a proper purpose and should be made available if they exist.

With regard to possible sources, I believe that you should contact the Bureau of Vital Records at the State Health Department. The State Health Department is the custodian of all original vital records. Officials of that agency should be able to tell you whether they have possession of the records in which you are interested, or they may be able to inform you of the locations where the records are kept. It is suggested that you call the Bureau of Vital Records at (518) 474-3038 or write to:

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

Another possible source is the State Archives, which maintains custody of records of historical interest. You can contact that office by writing to:

State Archives
Office of Cultural Education
Cultural Education Center
Empire State Plaza
Albany, New York 12230

The third alternative would be the offices of city and town clerks, which maintain duplicate copies of vital records. If you are familiar with the locations where your ancestors may have lived, you should contact the city and town clerks of theaappropriate municipalities.

Lastly, county clerks may have possession of census records. Consequently, it is suggested that you might want to contact the county clerks of the counties in which you believe your ancestors may have resided.

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-1617

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

July 9, 1980

Ms. Irene C. Bordenka
[redacted]

Dear Ms. Bordenka:

I have received your letter and copies of the correspondence appended to it concerning a series of events pertaining to a divorce and child custody.

Most of the records in which you are interested are or should be in possession of courts or court clerks. In this regard, it is important to emphasize at the outset that the courts and court records fall outside the scope of the Freedom of Information Law. Section 86(3) of the Freedom of Information Law defines "agency" and specifically excludes the "judiciary", which is defined in §86(1) of the Law.

Nevertheless, I would like to offer the following comments.

I believe that the court records in which you are interested are available in great measure if not in toto under various provisions of law.

With respect to records pertaining to a matrimonial proceeding, §235(1) of the Domestic Relations Law states that:

> "[A]n officer of the court with whom the proceedings in a matrimonial action or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, writ

> written agreement of separation or memorandum thereof, or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

In view of the foregoing, although members of the public generally cannot inspect or copy records in possession of a court regarding a matrimonial proceeding, virtually all records pertaining to a matrimonial proceeding are available to a "party" such as yourself.

Second, I believe that you are interested in obtaining records in possession of a family court. As in the case of the statute quoted earlier, family court records are not generally available to the public on the basis of mere curiosity, for example. On the contrary, §166 of the Family Court Act states that:

> "[T]he records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Under the circumstances, I believe that you have a legal interest in the records sought. Consequently, I do not feel that your request could be considered "indiscriminate". It is suggested that in directing a request to a family court, you explain whatever interests that you may have in the records sought.

You have asked how you can obtain the documents in question from the courts without bein subject to "harrassment in forms of ridicule, criticism, threats, embarrassment." I cannot offer any suggestion in this regard in addition to the legal direction provided above. However, if you feel that you have been treated improperly by court officials or by judges, it is suggested that you might want

to direct a complaint to either the Office of Court Administration or the Commission on Judicial Conduct. The Office of Court Administration has an office at 270 Broadway, New York, New York, 10007. The Commission on Judicial Conduct is located at 801 Second Avenue, New York, New York, 10016.

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-1618

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

July 10, 1980

Mr. Arthur H. Samuelson
[redacted]

Dear Mr. Samuelson:

As you are aware, I have received your letter of June 7, 1980.

In all honesty, I have hesitated to respond due to our ongoing conversations on the subject and my contact with the New York City Police Department.

Your inquiry pertains to records in possession of the New York City Police Department that were created a number of years ago regarding Camp Kinderland, Camp Lakeland, the International Worker's Organization and the Jewish People's Fraternal Order. The records in which you are interested concern surveillance by the Police Department concerning activities of a non-criminal nature. Unless I am mistaken, the records are similar to those prepared by the New York State Police Department that are now in possession of the New York State Archives and the FBI.

Assuming that the records sought from the New York City Police Department are analogous to those that have been obtained or that you are in the process of obtaining from other agencies, I believe that they are available.

In order to provide assistance and advice to the New York City Police Department concerning access to the records, a copy of my earlier opinion regarding records compiled by the State Police that are now in possession of the State Archives will be transmitted to the Legal Affairs Bureau of the New York City Police Department.

You also informed me that a representative of the Bureau of Legal Affairs for the New York City Police Department is considering transferring the records in which you are interested to a museum or an historical society. Although I have not confirmed your statement with the New York City Police Department, I believe that they would not have the capacity to engage in such a transfer.

Fairly recently, the Department of Records and Information Services was created by the New York City Council. I believe that the new department is responsible for devising schedules for the orderly process of retaining and disposing of records of New York City agencies. Further, I believe that the Department of Records and Information Services reviews records prior to their disposition to determine whether records should appropriately be destroyed, or whether they should be preserved, if, for example, they have historical value.

I hope that 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-1619

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

July 10, 1980

Ms. Jeanette C. McNamara
Town Clerk
Town of North Salem
North Salem, NY 10560

Dear Ms. McNamara:

As you are aware, I have received your letter of July 1 as well as the materials appended to it.

In short, your inquiry concerns a request that you made as Town Clerk that was directed to the Town Supervisor for all records regarding the Town payroll and vouchers for 1979. You wrote that, to date, no response has been given.

It is noted that, in view of your correspondence as well as an inquiry submitted by Ms. Lori Dillon, Secretary to the North Salem Planning Board, it appears that there is something of a controversy regarding the powers and duties of various officials of the Town of North Salem. In an effort to be fair, copies of my responses to you and Ms. Dillon will be sent to both of you. Further, I would like to emphasize that I know little about the implications of the controversy and that my goal is simply to provide appropriate answers.

First, the records in which you are interested are in my opinion available not only to you as the Town Clerk, but to any person.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the Town or its components, 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].

From my perspective, one of the grounds for denial, due to its nature, may be cited as a basis for disclosing. Specifically, §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 provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations must be made available. In this instance, the payroll information in which you are interested as well as the vouchers likely consist of purely factual data that should be made available. Further, in my opinion, when a voucher is signed, it might be considered a final determination that would also be available on that basis.

Further, §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abridge rights of access granted by other provisions of law or by means of judicial determination. In this regard, §51 of the General Municipal Law has for decades granted access to the records in question. Consequently, I believe that the records sought are accessible under both the Freedom of Information Law and the General Municipal Law.

Second, with respect to the custody of records, it appears from your correspondence that the Supervisor currently maintains possession of Town records applicable to 1979. I direct your attention to §30(1) of the Town Law, which in relevant part states that the town clerk of each town "[S]hall have the custody of all records, books and papers of the town."

I am mindful of §29 of the Town Law concerning the powers and duties of a town supervisor, and I believe that all statutes should be given a reasonable interpretation. From my perspective, if a town supervisor, for example, is charged with the duty of signing vouchers or checks, that person obviously requires possession of those records in order to carry out his duties. Nevertheless, I believe that the supervisor's custody of the records should be limited to the time in which the supervisor needs the records to carry out his or her official duties. Once the checks or vouchers have been signed, I believe that those records should be transferred to the town clerk under §30 of the Town Law, the legal custodian of the records.

In view of the foregoing, it would appear that you are engaged in an attempt to carry out your statutory duties. Further, although your request was directed to the Supervisor under the Freedom of Information Law, I believe that such formality should be unnecessary, for you have sought the records in your capacity as the Town Clerk acting in the performance of your official duties, not as a member of the public under the Freedom of Information Law.

Third, with respect to your question regarding the capacity of the Supervisor to "make out checks without supporting vouchers", I must admit that I have no expertise regarding that question, for it deals with neither the Freedom of Information Law nor the Open Meetings Law. It is suggested that you contact the Department of Audit and Control for a response to that question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Lori Dillon
Town Supervisor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-518
FOIL-AO-1620

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

July 10, 1980

Ms. Lori Dillon
Secretary
North Salem Planning Board
Town of North Salem
Town Hall
North Salem, NY 10560

Dear Ms. Dillon:

I have recently received your letter of June 26 in which you have raised questions regarding minutes of meetings and the custody of records.

It is noted that I have also received correspondence from Jeanette McNamara, the Town Clerk of the Town of North Salem, and that I am somewhat familiar with the controversy that has arisen. As I explained to the Town Clerk, copies of my responses will be sent to both of you.

The first series of questions raised concerns the interpretation of the Open Meetings Law. Specifically, you asked when minutes of meetings must be made available.

In this regard, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) concerns minutes of open meetings, subdivision (2) concerns minutes of executive sessions and subdivision (3) sets forth the time limits during which minutes of open meetings and executive sessions must be made available. The cited provision states that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, minutes of open meetings must be made available within two weeks of such meetings, and minutes of executive sessions must be made available within one week of the executive sessions.

Prior to the effective date of the provision quoted above, October 1, 1979, in an effort to assist public bodies, the Committee transmitted a memorandum seeking to explain the amendments to the Open Meetings Law. I have enclosed a copy of that memorandum for your consideration. In this regard and in recognition of the possibility that a public body might not have the capacity to review or approve minutes within one or two weeks, as the case may be, the Committee advised as follows:

> "[I]t is noted that the minutes required to be made available might not be approved or 'official', for in many instances a public body might not reconvene within two weeks to approve minutes of a previous meeting. Nevertheless, the Committee has consistently advised under the Freedom of Information Law that unapproved minutes should be made available when they are created, but that such minutes might be marked 'unapproved', 'draft' or 'non-final', for example. By so doing, the public has the ability to learn generally of what transpired at a meeting, but notice is given concurrently that the minutes are subject to change, and the members of a public body are thereby given a measure of protection."

Your next question involves who has custody of the minutes, whether "approved or marked 'draft'". In my opinion, it is difficult to provide a clear response to this requestion and I believe that common sense should dictate.

Section 30 of the Town Law states in relevant part that the Town Clerk "[S]hall have the custody of all the records, books and papers of the town". The cited provision also states that clerks "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting, and of all propositions adopted pursuant to this chapter". Therefore, in addition to being responsible for attending all meetings of a town board, the clerk is also responsible for keeping records of all meetings

and of all propositions adopted pursuant to the "chapter". The "chapter" is the entire volume known as the "Town Law". Consequently, I believe that a town clerk is responsible for keeping the minutes of all bodies that might operate under or be created pursuant to the Town Law, including planning boards or zoning boards of appeals, for example.

Further, the Freedom of Information Law requires that agencies adopt procedural regulations consistent with those promulgated by the Committee. Section 1401.2 of the regulations concerns the designation of a records access officer by the governing body of a public corporation, such as a town. The cited provision of the regulations states that a records access officer is responsible for assuring that agency personnel grant or deny access to records in conjunction with the Freedom of Information Law. The provision also states that:

> "[T]he designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

If, for example, the town clerk is the designated records access officer, that person is responsible for assuring that other agency personnel carry out the duties imposed by the Freedom of Information Law.

"Draft" minutes would be available under the Freedom of Information Law in conjunction with §101(3) of the Open Meetings Law. With respect to the question of who can or must provide access to those minutes, I believe that the question can be answered only by means of the direction provided by the rules and regulation adopted by the Town of North Salem under the Freedom of Information Law. Further, from the narrow point of view of this office, it makes no difference who provides access to the records so long as they are made available within the required time limits and in compliance with the Freedom of Information Law.

Lastly, you have indicated that due to lack of space in town office buildings, inactive files are stored in a vault at the Town Garage, which is approximately a quarter of a mile from the central Town offices. You have indicated that the Town Clerk has the key to the vault and has devised a procedure for entroy into the vault for the purpose of reviewing or obtaining records.

Since §30 of the Town Law makes the town clerk the legal custodian of town records, it would appear that the procedure outlined is appropriate.

"Physical custody" of records is in my view the equivalent of physical possession of records. "Legal custody" in my opinion means legal control. Due to the provisions of the Town Law cited earlier, although a town clerk might not have physical possession of records, in my view he or she nevertheless maintains legal custody. In a related vein, you asked whether a town clerk can demand that a department provide her with copies of records for filing in her office, "which documents are not by law required to be filed with her". I am not sure of the sense of the term "filed" in the context of the question. Again, although a record may not be physically in the office of the town clerk, the clerk might nonetheless have legal custody and control of the records. Further, in view of §30 of the Town Law, one might argue that all official records are "filed" with the town clerk, whether or not that person has physical custody.

I hope that 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: Jeanette McNamara

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1621

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

July 14, 1980

Mr. Claude R. Breese
General Electric Company
One River Road
Schenectady, New York 12345

Dear Mr. Breese:

As you are aware, I have received your letter of July 2 in which you requested an advisory opinion under the Freedom of Information Law. According to the correspondence appended to your letter, you have requested memoranda in possession of the Transit Authority prepared by the staff of its Power Department describing "any post-bid oral communications to or from Westinghouse..." with regard to a particular contract.

In terms of background, you have sought information from the Transit Authority regarding bid information pertaining to contract P-36300. Although communications between the Transit Authority and Westinghouse that you requested have been made available, three memoranda in question were denied by Edward J. Babb, Secretary to the Transit Authority, by means of a letter dated June 5.

It is noted that Mr. Babb's letter merely asserted that the memoranda in question were denied; no basis for the denial was explained. In my opinion, since §1401.7(b) of the regulations promulgated by the Committee on Public Access to Records, which have the force and effect of law, requires that the reasons for a denial be stated in writing, the basis for withholding offered by Mr. Babb was inadequate.

Further, in terms of substance, the memoranda in whole or in part may be accessible under the Freedom of Information Law. The Law is based upon a presumption of access. All records in possession of an agency, such as the Transit Authority, 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.

Under the circumstances, it appears that there is but one ground for denial that may 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 important to emphasize that the provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In your letter of appeal, you indicated that you are seeking only the "factual...data" contained within the memoranda that describes the communications between Westinghouse and the Transit Authority. In my opinion, while the memoranda may be considered "intra-agency" in nature, to the extent that they contain the information in which you are interested, i.e., "factual data", they are accessible.

Further, it is noted that the Freedom of Information Law imposes an obligation upon agencies to review records sought in their entirety to determine which portions of the records, if any, may justifiably be withheld. I direct your attention to the introductory language of §87(2), which states that an agency may withhold "records or portions thereof..." that fall within one or more of the grounds for denial. As such, it is clear that the Legislature envisioned situations in which a record might be both available and deniable in part. In the context of your request, I believe that the Transit Authority is required to review the records sought in order to determine which portions are reflective of factual data for the purpose of making those aspects of the records available.

Lastly, judicial interpretations of the Freedom of Information Law have in many instances held that the exceptions to rights of access should be narrowly construed. Further, it has also been held that §87(2)(g) "permits access to records or portions thereof which contain statistical or factual information..." [see e.g., Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979, 417 NYS 2d 147 (1979); Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

In sum, based upon the information that you have provided, I believe that the Transit Authority is required to review the three memoranda initially denied and grant access to those portions of the memoranda consisting of factual information.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward J. Babb
Richard Ravitch

FOIL-AO-1622

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Allen E. Brown

July 14, 1980

FROM : Robert J. Freeman

SUBJECT : Police Department Records

I have received your memorandum of July 2 concerning access to police department records.

According to the memo, you received a letter from the Probation Officer of the United States District Court, Southern District, in which information was requested regarding a particular individual believed to be a licensed real estate salesman. As a routine check, you requested from the Buffalo Police Department any record that might establish the identity of the individual. However, the Police Department officials denied access on the ground that a state trooper "had instructed that such records are not to be released.

In order to provide assistance, I would like to offer the following comments.

First, from my perspective, the Freedom of Information Law should not be at issue under the circumstances. As you are aware, the Freedom of Information Law is generally intended to permit the public to gain access to records in possession of government in order to ensure that government is accountable. In this case, you are not requesting information as a member of the public under the Freedom of Information Law, but rather as a representative of government seeking the information in order to perform your official duties. In my view, it is in the best interests of units of government to cooperate in the performance of their duties, and it is difficult to envision a reasonable basis for withholding information concerning identity, which is innocuous, that might assist either a federal or state agency in carrying out its duties.

Second, assuming that the Freedom of Information Law is applicable, an agency official cannot merely withhold records without a substantial reason. The Law is based upon a presumption of access. All records in possession of an agency, such as the City of Buffalo, are available, except to the extent that records or portions of re-

cords fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached). As such, the only bases for withholding records are those found within the Freedom of Information Law, and an agency cannot merely assert that records will be withheld without more.

Third, assuming that records exist that could assist you in identifying the individual in question, such records might be available to any person under the Freedom of Information Law. For example, police blotters and booking records have long been accessible. Although the term "police blotter" is not defined by any provision of law, the courts have held that police blotter is a log or diary in which any event reported by or to a police department is recorded, and that such a log or diary is available [Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. Similarly, if an individual has been convicted, the record of conviction would be available from any office that maintains it, such as the office of a district attorney, or a court. If a police department maintains similar information, I believe that it is available.

And lastly, even if there are serious questions concerning the protection of personal privacy, I cannot see why the Police Department would not simply confirm the identity of a particular individual without disclosing specific details which if disclosed might result in an unwarranted invasion of personal privacy. Again, I believe that cooperation among agencies is in the best interest of all agencies involved, as well as the public.

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

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1623

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

July 15, 1980

Ms. Majorie E. Karowe
Assistant Counsel
CSEA - Local 1000
33 Elk Street
Box 125, Capitol Station
Albany, New York 12224

Dear Ms. Karowe:

I have received your letter of July 1 in which you requested an advisory opinion regarding rights of access to a "CC-2 Form" that is "prepared by an agency requesting reclassification." The CC-2 Form in which you are interested has been withheld by the State University on the ground that the form in question is "predecisional" and contains "information prepared to assist an agency decision-maker". The University cited Matter of McAuley v. Board of Education of the City of New York (61 AD 2d 1048, aff'd 48 NY 2d 659) as the basis for withholding.

In order to assist you, I have obtained a copy of the form in question. From my perspective, the majority of the form is available, while portions of its contents might be deniable.

As indicated by the citation of McAuley, supra, the focal point regarding rights of access is §87(2)(g) of the Freedom of Information Law. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

It is important to emphasize that §87(2)(g) contains what in effect is a double negative. Although inter-agency and 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.

Under the circumstances, the CC-2 Form could be considered inter-agency material. However, it is clear that portions of the form consist of factual data that is available.

In my opinion, although the McAuley case provides direction, the materials sought in that controversy differ to some extent from the information sought in this instance. In McAuley the "recommendations and reasoning" provided to an executive by an advisory panel were found to be deniable. Portions of the CC-2 Form consisting of "recommendations and reasoning" would also in my view be deniable. Nevertheless, in McAuley, the Appellate Division specifically stated that "statistical or factual tabulations" found within inter-agency and intra-agency materials are available.

Based upon a review of the form, I believe that much of its content is purely factual in nature.

For instance, information contained in the first ten boxes are available, for each represents solely factual information.

In Item 11, the "Suggested Negotiating Unit" in my opinion would be advisory in nature and therefore may be deniable.

In Item 12, the indication of "proposed Minimum Qualifications" may be accessible or deniable depending upon the manner in which the information is provided. For example, it may be advisory, or it may be reflective of the policy of an agency.

Items 13 through 18 are in my view reflective of purely factual responses. Items 19 through 21, however, indicate that responses would be largely reflective of advice, and in the words of McAuley, indications of "reasoning". As such, the responses in the items are likely deniable and may be deleted.

Lastly, Item 22 concerning the effect of a change in title or salary grade on other positions in a department would be reflective of advice or fact, depending upon how the answer is presented.

In sum, CC-2 Form could not in my opinion be withheld in its entirety. I believe that the custodian of the record is required to review it to determine which portions may justifiably be withheld under §87(2)(g) of the Freedom of Information Law.

To ensure that this discussion concerns the same form that you cited, enclosed is a copy of the form that I have reviewed.

I hope that 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: Carolyn Pasley
Office of Counsel, State University

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-516
FOIL-AO-1624

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

July 15, 1980

Gary F. Stiglmeier
Assistant Corporation Counsel
City of Albany
Department of Law
100 State Street
Albany, New York 12207

Dear Mr. Stiglmeier:

Thank you for your letter of July 1 and your interest in complying with the Open Meetings Law.

In response to several recent newspaper articles and opinions prepared by this office regarding the conduct of meetings of the City of Albany's Board of Building, Housing and Zoning Appeals, you have asked questions regarding the Board's implementation of the Open Meetings Law.

First, you have asked "[W]hat procedure, formal or otherwise, must accompany the vote of this Board at public meeting[s]." Further, you have asked if the Board votes in public and the vote is recorded at its public meeting, whether the Law envisions the manner the vote should be carried out.

The Open Meetings Law does not specifically deal with the means by which the process described must be carried out. However, I believe that the Freedom of Information Law and the Open Meetings Law when read in conjunction with one another essentially require that a roll call vote be taken.

As you are aware, §87(3)(a) of the Freedom of Information Law provides that each agency shall maintain:

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

In my opinion, since the definition of "agency" appearing in §86(3) of the Freedom of Information Law includes a municipal board, the Board of Building, Housing and Zoning Appeals is an agency. The specific direction of the quoted provision in my view requires that a voting record be compiled in each instance in which a vote is taken reflective of the vote of each member. Stated differently, if a voting record or minutes, for example, indicates that the vote was 4-3 without more, such a record would not comply with the Freedom of Information Law. The record must indicate who voted and how each member voted.

While the Open Meetings Law does not specify the manner in which votes taken during open meetings must be conducted, §95, the Legislative Declaration of the Law, states in relevant part that:

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In view of the declaration, it is clear that the public business must be "performed in an open and public manner" and that the people should have the capacity to "observe the performance of public officials". From my perspective, the direction given by the Legislative Declaration indicates that it was an intention on the part of the Legislature that the public have the capacity to "observe" the manner in which public officials perform and vote.

Consequently, it is reiterated that the votes taken during open meetings must in my opinion be accomplished by means of a roll call vote, unless the vote is unanimous.

Second, in view of the quasi-judicial nature of the Board's deliberations and the exemption in the Open Meetings Law regarding quasi-judicial proceedings [§103(1)], you have asked what procedure "formal or otherwise" must accompany the deliberations. In addition, you have asked whether or not a board member could communicate with another board member or counsel "perhaps by telephone or even on a street corner...", or whether "any any all communications [must] await the formal convening of an Executive Session."

With regard to the procedure used during closed deliberations of a quasi-judicial nature, as the Law indicates, such deliberations are exempt. As such, I believe that a board acting in its quasi-judicial capacity should deliberate in a manner that is reasonable to its members.

With regard to the capacity to communicate that you described by means of example, the Open Meetings Law does not preclude such communications. In my view, members of a board consisting of less than a quorum of its membership or a member of the board and its counsel may confer in private completely outside the scope of the Open Meetings Law.

It is noted that the Open Meetings Law applies only to a "public body" as defined by §97(2) of the Law. In my view, a public body does not convene a meeting until a quorum of its members meets for the purpose of conducting public business. Therefore, if, for example, there are seven members on a public body and three seek to communicate, their act of convening or communicating would fall outside the scope of the Open Meetings Law, for less than a quorum would be present.

Lastly, you made reference to the closed deliberations of the Board as "executive sessions". It is important to point out that the term "executive session" is specifically defined by §97(3) of the Open Meetings Law to mean that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Open Meetings Law sets forth a specific procedure that must be followed for entry into executive session and delineates the eight subjects that may appropriately be considered in executive session.

If, however, a matter is "exempt" from the Open Meetings Law, it is as though the Open Meetings Law does not exist. For instance, although a motion must be made to enter into executive session which identifies in general terms the subject matter to be considered, no such steps need be taken with regard to a discussion of a matter that is "exempt" from the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1625

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

July 15, 1980

Mr. Scott Weinstein
[redacted]

Dear Mr. Weinstein:

I have received your letter of July 2 concerning a request for records directed to the New York City Employees' Retirement System.

According to your letter, you have requested and been denied access to records kept by the Retirement System concerning beneficiaries of deceased members who have not yet received money due them from the System. Your question is whether the records in question are available.

In all honesty, although I disagree with the basis for the denial offered by Mr. Herkommer, the Director of the Retirement System, it is possible that the records, assuming they exist, may be withheld.

I have contacted officials of the Retirement System as well as the Office of the Corporation Counsel of the City of New York on your behalf to gain additional information regarding access to the records in question. Based upon those conversations, I do not believe that the Director's characterization of the records as "confidential" is accurate. From my perspective, records may be deemed "confidential" only when statutory provisions enacted by the State Legislature or by Congress specifically preclude disclosure of particular records by an agency. There is no provision of which I am aware that relates to records in which you are seeking, and I do not believe that the Director can make as assertion of confidentiality without more.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency, such as the Retirement System, are available, except to the extent that records or portions of recorda 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 under the circumstances 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." Further, §89(2)(b) lists five illustrative examples of unwarranted invasions of personal privacy. One of the examples states that an unwarranted invasion of privacy 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)].

Under the circumstances, if, for example, you seek to obtain the information and to obtain a "finder's fee" or something like it to be paid by potential beneficiaries, it is possible that a court might find that you are seeking lists of names and addresses for a commercial purpose and, therefore, that the records may be withheld.

Further, in many instances, it is difficult to determine whether disclosure of particular records would result in an unwarranted as opposed to a permissible invasion of privacy. Often one reasonable person might consider that disclosure of a particular record would result in an unwarranted invasion of personal privacy; nevertheless, an equally reasonable person might consider that disclosure of the same record would result in a permissible invasion of privacy. Consequently, subjective judgments must in many cases be made by the custodians of the records. Here, I believe that the officials of the Employees' Retirement System must make such judgments.

Lastly, the Freedom of Information Law provides access to certain existing records. Section 89(3) of the Law specifically provides that an agency need not create a record in response to a request.

In terms of the information that you are seeking, it is possible that the Retirement System may not have a separate listing or file concerning beneficiaries of deceased members of the System. If no such list exist, the Retirement System would have no obligation to create such a record on your behalf.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Harold E. Herkommer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1626

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

July 15, 1980

Mr. Frederick R. Sims
Auburn Correctional Facility
135 State Street
80C174
Box 618
Auburn, New York 13021

Dear Mr. Sims:

I have received your letter of July 9 in which you requested a copy of your arrest records.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. It does not have possession of records generally, nor does it have the capacity to compel compliance with the Freedom of Information Law.

Nevertheless, I believe that arrest records pertaining to you are available to you.

It is suggested that you contact the Office of Public Information at the Division of Criminal Justice Services, 80 Centre Street, New York, New York, 10013. The Division has records of all arrests and convictions in its computer. It is possible that you may be required to submit your fingerprints in order to gain access to the information in the computer. In any event, I am sure that the Office of Public Information at the Division can provide you with the information that you need to gain access to the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-1627

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Seymour Abel July 15, 1980

FROM : Bob Freeman

SUBJECT : Request by Frank J. Muhlfeld

As you suggested, I spoke to Charles Williams regarding my role in the review of the complaint file in question. We agreed that my function should generally involve providing advice, rather than making determinations regarding access to specific records.

Nevertheless, I offer you the following comments.

First, 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 of the grounds for denial listed in §87(2)(a) through (h) [see attached].

Second, from my perspective, there are several possible grounds for withholding some of the records or portions of the records.

Section 87(2)(a) provides that an agency may withhold records that are specifically exempted from disclosure by statute. In this regard, communications between you and Charles Williams may be confidential if they were made pursuant to the attorney-client relationship. If that is the case, they would be privileged and confidential pursuant to §4503 of the Civil Practice Law and Rules.

Section 87(2)(b) states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". By means of example, in situations in which a complaint is made and the subject does not know the identity of a complainant, it has been advised that the name or other identifying details regarding the complainant may be deleted to protect privacy. In this instance, it would appear that the parties are known to one another and that the privacy implications are likely minimal.

Of possible application is §87(2)(d), which enables an agency to withhold recordsoor portions thereof indicative of trade secrets which if disclosed would cause substantial injury to the competitve position of a corporation. In this regard, some of the materials were provided in confidence to the Department. However, case law has long held that a request for or a promise of confidentiality is essentially meaningless. Further, the state's highest court has recently held that only bases for denial are those found in the Freedom of Information Law. Consequently, the request for confidentiality may have no substance. Nevertheless, it is possible that the contents of some of the records might constitute trade secrets which if disclose would cause substantial injury to the competitive position of the subject of the record.

The last ground for denial that may be applicable in part 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 inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. What remains to be denied would consist largely of communications in the nature of advice, suggestion, impression and the like.

It is noted that §87(2)(e) provides that some records compiled for law enforcement purposes may be withheld. Although an investigation may have taken place, the courts have held on two occasions that the "law enforcement purposes" exception may be asserted only by a criminal law enforcement agency.

Finally, as promised, I have prepared a letter of acknowlegment for Mr. Muhlfeld which is self-explanatory.

If you have any questions, please feel free to call me.

RJF:jm
Enc.

cc: Charles Williams

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1628

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

July 16, 1980

Mr. Bruce I. Raynor
BOCES
201 Sunrise Highway
Patchogue, NY 11772

Dear Mr. Raynor:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of the draft forms concerning requests and appeals made under the Freedom of Information Law, as well as the regulations of the BOCES. Please note that some of the following comments are perhaps overly technical in nature; they should not be construed as criticism.

With respect to the draft application form, I offer the following observations.

First, in the paragraph concerning fees, reference is made to the possibility of different fees prescribed by law. Although it is understood that the language merely reiterates that of the Freedom of Information Law, in the case of a BOCES, there are no other fees prescribed by law. As such, it is suggested that the clause concerning a different fee be deleted.

Second, there is a section in which an applicant would include reference to the person or firm the he or she represents. In my view, that section is unnecessary, for the courts have held that accessible records should be made 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]. Therefore, the person or firm represented by an individual has no bearing upon rights of access.

At the bottom of the application, some of the possible grounds for withholding are listed. However, not all of the eight grounds for denial appearing in

§87(2)(a) through (h) of the Freedom of Information Law are presented. Further, the first basis for denial concerns what may be characterized as a "confidential disclosure". From my perspective, the term "confidential" is applicable only when confidentiality is required by a statute passed by either the State Legislature or Congress. Such records would be "exempted" from disclosure by statute and deniable under §87(2)(a) of the Freedom of Information Law. It might be preferable to replace the grounds for denial appearing on the form with a general heading entitled "Basis for Denial" or something similar. The sections concerning the inability to locate a record or the absence of maintenance of a record by the BOCES should continue to be on the form.

The appeal form is in my view appropriate in all respects.

With regard to the rules concerning the procedural implementation of the Law, there are several comments that I would like to make.

First, the resolution makes reference to §36 of the Public Officers Law. The Freedom of Information Law, however, is found in §§84 through 90 of the Public Officers Law. Your resolution would be promulgated pursuant to §87(1) of the Law.

Reference is also made to Chapters 578 through 580 of the Laws of 1974. For fear of being overly technical, I would like to point out that those chapters were repealed by the enactment of Chapter 933 of the Laws of 1977. As such, reference need be made to only Chapter 933. There is a similar reference to the 1974 chapters in §VI concerning public notice.

Next, unless I am mistaken, it is possible that an applicant might be required to file two applications. An application would be filed under §VII(A) and perhaps also after an appointment has been scheduled with the records access officer. If that is the case, I believe that the resolution should be altered to require the submission of a single application.

Lastly, §VII(C)(4)(b)1.1. through 1.8 lists the bases for denial. From my perspective, the regulations promulgated by the Committee and the rules adopted by an agency subject to the Law are intended to deal solely with the procedural aspects of the Law. Further, the Court of Appeals has held on several occasions that the only grounds for denial are those appearing in §87 (2)(a) through (h) of the Freedom of Information Law. In view of the foregoing, I believe that it is unnecessary to list the grounds for denial in the resolution, for they appear in and are restricted 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1629

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

July 16, 1980

Mr. Jase Felix
78-A-3814
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Dear Mr. Felix:

I have received your letter of July 5 which was addressed to the King's County Supreme Court, the King's County Sheriff's Office and the Committee on Public Access to Records.

Please be advised that the Committee is responsible for providing advice with respect to the Freedom of Information Law. It does not have possession of records generally, such as those in which you are interested, nor does it have the authority to compel compliance with the Freedom of Information Law.

Further, it is noted that the Law does not apply to either courts or court records [see attached, Freedom of Information Law, §86, definitions of "agency" and "judiciary"]. Nevertheless, there are several provisions of law which generally grant access to court records. For example, §255 of the Judiciary Law provides in brief that a clerk of a court is required to search and produce records in his or her possession on request.

With respect to the records sought that are in possession of an "agency" as defined by the Freedom of Information Law, such as the Sheriff's Office or the Police Department, I offer the following observations.

First, 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 of the grounds for denial listed in §87(2)(a) through (h) of the Law.

Second, several of the grounds for denial may to some extent be applicable to the records that you are seeking.

For instance, §87(2)(b) of the Freedom of Information Law states that an agency can withhold records or portions of records when disclosure would result in an unwarranted invasion of personal privacy. Since I am unfamiliar with the records sought, I cannot provide specific direction with respect to the application of the privacy provisions. However, there may be records that were prepared during an investigation that identify individuals and which if disclosed would result in an unwarranted invasion of personal privacy.

Perhaps the most important ground for denial under the circumstances 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."

Based upon the language quoted above, in many instances records become available after an investigation has been closed. Nevertheless, other aspects of investigatory materials may continue to be withheld, such as those dealing with the identities of confidential informants.

In the context of your request, I believe that scientific reports, the names of arresting officers, and police blotter entries are available. It is noted that a police blotter has been construed by the courts to means a log or diary in which any event reported to or by a police department is recorded, and that such a log or diary is available [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

A statement by a co-defendant may or may not be available depending upon the circumstances. If, for example, charges against such a person were dismissed, it is possible that the records pertaining to that person might be sealed pursuant to §160.50 of the Criminal Procedure Law. On the other hand, it is possible that such a statement might be included in an accessible court record.

A third possible ground for denial is §87(2)(f), which enables an agency to withhold records wich if disclosed would "endanger the life or safety of any person."

The last possible ground for denial that might be applicable is §87(2)(g), which provides that inter-agency and intra-agency communications consisting of statements of advice, recommendations or suggestions, for instance, 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
Enc.
cc: Hon. Vincent M. Victnonio
King's County Sheriff's Office

FOIL-AO-1630

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Joseph Sittner July 16, 1980

FROM : Bob Freeman RJF

SUBJECT : Request under the Freedom of Information Law

Having received a request under the Freedom of Information Law, you have asked whether it is the function of the Department "to be a private investigator" for a person who seeks information for personal use following an investigation. You have intimated that the information may be used for the commencement of a civil action.

Very simply, the courts have held that accessible records should be made equally available to any person, without regard to status or interest [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. As such, it is not the Department's business to seek the reasons behind a request or to deny access to records because they might be used for the initiation of a lawsuit. On the contrary, the only question that can be raised under the Freedom of Information Law concerns the extent, if any, to which records fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

Under the circumstances and based upon the materials that you transmitted to me, it is suggested that the privacy provisions of the Law [see §§87(2)(b) and 89(2)(b)] might to some extent be applicable; in addition, the "intra-office confidential memo" would appear to be deniable under §87(2)(g) of the Freedom of Information Law.

It is suggested that you review the file in accordance with the grounds for denial listed in the Freedom of Information Law. In addition, I have enclosed copies of a memorandum dealing with a similar subject written at the request of Seymour Abel, and a letter of acknowledgment of a request.

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

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1631

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

July 16, 1980

Ms. Anne Lynn
[redacted]

Dear Ms. Lynn:

I have recently received your letter of July 7. As requested, enclosed are copies of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", the Freedom of Information Law itself and regulations governing the procedural implementation of the Law.

In all honesty, I had some difficulty reading your letter. However, I believe that you are most concerned with the practices and records of attorneys and doctors.

In this regard, it is important to point out that the Freedom of Information Law applies only to records in possession of government in New York. It does not apply to the records of private attorneys or doctors, for example.

If you wish to complain about a particular attorney, for example, it is suggested that you contact your local bar association. In most instances, bar associations deal with complaints and attempt to follow up on such complaints to resolve a controversy. Similar steps could be taken with respect to doctors by contacting a local medical society.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1632

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

July 16, 1980

Mr. David Danzeisen, President
NY School Bus Contractors Association
17 Elk Street
Albany, New York 12207

Dear Mr. Danzeisen:

I have received your letter of July 7 in which you requested an advisory opinion under the Freedom of Information Law.

You have indicated that, as part of the public contract bidding process, prospective contractors are required to submit a "cost factor form" which includes "the most highly confidential financial information" concerning corporate entities, including a breakdown of experience relative to virtually all costs associated with running a business. You have also written that some school districts have released this material to possible competitors and that in your opinion the information is deniable under the Freedom of Information Law.

In view of the foregoing, you have asked the following question:

> "[I]s it appropriate under the Freedom of Information Law for a school district or the State Education Department to release to potential competitors records which a school bus contractor is legally required to submit with a contract bid where the records contain trade secrets or where disclosure might cause substantial injury to the competitive position of the company submitting the records?"

It is noted at the outset that the Freedom of Information Law is permissive. Stated differently, although an agency may withhold records or portions of records falling within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law, there is no requirement that an agency do so. Therefore, although records may be withheld, they need not be withheld.

Under the circumstances that you described, I would agree with your contention that, at the very least, portions of the documentation submitted to a school district would be deniable. As you are aware, §87(2)(d) of the Freedom of Information Law 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..."

In this instance, disclosure of the particulars of the operation of a corporation might in my view be considered trade secrets which if disclosed would "cause substantial injury to the competitive position of the subject enterprise."

I would like to point out that the grounds for denial in the Freedom of Information Law are generally written in terms of potential harmful effects of disclosure. In the case of the "trade secrets" exception, the test is whether disclosure would cause substantial injury to the competitive position of a corporation. That standard is flexible, for disclosure of particular information today might have a harmful effect vis a vis a corporation's competitive position, but the disclosure of the same information a year from now, for example, might have little effect upon the corporation's competitive position.

I would like to point out that the problem of trade secret or commercial information is coming to the fore. I believe that it is likely that legislation will pass within the next year or two that will serve to provide some protection to corporate entities.

At this juncture, it would appear that the most appropriate means of communicating your contentions as well as the advice rendered by this office involves educating those who deal with the Freedom of Information Law. This office is continually engaged in efforts to distribute information regarding the Freedom of Information Law to as many people as possible. If you can suggest additional means by which information can be disseminated, I would be most please to learn of your ideas.

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-1633

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

July 17, 1980

Daniel G. Blumenstein
Law Clerk
City of Long Beach
Office of Corporation Counsel
Kennedy Plaza
Long Beach, NY 11561

Dear Mr. Blumenstein:

I have received your letter of July 9 and thank you for your interest in complying with the Freedom of Information Law.

Enclosed are several documents that might be useful to the City of Long Beach in its reexamination of existing rules and regulations. The package includes the Freedom of Information Law and regulations promulgated by the Committee that govern the procedural aspects of the Law. Under §87(1)(b) of the Law, each agency, including the City of Long Beach, is required to adopt its own regulations consistent with and no more restrictive than those promulgated by the Committee. To facilitate the task of compliance, I have enclosed a set of model regulations that enable an agency to comply by filling in the appropriate blanks.

Also, included in the package are copies of an explanatory pamphlet, a summary of judicial decisions rendered under the Freedom of Information Law, and an index to written advisory opinions issued by the Committee. The opinions are identified by key phrase and by number. If after reviewing the index you find references to opinions in which you have a particular interest, please identify them by key phrase or by number and I will be happy to send them to you.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1634

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

July 17, 1980

Edwin Michel, Lieutenant
Enforcement Section
Highway Patrol Bureau
County of Suffolk Police Department
Yaphank Avenue
Yaphank, New York 11980

Dear Lieutenant Michel:

I have received your letter in which you requested an advisory opinion, and I apologize for the delay in response.

In brief, your inquiry deals with rights of access to records in possession of the Suffolk County Police Department, and particularly access to records concerning speed enforcement. You have indicated that the Department has engaged in efforts to comply with both the spirit and intent of the Freedom of Information Law as well as an opinion prepared by this office approximately a year ago. However, requests for records relative to speed enforcement have in your view "multiplied beyond reasonable parameters and are being employed to harass..." your office by "swamping" the office with requests for "voluminous irrelevant information". You wrote that if the Department is continually forced to perform research and searches of the records requested, your radar enforcement unit will be "effectively suffocated."

You have contended that some of the information sought might justifiably be withheld under §87(2)(e)(i) of the Freedom of Information Law. You indicated further that a judicial determination held that the discovery procedures usually involved in litigation are not applicable to proceedings before the Administrative Adjudication Bureau of the Suffolk County Supreme Court.

Although I am not sure that I can assist you considerably, I would like to offer the following comments and observations.

First, based upon some of the materials that you have submitted for background, it appears that several of the requests that you have received are more akin to cross-examination than requests for records under the Freedom of Information Law. In this regard it is emphasized that the Freedom of Information Law pertains to records; it is not a statute that enables members of the public to cross examine public officials.

Further, the Law provides access to certain existing records and §89(3) specifically states that an agency need not create a record in response to a request. In some instances, it would appear that information sought does not exist in the form of a record or records. In those cases, the Department would have no obligation to create a new record in response to the request.

Second, as you are aware, one of the bases for withholding in the Freedom of Information Law concerns records compiled for law enforcement purposes [see §87 (2)(e)]. I believe that a line of demarcation should be drawn between those records that are compiled or maintained in the ordinary course of business and those records that are indeed compiled for law enforcement purposes. For instance, records concerning radar equipment, its use or its capabilities, would not have been compiled for law enforcement purposes. However, records prepared by a police officer in the performance of his duties concerning the arrest of an individual for speeding, for example, would be compiled for law enforcement purposes.

Section 87(2)(e)(i) 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..."

In view of the foregoing, if in your judgment disclosure of particular records compiled for law enforcement purposes would interfere with judicial proceedings, the Law offers a basis for withholding.

It is noted however, that case law has long held that "mere inconvenience" does not constitute a sufficient basis for withholding records [see e.g., Sorely v. Lister, 218 NYS 2d 215 (1961); and Matter of United Federation of Teachers, Sup. Ct., New York Cty., NYLJ, May 28, 1980]. Consequently, in the event of litigation, it may be difficult to prove that disclosure of the records compiled for law enforcement purposes would indeed interfere with judicial proceedings. It is also noted that §89(4)(b) of the Freedom of Information Law places the burden of proof upon an agency in a judicial proceeding. As such, an agency cannot merely assert a ground for denial and prevail; on the contrary it must demonstrate that the harmful effects of disclosure envisioned by the grounds for denial would indeed arise [Church of Scientology v. State, 403 NYS 2d 224, 60 AD 2d 942 (1978); 46 NY 2d 906 (1979)].

Third, some of the information requested pertains to particular police officers concerning training, test scores and similar information. Portions of that information may be confidential under §50-a of the Civil Rights Law, which pertains to police officers' personnel records. In brief, the cited provision states that personnel records of police officers used to evaluate performance toward continued employment or promotion are confidential. To the extent that records sought fall within the scope of §50-a of the Civil Rights Law, they are exempted from disclosure by statute pursuant to §87(2)(a) of the Freedom of Information Law.

Fourth, it is possible that some of the documentation concerning radar equipment may be copyrighted. Materials that are copyrighted are subject to inspection, but may not be photocopied or otherwise reproduced except in accordance with the "fair use" doctrine. Therefore, to the extent that materials sought are copyrighted, they would likely be exempted from the requirement that photocopies be made in response to a request.

And fifth, you made reference to Baumann v. Dilworth (420 NYS 2d 98). In my view, the decision rendered in Baumann could not be used as a basis for withholding records under the Freedom of Information Law. I believe that the decision stands for the notion that many of the discovery vehicles often employed in litigation are not available in the cases before the Adjudication Bureau of the Department

of Motor Vehicles. In fact, the court specifically stated that "[T]he petitioners, under the circumstances, must be left to any other approaches which may be available for gathering information for use on the hearings" (id. at 99). In my opinion, implicit in the statement quoted above is the availability and utility of the Freedom of Information Law for gaining access to records relevant to the proceedings.

Lastly, I would like to reiterate the point made initially. Specifically, the Freedom of Information Law is an access to records statute; it does not require that an agency create records in response to a request. Based upon the correspondence that you attached related to the controversy, it appears that many of the requests for information could be disposed of by reliance upon the principle that an agency need not 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
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-519
FOIL-AO-1635

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

July 21, 1980

Mr. Gary K. Howell
[redacted]

Dear Mr. Howell:

I have received your letter in which you described your efforts to enhance your "ability to understand the workings of government" with regard to the Village of Waterloo.

According to your letter, the Village of Waterloo does not create records with respect to many of their meetings. For instance, you wrote that the clerk of the Village has claimed that there is no requirement that minutes of executive sessions be compiled; further, minutes of special meetings held to discuss a single subject have not been created. You also wrote that the contents of the minutes book have been changed and that you are having difficulty in gaining access to records pertaining to monies owed to the Village in the amount of $86,000.

Your questions deal with both the Freedom of Information Law and the Open Meetings Law, and I offer the following comments.

First, §101 of the Open Meetings Law (see attached) provides different requirements regarding the compilation of minutes of open meetings and executive sessions. With respect to open meetings, §101(1) requires that minutes consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and and the vote thereon." Further, §101(3) prescribes that minutes of open meetings be compiled and made available within two weeks of an open meeting.

Section 101(2) of the Law pertains to minutes of executive sessions and states that such minutes must be compiled with respect to "any action that is taken by formal vote" and that such minutes "shall consist of a record or summary of the final determinations of such action, and the date and vote thereon." Section 101(3) of the Law states that minutes of executive sessions must be compiled and made available within one week of an executive session.

It is noted that the language concerning minutes of executive sessions in my view requires that minutes be compiled only when action is taken. Consequently, if a public body merely discusses public business but takes no action during an executive session, there need not be minutes of executive session.

There may be situations in which a board cannot meet to approve minutes within the time limits specified in §101(3) of the Open Meetings Law. In this regard, it has been advised that if minutes cannot be approved or made official within the time limits, they might be marked as "draft", "unofficial", or "non-final", for example. By so doing, the public can find out generally what transpired at a meeting and, concurrently, the members of a board are given a measure of protection.

You also wrote that a meeting was recently held with an auditor of the State Department of Audit and Control. In my opinion, if a quorum of the Village Board of Trustees convened for the purpose of conducting public business with the auditor, that gathering was a "meeting" subject to the Open Meetings Law in all respects [see §97(1)] and it should have been preceded by notice given in accordance with §99 of the Open Meetings Law. The cited provision states that notice of the time and place of a meeting scheduled at least a week in advance must be given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations not less than seventy-two hours prior to the meeting [§99(1)]. If a meeting is scheduled less than a week in advance, a public body is required to fulfill the same requirements, and notice must be given "to the extent practicable" at a reasonable time prior to such meetings [§99(2)]. Therefore, all meetings, whether regularly scheduled or otherwise, must be preceded by notice.

You have written that minutes initially created have been replaced by other minutes and you suggested that official records may have been changed or "tampered" with. In this regard, I would like to point out that the Village Clerk under §4-402 of the Village Law is the legal custodian of all village records and is required to "keep a record" of the proceedings and "resolutions, ordinances and local laws adopted by a village board of trustees". It is suggested that you discuss the matter with the village clerk.

Lastly, with respect to access to records, I have enclosed a copy of the Freedom of Information Law as well as an explanatory pamphlet concerning that statute and the Open Meetings Law.

In brief, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency,such as a village, are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Based upon your description of the records in which you are interested, they are in my view available. It appears that they consist largely of statistical or factual information, which is available [see §87(2)(g)(i)]. Moreover, §51 of the General Municipal Law has long granted access to books of entry or account, bills, vouchers, checks, contracts and similar records concerning the operations of a municipality.

I hope that 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: Village Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1636

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

July 21, 1980

Mrs. Ilene Moak
[redacted]

Dear Mrs. Moak:

I have received your letter of July 7 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you are having difficulty obtaining copies of two reports pertaining to an automobile accident involving your son which occurred on May 25. With respect to the first report, the Police Chief of the Town of Queensbury, Charles Judkins, informed you that you could have a copy of the initial accident report for a fee of ten dollars. You have indicated that the report is not lengthy and that it consists of one side of a single sheet of paper. Apparently, there is a second report concerning further investigation of the incident. Although the Chief has not specifically confirmed that the report exists, you wrote that the Chief informed you that such a report would not be given to you because "it could be misused".

I would like to offer several comments with respect to the situation that you described.

First, as you are aware, §66-a of the Public Officers Law has long provided access to accident reports to "interested" persons. It is noted that §66-a of the Public Officers Law has been interpreted broadly in conjunction with the Freedom of Information Law. Although you would in my view be characterized as an "interested" person, in this instance, I believe that any person may gain access to an accident report subject to the provisions of §66-a of the Public Officers Law [see Yungworth v. New York, 92 Misc. 2d 1087, 402 NYS 2d 124 (1978)].

Second, with respect to fees, §87(1)(b)(iii) of the Freedom of Information Law provides that an agency, such as a town police department, may assess a fee:

> "...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."

In view of the provision quoted above, a police department may not charge a fee higher than twenty-five cents per photocopy, unless some other provision of law permits a a higher fee to be charged.

In this case, although you inquired as to the basis of the proposed ten dollar fee, no response based upon any provision of law was given. In my opinion, if the fee of ten dollars is based merely on policy, it is invalid, and the Police Department may charge a maximum of twenty-five cents.

It is noted that §202 of the Vehicle and Traffic Law enables the State Department of Motor Vehicles to charge a fee of $3.50 for accident reports. Although several police departments across the state have adopted similar fees based upon §202 of the Vehicle and Traffic Law, it is clear that the cited provision applies only to fees assessed by that State Department of Motor Vehicles. Consequently, a municipal police department, for example, cannot by means of policy charge for reproduction in accordance with the Vehicle and Traffic Law. In sum, if no fee has been adopted by law consistent with that proposed to be charged by the Chief, the maximum that may be charged is twenty-five cents per photocopy.

Third, the second report to which you made reference is also likely available in great measure if not in full, assuming that it exists.

It is emphasized that the Freedom of Information Law grants access to existing records. Section 89(3) of the Law specifically states that an agency need not create a record in response to a request. Therefore, if, for example, no second report exists, a police department is under no obligation to create such a report. Nevertheless, if it does exist, it is subject to the Freedom of Information Law in all respects.

Fourth, the Freedom of Information Law is based upon a presumption of access. All records of an agency 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 Freedom of Information Law. Under the circumstances, there may be three grounds for denial that relate to the second report. However, it is in my view doubtful that any of the three grounds for denial could justifiably be cited to withhold the report.

The initial ground for denial that might have relevance 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. In my view, it is unlikely that the privacy provisions are applicable, for the first accident report, which you have inspected, probably indicates that identity of the other driver involved.

The next ground for denial that could be applicable 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 language quoted above enables an agency to deny when disclosure would result in the harmful effects described in its provisions. Based upon the information that you have provided, none of the harmful effects of disclosure described in §87(2)(e) would arise by means of disclosure.

The final ground for denial that might be 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 provisions of §87(2)(g) contain what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations are available.

Under the circumstances, if there is a second report, it might properly be considered an "intra-agency" document. Nevertheless, to the extent that it contains factual information, for example, it is available.

Lastly, you wrote that the Chief was unwilling to provide access to the second report on the ground that the report "could be misused". In this regard, it is important to note that the courts have held that accessible records 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]. Consequently, your use of the information, for whatever the reasons might be, is irrelevant to rights of access. Further, the state's highest court has held that the only bases for denial are those appearing in the Freedom of Information Law [Doolan v. BOCES, 48 NY 2d 341 (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: Charles Judkins, Chief of Police

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1637

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

July 21, 1980

Mr. Francis B. Looney
Counsel
New York State Association
of Chiefs of Police
4 Quaker Meeting House Road
Farmingdale, New York 11735

Dear Mr. Looney:

In accordance with our conversation of this afternoon, this is to advise you that Chapter 677 of the Laws of 1980 is applicable only to state agencies.

Due to the definition of "agency" appearing in §2(a) of the legislation, it is clear that the legislation does not apply to units of local government or their components, such as police departments. The cited provision defines "agency" to include:

> "any state board, bureau, commission, council, department, public authority, division, office or other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary, the state legislature or any unit of local government " (emphasis added).

In view of the exceptions found in the definition, municipalities fall outside the scope of the legislation.

It is noted, too, that the statute does not in any way affect or alter rights of access to records. From my perspective, it seeks to enable the Governor and the Legislature to gain general information regarding systems of records that identify individuals in order to determine whether so-called "privacy" legislation is 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1639

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

July 23, 1980

Homer G. Biggs, Ph. D.
Preventive Medicine Research Center
of Cleveland
27700 Center Ridge Road
Westlake, OH 44145

Dear Dr. Biggs:

As you are aware, your letter addressed to the Attorney General has been transmitted to the Commitee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

Your letter indicates that you were informed by Peter Tinsley of the Medical Fraud Control Unit that records pertaining to an investigation by that unit would be withheld.

In an effort to assist you, I have made several telephone inquiries on your behalf. However, I was unable to locate Mr. Tinsley and was informed by a representative of the New York Department of Social Services that Medicare is a federal program. Consequently, it is possible that the records are in possession of a federal agency subject to the provisions of the federal Freedom of Information Act rather than an agency of New York that is subject to the New York Freedom of Information Law.

Moreover, even if the records are in possession of a New York State agency, it is likely that they would be deniable. Section 136 of the Social Services Law provides that the records that identify applicants for or recipients of public assistance are confidential.

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:ch
cc: Joseph Cooper

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1639

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

July 22, 1980

Mr. Gregory Melahn
Senior Personnel Technician
County of Ulster
244 Fair Street
Box 1800
Kingston, New York 12401

Dear Mr. Melahn:

I have received your letter of July 9 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a situation in which Ulster County is recruiting for the position of County Administrator, a position that will be placed in the unclassified service under §35 of the Civil Service Law. The question raised under the Freedom of Information Law is whether the County is required to release to the public the names of persons who have applied for the position.

In my opinion, applications or other records indicating the names of persons who have applied for the position in question are deniable.

Section 87(2)(b) of the Freedom of Information Law 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) lists five illustrative examples of unwarranted invasions of personal privacy. Under the circumstances, I believe that disclosure of the names of applicants for a position in the unclassified service would result in an unwarranted invasion of personal privacy.

If the identities of the applicants become known, disclosure could result in embarrassment to those who fail to be hired for the position. Further, disclosure could result in economic or personal hardship to applicants if their current employers are aware of the fact that a new position is being sought.

It is noted that the response would likely be different if the position was classified in a different manner. For example, although the names of applicants need not be disclosed, names of candidates who pass an examination that are placed on an eligible list are accessible (see Rules and Regulations, Department of Civil Service, Part 71).

In this instance, however, there is neither an examination nor an eligible list. Further, to reiterate, due to possible effects of disclosing the names of the applicants, records indicating the names may in my view be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-520
FOIL-AO-1640

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

July 23, 1980

Mr. Walter S.J. Wenger
[redacted]

Dear Mr. Wenger:

As you are aware, I have received your letter of July 11. You have raised questions that generally concern your right to find out how the Canastota School District operates. Your specific questions can in great measure be answered by means of a review of applicable provisions of the Freedom of Information Law and the Open Meetings Law. Copies of both statutes have been attached for your consideration.

The first question concerns your capacity to copy School District records and the fees for copying. In this regard, I direct your attention to §87(1)(b)(iii) of the Freedom of Information Law, which states that the fees for copying:

> "...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."

In view of the foregoing, it is clear that an agency may charge up to twenty-five cents per photocopy unless some other provision of law provides to the contrary. I do not believe that there is any other provision of law that prescribes the fees that may be assessed by a school district. Therefore, the fee of twenty-five cents per photocopy established by the District is in my view legal.

An agency may assess fees based upon the actual cost of reproduction in situations in which records are not subject to conventional photocopying means. For example, if you sought information contained within a computer, you might be charged on the basis of computer time; if you requested a tape recording, you might be assessed a fee based upon the cost or purchase of a cassette. In short, the language pertaining to the actual cost of reproduction is applicable to records that cannot be photocopied or records which are larger than nine inches by fourteen inches.

You also wrote that you have been denied an opportunity to use your own copier to make photocopies at a cost lower than twenty-five cents per photocopy. In my opinion, you have the right to bring your copier to the District offices and make photocopies of accessible records, so long as there is available space and if you are willing to pay for whatever energy costs might be involved. As early as 1974, the initial year of implementation of the Freedom of Information Law, situations have arisen and have been judicially considered in which a member of the public has sought to use his or her own photocopier to inspect records. In such cases, the use of a personal photocopier has been permitted [e.g., Cooke v. City of Albany, Sup. Ct., Albany Cty., 1974]. Further, the courts have held for approximately sixty years that the right to copy is concomitant with the right to inspect [Re Becker, 200 AD 178 (1922); New York Post Corporation v. Moses, 12 AD 2d 243, reversed on other grounds, 10 NY 2d 199 (1961)]. As such, I believe that you have the right to use your own photocopier based upon the conditions described earlier.

The second issue raised concerns the records access officer designated by the School District, who apparently is not always available during regular business hours. In this regard, I direct your attention to the regulations promulgated by the Committee, which have the force and effect of law and with which each agency must comply (see attached). Section 1401.4(a) of the regulations states that:

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

Further, §1401.2 of the regulations concerning the designation and duties of a records access officer indicates that the governing body of a public corporation, such as a school board:

> "...shall designate one or more persons as records access officer by names or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records."

Based upon the two provisions of the regulations cited above, it is clear that an agency is required to accept requests and produce records during regular business hours. Moreover, the School Board has the capacity to designate more than one records access officer to accommodate persons who request records records in the absence of the sole Records Access Officer, Mr. Sullivan. Since the regulations state that the records access officer is responsible for "coordinating" the agency's response to requests, I do not believe that the records access officer is required to deal with each and every request. If his duty is to "coordinate", he may designate others to act in his stead or in his absence.

The third issue concerns a denial of your request for a subject matter list on the ground that such a list is not maintained by the District. As a general rule, an agency need not create a record in response to a request [see Freedom of Information Law, §89(3)]. Nevertheless, the cited provision states that the absence of a responsibility to create records does not apply to the records required to be maintained under §87(3) of the Law. In relevant part, §87(3)(c) provides 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."

Based upon the language quoted above, it is clear that an agency, such as a school district, is required to compile and make available a "subject matter list". It is noted that the list need not make reference to each and every record in possession of the District; on the contrary, the list is required to make reference to the file cate-

gories by subject matter of the records in possession of the District, whether or not the records to which reference is made are available. I would like to point out, too, that the State Education Department has developed detailed schedules for the retention and disposal of particular records. It has been suggested in the past that those schedules might be used to form the basis of a school district's subject matter list.

Lastly, you wrote that minutes of meetings of the School Board do not become available until they have been approved by the Board. Specifically, in response to your request for minutes of a meeting held on June 24, you were informed that the minutes would not become available until approved by the Board on July 16. Here I direct your attention to §101(3) of the Open Meetings Law. The cited provision requires that minutes of open meetings be compiled and made available within two weeks of such meetings. The two week time limitation is one of a series of amendments to the Open Meetings Law that went into effect on October 1, 1979. Enclosed is a copy of a memorandum sent to public bodies that is intended to provide advice with respect to the amendments. The last area of discussion concerns minutes.

The Committee anticipated that there may be situations in which a public body might not have the capacity to approve minutes within two weeks. As a consequence, it was advised that minutes be compiled and made available within the two week period, but that such minutes might be marked "unapproved", "unofficial", or "draft", for example. By so doing, a member of the public may find out generally what transpired at a meeting, and at the same time, the members of a board are given a measure of protection by implicitly indicating that the minutes are subject to change.

I hope that 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: William H. Sullivan
Canastota Board of Education
Superintendent of Schools

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1641

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

July 23, 1980

[redacted]

Dear [redacted]

As you are aware, I have received your letter of July 10 which concerns a situation that we have discussed on several occasions. Specifically, you are interested in gaining access to records concerning an incident that occurred on May 20 in which your daughter was allegedly physically mishandled by an employee of BOCES III. At the very least, the statements made by your daughter regarding the incident and those offered by District officials conflict. While your daughter and a friend indicated that the physical contact was made by a blonde female, District officials have asserted that the person who supervised the group in which your daughter was present was a male with a black beard. In order to obtain information concerning the identity of the person described by your daughter, you have requested various records from the District.

Although I am not sure that I can be of assistance, I would like to offer the following comments.

First, as indicated in earlier conversations, the Freedom of Information Law provides access to existing records, and §89(3) of the Law specifically provides that an agency need not create a record in response to a request. Consequently, if there are no records in existence pertaining to the incident, neither the Freedom of Information Law nor any other access law can be of substantial value.

Second, assuming that a record of the incident does exist, I believe that it would be available to you under two provisions of law. The Freedom of Information Law of New York provides access to intra-agency materials consisting of statistical or factual information [see §87(2)(g)(i)]. As such, a factual report of the incident would be available to you. In the alternative, the Family Educational Rights and Privacy Act (20 U.S.C., §1232g), which is commonly known as the "Buckley Amendment", provides in brief that a parent of a student under the age of eighteen has the right to inspect "education records" pertaining to his or her child. Therefore, if a report of the incident exists, I believe that it would also be available to you under the provisions of the Buckley Amendment.

Reference will be made in the following paragraphs to your request submitted to Dr. John Dooley, Associate District Superintendent of BOCES III as well as his response.

First, you asked that Dr. Dooley send to you State Education Laws regarding "Discipline, Corporal Punishment, and Uses of Physical Force and copies of all the BOCES III Board of Education Policies dealing with all of the Educational Laws." In this regard, I agree to an extent with Dr. Dooley's response, for the records sought might amount to thousands of pages. For example, the volumes in possession of this office concerning the Education Law consist of over 2,000 pages. Nevertheless, based upon the regulations promulgated by the Committee, which have the force and effect of law, a records access officer is responsible for assisting an applicant in identifying the records sought [see attached regulations, §1401.2(b)(2)]. It is suggested that you might want to discuss the matter with Dr. Dooley and attempt to narrow your request. Further, the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy; however, the Law does not permit the assessment of a fee for the inspection of records. Consequently, I believe that you can view the volumes known as the Education Law for free at any number of locations, including a local library. Similarly, to the extent that the District has possession of records reflective of the law, regulations or policies adopted with respect to discipline, corporal punishment and the use of physical force regarding students, it is suggested that you seek to inspect such records. In all likelihood, after perusing the State Education Law and the other materials, you will find that you do not want copies of all of the materials described, but rather relatively brief portions thereof.

Dr. Dooley wrote that some of the information that you requested is "in the principal custody of other agencies". It is noted in this regard, that "principal custody" as opposed to secondary custody of records is of no relevance under the Freedom of Information Law. The Law defines "record" in §86(4) to include any information in any physical form whatsoever in possession of an agency, such as a BOCES. Consequently, a contention that another agency may be the principal custodian of the records that are also in possession of the BOCES would not constitute a valid ground for withholding.

A request was also made for records that Dr. Dooley characterized as "assignments and schedules for large numbers of personnel on May 20, 1980". He wrote that such records are not in existence and would have to be created to respond to your request. As noted earlier, the Freedom of Information Law does not require an agency to create records. Nevertheless, there might be records that are generally available and which might not make specific reference to May 20 that indicate the assignments of staff on May 20. Although it may not be the case in this instance, I believe that in some districts teachers and other staff are required to submit a schedule of their lesson plans and assignments for a particular period of time in advance. If similar records have been prepared by the staff of BOCES, you should have the capacity to review them.

Lastly, in our most recent conversation you made reference to access to records regarding a speech center, which apparently is a private, not-for-profit entity. As indicated to you orally, the Freedom of Information Law is applicable only to governmental entities [see definition of "agency", §86(3)]. As such, if the speech center is indeed non-governmental, it would not be subject to the Freedom of Information Law.

With respect to the coverage of the Buckley Amendment, that Act applies to educational agencies or institutions that receive funding through one or more programs administered by the United States Department of Education. In my view, it is unlikely that the speech center would be classified as an educational agency or institution. Further, whether or not it participates in the programs described above is unknown to me.

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: Dr. John Dooley
Foster Hoff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-522
FOIL-AO-1642

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

July 24,1980

Ms. Kathleen Kenny
[redacted]

Dear Ms. Kenny:

As you are aware, I have received your letter of July 11 which concerns your ongoing efforts to gain access to records from Community Board No. 2 in Queens.

Your letter raises several questions under the Freedom of Information Law, and I will attempt to deal with each of them. In addition, I will seek to answer questions raised orally that bear upon rights granted under the Freedom of Information Law as well as the Open Meetings Law.

First, you indicated that you transmitted a request to Community Board No.2 by means of certified mail on April 9. However, no response was received until ten days after the receipt of the request by the Board.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)].

Second, you requested to inspect the records prior to paying for photocopies. In my view, since §87(2) of the Law enables the public to inspect accessible records, you should have had the capacity to inspect the records before paying for photocopies. Further, the District Manager of Community Board No.2, John Mullins, indicated that "that was the way Community Board No. 2 handled the Freedom of Information Law" and if you objected to the Board's procedure, the matter should be raised with the Office of Corporation Counsel. I would like to point out that §87 (1) of the Freedom of Information Law requires agencies to adopt procedures consistent with the regulations promulgated by the Committee on Public Access to Records. To the extent that procedures are more restrictive than the Committee's regulations, they are in my view invalid.

Third, you indicated that, following a constructive denial of access, you initiated a "hunt for an appeals officer for Community Board No. 2". Approximately a month after you began, Steven Orlow, Counsel to the Borough President, informed you that Ms. Claire Shulman is the appeals officer. You indicated that an appeal was delivered to Ms. Shulman's office on May 19, but that you have not yet received a response. To reiterate advice given earlier, the person designated to determine appeals has seven business days from the receipt of an appeal to render a determination. If the appeals officer upholds a denial, the reasons for the denial must be fully explained in writing. In the alternative, the records should be made available. Under the circumstances, I would suggest that the failure to respond to the appeal constitutes a denial of access that may be challenged by means of 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 specifically states that the burden of proof in a judicial proceeding is borne by the agency that denied access. Stated differently, an agency must demonstrate that records withheld fall within one or more of the grounds for denial appearing in §87(2) (a) through (h) of the Law. Further, the Court of Appeals has held on two occasions that an agency cannot merely assert a ground for

denial and prevail; on the contrary; the agency must prove that the harmful effects of disclosure described in the exceptions to rights of access would indeed arise [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 341 (1979)].

In our numerous conversations, you indicated that as a result of your protests you were permitted to enter the office of the Board, presumably for the purpose of inspecting the records sought. However, it is your belief that some of the records have been removed. The records shown to you dated earliest consisted of correspondence written in January of 1980. You have indicated that you were an employee of the Board from 1977 to 1979, but that no records pertaining to your employment during that period were located or made available. It is important to point out that an agency, such as Community Board No. 2, cannot dispose of records without following specific procedures. For example, I believe that the newly created New York City Department of Records and Information Services has developed schedules for the retention and disposal of records in possession of New York City agencies. I do not believe that a New York City agency can destroy or otherwise dispose of records without following the procedures set forth by that Department.

If you believe that records pertaining to you or records in which you are interested exist but have not been made available, you may seek a certification in accordance with §89(3) of the Freedom of Information Law and §1401.2(b) (6) of the Committee's regulations. The cited provision of the Law states that a person who requests records may request that the agency "certify that it does not have possession of such record or that such record cannot be found after diligent search". It is suggested under the circumstances that you seek such a certification from the records access officer of Community Board No.2.

Lastly, you indicated that the Board created a "committee" to deal with the controversy in which you are involved. Here I direct your attention to the Open Meetings Law, a copy of which is attached.

In my view, if a committee was indeed created, it is a "public body" subject to the Open Meetings Law that would be required to compile minutes.

Section 97(2) of the Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct public business and which consist 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."

It is noted that the status of committees, subcommittees and similar bodies of an advisory nature was unclear under the Open Meetings Law as originally enacted. Nevertheless, amendments to the Law that became effective on October 1, 1979 make clear that committees, subcommittees and similar advisory bodies are subject to the Law in all respects.

Further, you wrote that an executive session was convened to dicuss your situation. Although an executive session may have been proper [see §100(1) (f)], in order to enter into executive session, a motion to do so must be made during an open meeting and carried by a majority vote of the total membership of a public body.

Section 101 of the Open Meetings Law requires that minutes of open meetings as well as action taken during an executive session must be compiled and made available. In the case of an open meeting, §101(1) requires that minutes "shall consist of a record or summary of all motions proposals, resolutions and any other matter formally voted upon and the vote thereon." Consequently, any motion, such as a motion to enter into executive session or even a motion to adjourn, should be recorded in minutes. With respect to executive sessions, §101(2) requires that minutes "shall consist of a record or summary of the final determination..." of action taken during an executive session, as well as the date and the vote.

In view of the foregoing, if indeed there was a committee designated, it would be required to take minutes. Moreover, §101(2) of the Open Meetings Law requires that minutes of executive sessions be made available within one week of such executive sessions and that minutes of open meetings be made available within two weeks of such meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

cc: John Mullins
Steven Orlow
Claire Shulman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1643

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

July 24, 1980

Ms. Joyce T. Altieri
Deputy County Clerk
County of Rockland
Office of the County Clerk
New City, New York 10956

Dear Ms. Altieri:

Your letter of July 22 addressed to Fred Koster of the Department of State has been forwarded 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 received inquiries concerning requests for a list of notaries public qualified in Rockland County. You have asked whether the names and addresses of the notaries should be made available.

I would like to offer the following comments.

First, the Freedom of Information Law, a copy of which is attached, is permissive. Although an agency may withhold certain records, there is no obligation to do so.

Second, the Law is based upon a presumption of access. All records of an agency, such as Rockland County, are available except to the extent that records or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law. Relevant under the circumstances are §§87(2)(b) and 89(2)(b), both of which concern the capacity to deny when disclosure would result in an unwarranted invasion of personal privacy.

Specifically, §89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes:

> "...sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

Therefore, if a list of names and addresses is sought for commercial or fund-raising purposes, it may be denied.

Nevertheless, it has been advised that individual licenses, for example, should be made available. As a general rule, it has been suggested that the grant of a license or a permit, for example, enables the public to know that a particular individual is qualified to engage in an area of activity regulated by government. Therefore, in the Department of State, which oversees the licensing of various professions, applicants have been permitted to view individual licenses and may copy them in order to create their own lists.

Lastly, it is important to note that §89(3) of the Freedom of Information Law provides that an agency need not create a record in response to a request. Therefore, if no list of notaries exists, the County is not obliged to create a list on behalf of of an applicant.

In sum, I believe that any person may request and make copies of individual licenses of notaries public in Rockland County. Further, if a list of notaries public exists, it may be made available unless disclosure would in the opinion of County officials result in an unwarranted invasion of personal privacy based upon the direction given be §89(2)(b)(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:jm
Enc.
cc: Fred Koster

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1644

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

July 25, 1980

William Michael Brown
Reporter
Chelsea-Clinton News
148 West 24 Street
New York, NY 10011

Dear Mr. Brown:

I have received your letter of July 14 in which you requested an advisory opinion regarding your unsuccessful efforts to gain access to records in possession of the New York City Planning Commission and the Department of City Planning.

In terms of background, the records in which you are interested pertain to an urban renewal proposal known as "The City at 42nd Street". The records sought involve reports concerning proposals and plans offered by the New York City Planning Commission as well as the Urban Development Corporation. Your inquiry focuses on five documents, none of which have apparently been made available. Further, it appears that the records have been withheld on the ground that they constitute "intra-agency" staff communications that are deniable under the Freedom of Information Law.

You also raised questions concerning the apparent failure to formally designate a records access officer on the part of the Department of City Planning.

I would like to point out initially that it appears that the Department of City Planning has designated a records access officer and an appeals officer. However, none of the names mentioned in your letter are the same as those of which I am aware. According to the New York City Record of November 8, 1979, the Records Access Officer for the Department of City Planning is Julius Spector, Chief Engineer and Director of the Office of Technical Operations at Room 512, 2 Lafayette Street. The City

Record also indicates that the Appeals Officer is Norman Marcus, Counsel to the Department, whose office is also located at 2 Lafayette Street, Room 1512. Unless the information contained within the City Record is inaccurate, or if the designation of the records access officer has been changed, I believe that Mr. Spector is responsible for performing the duties of records access officer as described in the regulations promulgated by the Committee.

I have enclosed a copy of the Committee's regulations, which prescribe that the records access officer is responsible for "coordinating agency response to public requests for access to records." Again, if the information found in the City Record is accurate, Mr. Spector should in my opinion have been made aware of your requests and "coordinated" the Department's response to them.

With respect to rights of access to the records in question, it is important to emphasize that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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.

Based upon the information that you have provided, it appears that the project is in its incipient stage and that only one ground for denial may be relevant.

Specifically, §87(2)(g) of the Law provides that government 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 inter-agency and intra-agency materials may generally be withheld, 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 must be made available.

From my perspective, intra-agency materials consist of those materials that are transmitted from an official or officials of one agency to an official or officials of the same agency. Inter-agency materials consist of those documents that are transmitted from an official or officials of one agency to an official or officials of another agency.

Under the circumstances, it is unclear whether the documents sought consist of inter-agency materials as opposed to intra-agency materials. However, the distinction between the two is irrelevant to rights of access, for the accessible portions of such documents would be the same whether the documents are characterized as "inter-agency" or "intra-agency".

Further, it is important to point out that the Law makes reference to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial. As such, it is clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. As such, it is also clear that an agency must review records requested in their entirety to determine which portions, if any, may justifiably be withheld.

With respect to the records sought, it appears that all of them could be characterized as either inter-agency or intra-agency materials, except the consultant's materials to which you make reference in document #5. However, I believe that any agency that maintains possession of the records is required on request to review them in toto in order to locate and provide access to portions of the records consisting of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations.

In my view, based upon your description of the documents, they likely contain substantial portions of "statistical or factual tabulations or data", which must be made available. In addition, I would like to point out that several courts have directed that the exceptions to rights of access should be construed narrowly and that "factual data" essentially means factual information [see Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979)].

It is possible, too, that the decision to which you made reference made by the New York City Planning Commission would be reflective of a "final determination" that is also available under §87(2)(g)(iii).

The contentions expressed above are in my opinion bolstered by a letter sent to me by the Assembly sponsor of the amendments to the Freedom of Information Law. After the passage of the amendments and before their effective date (January 1, 1978), in discussing the scope of §87(2)(g), Assemblyman Mark 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 an agency be made available. Stated differently, records or portions thereof containing any statisitcal or factual information, policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff need not be made available.
>
> "It has been suggested that the phrase 'intra-agency materials' within paragraph (g) might inlcude all materials in the possession of an agency. This is not the intent of the phrase. Such

> a construction would severely detract from existing rights of access and would be absurd when read within the context of §87(2) taken as a whole. Moreover, to reiterate, the intent is to permit an agency to deny access to the purely advisory communications by officials within an agency or between agencies under the circumstances described above."

In view of the foregoing, it is reiterated that portions of inter-agency and intra-agency materials consisting of advice, recommendation, suggestion or similar types of information may justifiably be withheld. However, those portions of such materials consisting of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations are accessible.

Lastly, the fifth document that you identified is a "300-page draft report" that "is being circulated to the real estate industroy and community and civic groups for comment" (quotation attributed by you to New York Times). You have indicated that the report was written by the staff of the Department of City Planning and by consultants.

Two points should be made with respect to the report.

First, records transmitted from a consultant, for example, to government, could not be considered inter-agency or intra-agency materials, for consultants are not officials of an agency. As such, portions of the report, at the very least, would not fall within the scope of §87(2)(g) of the Freedom of Information Law.

Secondly, if the report has been distributed to a number of persons, I believe that it would be difficult to justify a denial. This Committee has consistently advised and the courts have upheld that accessible information should 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]. Consequently, if the report was disclosed to a number of members of the public, I believe that any member of the public should be able to gain access to 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: Ken Halperin
NYC Planning Commission

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1645

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

July 25, 1980

Mr. Nicholas Domoroski, Jr.
[redacted]

Dear Mr. Domoroski:

I have received your letter of July 15 regarding your efforts to gain access to records relative to events that occurred years ago.

It is noted that you made reference to earlier correspondence. However, having reviewed our files, I do not believe you have had any previous correspondence with this office.

In brief, the duties of the Committee involve providing advice with respect to the Freedom of Information Law. As such, I would like to offer the following comments regarding your inquiry.

First, in your initial request directed to the New York City Police Department, you requested "copies of all information on self". In this regard, §89(3) of the Freedom of Information Law requires an applicant for records to "reasonable describe" the records sought. The description of events and circumstances in your letter to this office would in my view likely provide sufficient background to enable an agency to respond to a request.

Second, it is possible that the records in which you are interested no longer exist. If that is the case, there are simply no records to be made available. Further, §89(3) of the Freedom of Information Law specifically provides that an agency need not create a record in response to a request.

Third, based upon your letter, it is suggested that your request be directed not to the New York City Police Department, but rather to the office of the Kings County (Brooklyn) District Attorney.

Fourth, assuming that the records in question exist, there may be grounds for withholding them in part. In this regard, I have enclosed copies of the Freedom of Information Law and an explanatory pamphlet on the subject. Most relevant to your inquiry is §87(2)(e), which permits an agency to withhold records or portions of records compiled for law enforcement purposes when disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of the cited provision.

Lastly, it is reiterated that you should likely renew your request, provide as much background information as possible, and transmit it to the office of the District Attorney in Kings 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-523
FOIL-AO-1646

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

July 25, 1980

Mr. Harvey A. Albert
Albert Homes of Elmira, Inc.
1320 E. Fayette Street
Syracuse, New York 13210

Dear Mr. Albert:

I have received your letter of July 16 concerning the closing of a school by the Board of Education of the Fayetteville Manlius School District.

In terms of background, two schools have been considered for closing, and the Board "placed both schools up for bid to see which would be to the best interest of the district for the sale with the other to be used as district offices." The bids were opened during a closed meeting during which the Board determined to sell the Manlius Elementary School to the Village of Manlius to be used for municipal offices. You requested a copy of records indicating the amounts offered in the bids received and the identities of the bidders. You also requested inspection of records regarding the estimated cost of remodeling the Mott Road School. You have asked whether or not the information requested should have been made available.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as a school district, 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) (see attached).

Under the circumstances, it would appear that only one ground for withholding appearing in the Freedom of Information Law is relevant to the request concerning bid information. Specifically, §87(2)(c) states that an agency may withhold records or portions thereof that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations..."

In my view, the focal point of the language quoted above is the effect of disclosure. For example, if disclosure would indeed impair collective bargaining negotiations or the capacity of the District to award a contract in a most optimal manner, records may be withheld to that extent.

Nevertheless, with respect to the bids, neither collective bargaining nor contract awards are involved. Consequently, I do not believe that §87(2)(c) or any other ground for denial in the Freedom of Information Law could appropriately be cited to withhold the records concerning the bids that you requested. Moreover, in terms of the effects of disclosure, all the bids have been submitted, so there is virtually no possibility of one bidder gaining an advantage over another bidder.

This contention is in my view bolstered by a recent judicial decision in which it was held that:

> "...the words 'imminent contract awards' contained in Public Officers Law Section 87, paragraph 2, subparagraph c were not intended to include the present situation where a government agency is offering its property for sale based upon proposals submitted by interested members of the public. In this situation, the agency is not awarding a contract to perform work on property owned by the agency or subject to the agency's control or for services to be performed by an outside party for the agency. Here, the agency is merely selling property it has authority to sell pursuant to applicable government statute or regulation. The lack of an ongoing contractual relationship appears to remove the present situation from the 'contract award' exception contained in Public Officers Law Section 87. Furthermore, the court is not entirely convinced by the respondents that disclosure of the minimum acceptable price for each subject property would of necessity decrease the opportunity for competitive bidding.

> While the negotiated purchase arrangement being utilized in this proceeding is different from a competitive bidding arrangement and also different from an auction situation, a prospective buyer who desires to own the property he is bidding on will probably make an effort to bid more than the minimum price to insure his selection from among his potential competitors for the subject property. In sum, the court does not believe that the contract award exception applies to this situation because of lack of ongoing contractual relationships between the agency and the successful purchaser and, because the court does not believe that prior knowledge of a minimum acceptable price will necessarily impair the prospect of competitve bidding"[Murray v. Troy Urban Renewal Agency, Sup. Ct., Rennselaer County, May 14, 1980).

With respect to records regarding the estimated costs of remodeling the Mott Road School, I believe that such records are also available. First, if the estimates were prepared by a private firm as opposed to employees of the School District, there would not in my view be any ground for denial in the Freedom of Information Law that could be cited to withhold the records. Second, if the records were prepared by School District officials, §87(2)(g) of the Freedom of Information Law can be cited to provide direction. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The provision cited above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

From my perspective, records reflective of the estimates would constitute "statistical or factual tabulations or data" that are accessible. Consequently, I believe that the records of the estimated costs of remodeling are also available.

I would also like to comment with respect to the situation described relative to the Open Meetings Law.

You indicated that the Board took action during an executive session.

In this regard, it is noted that 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 of 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 (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.

Lastly, you asked whether the proposed vote on the sale of the board may "be halted until everyone knows what the other bids consisted of". I must admit that I have no expertise regarding provisions of law regarding bids or the capacity of the School District to engage in the types of activity that you described. However, based upon the requirements under §1708(3) of the Education Law, it would appear that a court has the capacity to make null and void action taken behind closed doors by a board of education.

I hope that 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: William Broad, Esq.
Dr. Phillip Martin
Sandy Meyers
Robert B. Salisbury

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1647

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

August 7, 1980

Louis Milburn #71-A-0356
Drawer "B"
Stormville, NY 12582

Dear Mr. Milburn:

I have received your latest letter and apologize for the delay in response, which was due to my absence from the office. Please consider that this letter is written in response to your four latest communications.

First, I appreciate your interest in improving the Freedom of Information Law and have reviewed the suggestions that you have prepared. From my perspective, most of the records that you have directed to be available are in my opinion now accessible in most instances, depending upon the circumstances.

For instance, all records introduced into evidence during a trial become part of the court record and therefore are available. I direct your attention to §255 of the Judiciary Law which states in brief that a clerk of a court must diligently search for and provide access to all records in his or her possession upon payment of the appropriate fees.

With regard to the records that you described that are in possession of a police agency, again, I believe that those records are generally available now to a defendant under the Freedom of Information Law. Many of the records that you described are introduced into evidence. Further, as you are aware, §87(2)(e) of the Freedom of Information Law concerning records compiled for enforcement purposes is written in terms of harmful effects of disclosure. Therefore, when an investigation has ended or a judicial decision has been made, most of the harmful effects essentially dissappear and the records become available.

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:ch

cc: Rosemary Carroll
Peter Grishman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1648

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

August 7, 1980

Davis & Davis
Attorneys at Law
116 John Street
New York, NY 10038

Dear Mr. Davis:

As you are aware, I have received your letter of July 14 in which you requested my reaction to the decision rendered in Cirino v. Board of Education.

All things considered, I believe that the decision was quite favorable to you and your client. Although many bases for withholding the records sought were offered by the Board of Education, all of them were found to be without merit, except §87(2)(b) concerning privacy. Moreover, the court in my view took steps not required to be taken in order to attempt to assist your client in locating the subjects of records in order to attempt to obtain releases from them.

The one point with which I disagree concerns the deletion of identifying details to protect privacy. In brief, the court directed that records pertaining to those who have not signed releases consenting to disclosure should be redacted by means of deleting names and other identifying details.

Since I am not familiar with the records in question, I can only offer conjecture as to the propriety of the deletions. In addition, it appears that the court made no in camera inspection of the records. In this regard, I would like to offer several comments.

First, it is clear that the Freedom of Information Law seeks to enable an agency to withhold when disclosure would result in an "unwarranted" invasion of personal privacy. While subjective judgements must be made regarding the effects of disclosure relative to an invasion of personal privacy, it is also clear that not every disclosure of an identifying detail constitutes

an "unwarranted" invasion of privacy; on the contrary, some disclosures result in a permissible invasion of privacy. Either eventuality may be the case with respect to the records sought. Stated differently, while disclosure of some identifying details might result in an unwarranted invasion of personal privacy, it is also possible that disclosure of other identifying details would result in a permissible invasion of personal privacy. Consquently, I would contend that each record containing identifying details must be reviewed and evaluated to determine the extent to which the subject's privacy might be invaded by means of disclosure. As such, I would also contend that the court's direction to delete all identifying details is overbroad.

And second, I would like to direct your attention to a recent decision of the Court of Appeals, Westchester-Rockland Newspaper v. Kimball, (N.Y.L.J., August 6, 1980, p.1), which in part dealt with the deletion of identifying details from records. In brief, petitioners sought to learn the names of winners of a lottery conducted by a volunteer fire company in conjunction with a village. The Appellate Division, however, held that "it should be the court in camera rather than the village officials" that reviews the records to determine which identifying details should be deleted. The Court of Appeals affirmed, stating that:

> "...we find no abuse of discretion as a matter of law in withholding the prerogative of deletion from the Village... and it was well within the discretion of the Appellate Division to order the sensitive references to be deleted in as cool and uncontentious an atmosphere as possible."

In view of the foregoing and the potentially sensitive nature of the records, it is suggested that, as in Westchester-Rockland, supra, it might be more appropriate for a court to view the records in camera in order to determine which portions of the records may justifiably be deleted.

If you would like to discuss the matter further, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1649

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

August 8, 1980

Mr. D. Loggins
[redacted]

Dear Mr. Loggins:

I have received your letter of July 28.

First, as requested, enclosed are copies of privacy legislation recently signed by the Governor, the Committee's memorandum sent to the counsel to the Governor prior to the enactment of the legislation, and a memorandum recently sent to state agencies regarding the legislation.

It is emphasized that the privacy legislation does not affect or alter rights of access to records. On the contrary, as explained in both of the enclosed memoranda, it is intended to enable the Governor and the Legislature to determine the nature of state agencies' existing systems of records that identify individuals and whether additional legislation concerning privacy is necessary.

Second, you asked whether the City University of New York is subject to the New York Freedom of Information Law. In my opinion, which is shared by the City University, C.U.N.Y. is clearly an "agency" as defined by §86(3) of the Freedom of Information Law (see attached) that is subject to the 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

Robert J. Freeman
Executive Director

RJF:ch
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-524
FOIL-AO-1650

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

August 8, 1980

Mr. David S. Giles
Oriskany Central School
Towns of Whitestown-Marcy-Floyd-Rome
Oriskany, NY 13424

Dear Mr. Giles:

Thank you for your letter of August 5 and your interest in complying with the Freedom of Information and Open Meetings Laws. Copies of both statutes, as well as an explanatory pamphlet, have been enclosed for your consideration.

Your inquiry concerns the nature of minutes of executive sessions.

It is noted at the outset that the requirements of school boards regarding minutes differ to some extent from the requirements of most public bodies. As a general rule, §100(1) of the Open Meetings Law states that a public body may vote during a properly convened executive session, unless the vote concerns the appropriation of public monies. Further, §101(2) of the Open Meetings Law requires that minutes of executive sessions must be compiled reflective of action taken during an executive session. If no action is taken in executive session, minutes need not be compiled.

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. Therefore, since school boards cannot generally take action during an executive session, minutes of executive generally need not be compiled.

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 fo 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 in which the members 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. Consequently, if a school board cannot act in executive session, minutes of executive session in the majority of instances need not be compiled.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch
Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1651

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

August 11, 1980

Mr. John J. Mooney
Administrative Director
NYS Department of Civil Service
State Campus
Albany, New York 12239

Dear Mr. Mooney:

Thank you for transmitting a copy of your determination rendered pursuant to an appeal made by Mr. Brooke Fay under the Freedom of Information Law.

The appeal concerns a request for records indicating the identities of individuals and the amounts of money paid to those individuals in relation to the performance evaluation program. In your determination, you denied access to "PR-75" forms on the ground that disclosure would result in an unwarranted invasion of personal privacy, unless the employees receiving the awards give prior consent to disclosure. It appears that another ground for withholding is based upon the notion that the payroll record required to be compiled under §87(3)(b) of the Freedom of Information Law is the only record concerning payroll information required to be made available. Your determination also cited an earlier opinion rendered by this office indicating that the payroll record is required to make reference to but four items of information.

I disagree with your determination and believe that the information sought is accessible under the Freedom of Information Law.

First, I have reviewed advisory opinion number 604 rendered by this office and would like to distinguish the advice given in that opinion form the advice given herein.

The earlier opinion was written in 1977 pursuant to the provisions of the original Freedom of Information Law. As you recall, the original Freedom of Information Law was completely different from the amended Law, which went into effect on January 1, 1978. The original Law granted access to specified categories of available records to the exclusion of all others. Stated differently, if an applicant could not conform a request to one or more of the categories of available records, that person simply had no rights of access. The amended Law, however, reverses the presumption of the original Law. Instead of stating that particular records are available, the Law now states that all records are available except those records or portions thereof that fall within one or more categories of deniable records appearing in §87(2)(a) through (h) of the Law.

In both the original and amended statutes, agencies have been required to create a payroll record containing particular items. Although §88(1)(g) of the original Freedom of Information Law may have represented the only items of payroll information required to be made available under that statute, other records that exist relative to payroll information are subject to rights of access under the amended statute. Therefore, the fact that particular items of payroll information are required to be maintained under §87(3)(b) is irrelevant to rights of access to additional records on a related subject.

Second, I believe that the two items of information sought, the names of those who received awards and amount of awards, are clearly available.

In this regard, it is important to point out that the courts have consistently held that public employees enjoy a lesser right to privacy than the members of the public generally. Moreover, as a general rule, 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 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 309 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); and Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)].

Under the circumstances, since public monies were awarded to particular employees on the basis of their performance, I believe that both the names and the amounts of awards are clearly relevant to the performance of their duties. Consequently, §87(2)(b) concerning privacy could not in my opinion be justifiably cited as a basis for withholding, and I do not believe that the consent of the subjects of the records can be considered a condition precedent to disclosure.

Lastly, having discussed the matter with Harold Snyder of your Office of Counsel, it appears that the PR-75 contains information other than that sought by Mr. Fay. If that is the case, in my view the information that is not being sought may be deleted or redacted from the records, while the remaining portions sought should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brooke Fay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1652

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

August 13, 1980

Mr. Otto G. Adamec
[redacted]

Dear Mr. Adamec:

As you are aware, I have received your letter and apologize in delay for your response.

Your inquiry concerns a denial of access to a tape recording of an oral portion of an examination administered by the Department of Civil Service. Your request was denied on the basis of §87(2)(h) of the Freedom of Information Law and §70 of the regulations of the Department of Civil Service.

Although I have not heard the tape recordings and have no capacity to do so, based upon your description of the tape recording, the denial of access is in my view questionable.

Section 87(2)(h) of the Freedom of Information Law provides 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."

Section 70 of the Department regulations concerns the security of examination materials.

Based upon your description of the information sought, I feel that it is disputable whether the contents could be considered as examination questions or answers. You described the oral portions of the examination not as a series of questions and anxwers, but rather as a "role" playing situation designed to determine whether the subject of an examination has the ability to reason clearly, to

make sound judgements, to present ideas effectively, and to develop satisfactory relationships with others.

From my perspective, the purpose of §87(2)(h) is to enable an agency to withhold examination questions or answers when disclosure of such information would permit a candidate for an examination to gain an unfair advantage over other candidates, or when disclosure would subvert the examination process. Stated differently, if, for example, the questions and answers for a written examination were to be distributed prior to the final administration of the examination, anybody in receipt of the exam might score one-hundred.

In this situation, however, it does not appear that the harmful effects disclosure envisioned by §87(2)(h) would arise. According to your letter and our conversation, the oral portion of the examination is largely subjective in nature rather than objective, as in the case of written questions and answers. Consequently, it is questionable in my view whether the portion of the examination that you are seeking could be characterized as questions and answers. On the contrary, it appears that the information sought consists of a dialogue upon which subjective judgements might be made. Further, if it is essentially a dialogue, it appears unlikely that the same dialogue or communication would arise in future examinations on the same subject.

It is also emphasized that the Freedom of Information Law places the burden of proof upon an agency that has denied access [see Freedom of Information Law, §89(4)(b)]. Consequently, should the denial be challenged judicially, the agency would have to prove that the "questions", to the extent that they could be characterized as such, will be administered again.

Lastly, to the extent that the denial is based upon regulations, I believe that it is without merit. Although §87(2)(a) of the Freedom of Information Law enables an agency to withhold records that are specifically exempted from disclosure by state or federal statute, regulations cannot be equated with a statute. As such, the regulations could not in my opinion be cited as a basis 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
Executive Director

RJF:ch

cc: John Mooney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1653

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

August 14, 1980

Mr. John J. Sheehan
Adjusters, Inc.
P.O. BOX 604
Binghamton, NY 13902

Dear Mr. Sheehan:

I have received your most recent inquiry and apologize for the delay in response. Your question concerns a denial of access to records rendered on appeal by Donald Brandon, Chief Inspector of the New York State Police.

Your letter and correspondence attached to it indicate that you requested records concerning your client, who was arrested by the State Police and charged with criminally negligent homicide. The basis for the denial offered by Chief Inspector Brandon is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions of records when disclosure would result in an unwarranted invasion of personal privacy. You have questioned the denial due to the failure on the part of the State Police to acknowledge that your client was found not guilty in a trial that occurred in the spring of this year.

I would like to make several comments with the respect to the foregoing.

First, in my view it is likely that the records in which you are interested are in greater measure in possession of the court in which the case was tried. If that is true, I believe that your client or you as her agent have the right to gain access to records from the court pursuant to §160.50(1)(d).

The provisions of §160.50 of the Criminal Procedure Law concern the disposition of records in situations in which a criminal action or proceeding has been terminated in favor of the accused.

In relevant part, upon termination of a criminal action or proceeding in favor of an accused, a court generally enters an order:

> "which shall immediately be served by the clerk of the court upon the commissioner of the division of criminal justice services and upon the heads of all police departments and other law enforcement agencies having copies thereof directing that...
>
> (c) all official records and papers, including judgements and orders of a court but not inclucing published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office be sealed and not made available to any person or public agency; and
>
> (d) such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chaptor, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such license."

Second, I do not believe that the basis for withholding offered by the State Police is sufficient. Although the Freedom of Information Law does enable an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy, a blanket denial based on the provisions of the Freedom of Information Law is in my view inappropriate for several reasons. The first is that the trial was conducted in an open court and any person could have been present. Second, you clearly indicated that you were acting on the behalf of your client, the subject of the records. Third, the Freedom of Information Law requires

an agency to review records sought in their entirety to determine the extent, if any, to which one or more grounds for denial may properly be cited to withhold records. In this instance, it is possible that portions of the records in possession of the State Police might conceivably be withheld under the privacy provisions. If that is the case, those aspects of the records may be deleted. Nevertheless, the remainder 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:ch

cc: Donald G. Brandon

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1654

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

August 20, 1980

Mr. Robert L. McCray
#27119
Box 300
Marcy, New York 13403

Dear Mr. McCray:

As you are aware, I have received your letter concerning your efforts to gain information from the New York City Police Department.

First, according to the copies of correspondence attached to your letter, you have been unsuccessful in gaining access to information contained within a "log book". Your request identified the approximate time of the incident to which you made reference, as well as the date and the nature of the incident. In my opinion, if the record that you are seeking continues to exist, it should be made available to you. It is noted, however, that §89(3) of the Freedom of Information Law (see attached) states that an agency, such as the Police Department, generally need not create a record in response to a request. Therefore, if the information that you are seeking no longer exists, the Police Department has no obligation to create it on your behalf.

Second, based upon your description of the record sought, it appears that it is analogous to a "police blotter". In this regard, the courts have held that police blotters, which are reflective of logs or diaries in which events reported to or by a police department are recorded, are available [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. Therefore, if the information that you are seeking is contained within what may be considered a police blotter, I believe that it is available to you.

Third, the Freedom of Information Law is based upon a presumption of access. All records of an agency are available, except to the extent that records or portions thereof fall within one or more of the categories of deniable records listed in §87(2)(a) through (h) of the Law. The only relevant exception under the circumstances would appear to be §87(2)(e) concerning records compiled for law enforcement purposes. However, if the log relates to an investigation that has been terminated or solved, for example, it is doubtful that §87(2)(e) could be cited to withhold the information sought in its entirety.

Fourth, although you did not specifically indicate whether your request was answered, it appears that no response was given. In this regard, an agency is required to comply with specific time limits for response to request. It is noted that, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Lastly, it is suggested that you renew your request and direct it to the "records access officer" for the New York City Police Department. You should address it as follows:

Mimi Gertz
Records Access Officer
New York City Police Department
One Police Plaza
New York, New York 10038

I hope that 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: Mimi Gertz, Records Access Officer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1655

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

August 20, 1980

Ms. Cynthia Alexander
New York State Science Service
Room 3140 CEC
Albany, NY 12230

Dear Ms. Alexander:

As you are aware, I have received your letter of July 15. Your questions deal with the status of the Freedom of Information Law in relation to the Collections Management Section of the New York State Museum, which is in the process of investigating problems encountered regarding the automation of the collection of data.

Some of your questions can be answered with relative ease, while others are in my view difficult if not impossible to answer on a legal basis. Nevertheless, I will attempt to deal with each area of inquiry.

First, you asked when a request for information becomes "a freedom of information question". Further, you asked whether any request for information directed to a state or federal agency is governed immediately by the New York Freedom of Information Law or the federal Freedom of Information Act, or whether those statutes apply only when an initial request is rejected.

In my view, subject to the following conditions, any request for information should be considered in accordance with the applicable access statutes. However, it is emphasized that the New York Freedom of Information Law is an access to "records" law; it is not a statute that permits the cross-examination of public officials. Section 89(3) of the Law specifically states that an agency need not create or compile a record in response to a request. Moreover, the cited provision of the New York Law requires that an applicant reasonably describe the records in which he or she is interested.

Therefore, if, for example, an agency receives a general request that is so broad that agency officials cannot determine the nature of records or information sought, the applicant would not have met his or her responsibility. In addition, an agency may require that a request be made in writing.

If each of the conditions described in the preceding paragraph is met, I believe that a request for information should be treated as a request made under the Freedom of Information Law.

Further, the Law is in my view clearly applicable prior to a denial. In fact, under §89(3) of the Law and the regulations promulgated by the Committee, a failure to respond to a request within the requisite time limits constitutes a "constructive" denial of access that may be appealed to the head of the agency.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulation provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that one may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Second, you indicated that requests are routinely handled by curators or scientists "who pay little if any attention to formal procedures". In this regard, I offer you the following suggestions. Perhaps those who receive requests for information should become familiar with and educated with respect to the require-

ments of the Freedom of Information Law. Also, in some instances, individuals requesting information might be willing to waive the time limitations described above. If an applicant agrees to such a waiver, you would not be bound by those limitations.

In a related vein, you mentioned that requests directed to the New York State Museum are not handled by the records access officer for the State Education Department. I am familiar with the problem, for it has arisen in the past. Here I direct your attention to §1401.2(a) of the regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law (see attached). The cited provision of the regulations states that the head of an agency:

> "...shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records."

In view of the foregoing, it is clear that an agency may designate more than one records access officer. For example, you may be aware that the Department of State has numerous divisions, many of which are largely unrelated in terms of their functions. Since no single individual could be familiar with the records of each of the divisions, the rules promulgated by the Department of State indicate that the head of each division is the records access officer for his or her division. Since the State Education Department is a huge agency with myriad functions, it is suggested that Department officials review extant regulations with an eye toward optimal compliance and effectiveness and minimal administrative burden. From my perspective, it would likely be most efficient to designate a number of records access officers responsible for responding to requests within their individual areas of expertise and familiarity.

Third, you asked whether all requests for information concerning "endangered species or environmentally sensitive areas" should be referred to the Department of Environmental Conservation or handled by the Department of Education's records access officer. In my opinion, requests directed to the Department of Education concerning its records should be handled by the Department of Education. I feel compelled to provide such a response due to the definition of "record" appearing in §86(4) of the

Freedom of Information Law. In relevant part, "record" is defined 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..."

Consequently, if the State Education Department maintains possession of records as an original custodian or a secondary custodian of the records, the Department is responsible for determining rights of access to those records under the Freedom of Information Law.

However, there is nothing in the Freedom of Information Law or any other provision of law of which I am aware that would preclude officials of one agency from consulting with officials of another with respect to requests for records. For example, if the Department of Education has possession of records concerning endangered species based upon information provided by the Department of Environmental Conservation (ENCON) it may in my view make judgments regarding rights of access based upon such information or the advice of ENCON. From a technical, legal point of view, the exemption from disclosure envisioned by §3-0301(2)(r) of the Environmental Conservation Law is applicable to and may be asserted only by ENCON with respect to its records. Nevertheless, it would appear that your Department might obtain information regarding endangered species, for example, in the performance of its official duties. Further, although the exemption from disclosure in the cited provision of the Environmental Conservation Law is applicable only to the Department of Environmental Conservation, I believe that all statutes should be construed reasonably and that unreasonable results that conflict with statutory direction should be avoided. Although it is questionable whether a court would enable the Department of Education to cite §3-0301(2)(r) of the Environmental Conservation Law as a basis for withholding, it is possible that a court might do so in order to avoid an unreasonable result, i.e., disclosure of information regarding endangered species that might be protected if sought from the original custodian of the records.

Consequently, in response to your question, I believe that officials of the State Education Department are responsible for responding to requests and that such requests should not be transmitted to the Department of Environmental Conservation. However, again, there is nothing

in the Law that precludes officials of your Department from consulting or discussing requests with officials of another department. Under the circumstances, that might be the most appropriate course of action.

Fourth, you raised questions regarding the effect of the federal Freedom of Information Act on state government and private groups funded in whole or in part by federal agencies. I agree with your intimation that the federal Freedom of Information Act is applicable only to records in possession of a federal agency as defined in 5 USC §551. Even though a state agency may have a relationship with a federal agency or may have possession of federal agency records, the state agency would not be subject ot the federal Freedom of Information Act, but rather the New York Freedom of Information Law. Similarly, a private organization would not be subject to either the state or federal freedom of information statutes.

Fifth, you asked whether state regulations apply to state agencies and not private organizations. As a general rule, that question can be answered only by reviewing particular regulations. In the context of your question, regulations regarding access to records, for example, would not apply to private museums or organizations; they would, however, apply to any "agency" as defined by §86(3) of the Freedom of Information Law.

In some cases, state regulations are directed toward private entities. For instance, the state might regulate persons licensed in a particular vocation, as in the case of real estate brokers, barbers, etc.

Sixth, you raised several questions regarding the status of "pre-publication research data and analysis" generated during regular business hours and in the performance of one's official duties as a public employee.

I believe that such information falls within the definition of "record" described earlier. Very simply, if an agency has possession of records or if records are prepared for the agency, they are subject to rights of access granted by the Freedom of Information Law. In my view, the fact that the materials may be grant related does not change their status with respect to right of access. Further, as indicated earlier, rights of access should in my opinion be determined by designated records access officers or their delegates, rather than the individuals who prepare the materials. Certainly, the authors of the materials may provide advice to those who

determe rights of access. Nevertheless, I feel that it is doubtful that each scientist, for instance, can or should be an expert with regard to the Freedom of Information Law.

You asked how a state worker can protect his or her publication rights when they relate to a person engaged in research in the performance of one's official duties. Although the state may be "concerned" with the work product of its employees, I am not sure that public employees enjoy "rights" with respect to the materials they produce. Again, if a record is developed in the course of one's official duties, it must in my view be considered a "record" subject to rights of access granted by the Freedom of Information Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. This is not to say that all records of an agency are available, but rather that they are subject to rights of access granted by the Law. Further, it is important to point out that the Court of Appeals, the state's highest court, has held that the only bases for withholding records are those listed in §87(2)(a) through (h) of the Freedom of Information Law [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979)]. Consequently, I do not know how or if an agency can protect publication rights, or even whether there are publication rights under the circumstances.

Seventh, you have asked for a description of the status of information relating to various areas of concern, such as environmentally sensitive information on "bogs, swamps and animal breeding areas", archaelogical sites, or drafts regarding budget, program schedules, planning documents, etc. As you intimated, rights of access must be determined on a case by case basis by an individual designated to make such determinations.

As a general rule, the Freedom of Information Law is based upon a presumption of access. All records are available, except to the extent that records or portions thereof fall within one or more grounds for withholding cited earlier.

Further, in many instances, the grounds for denial are written in terms of the effects of disclosure. I consider the Freedom of Information Law to be a "common sense" statute. Stated differently, in many cases, if disclosure of a particular record or aspect of that record would be damaging to an individual or would impair some governmental process, it is likely that there is a basis for denial. On the other hand, if there would be no harmful effect of disclosure, the records are likely

available.

I believe that particular attention should be paid to §87(2)(g) of the Law concerning inter-agency and intra-agency materials. Inter-agency materials consist of those documents transmitted from one agency as defined by §86(3) to another. Intra-agency materials include those that are developed or transmitted within a particular agency or among officials of that agency. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is important to emphasize that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. In my view, what remains to be denied under §87(2)(g) would constitute records or portions of records reflective of advice, opinion, suggestion, impression and similar information.

Lastly, you raised questions regarding the automation of the Museum's collections catalogues and wrote that files are being developed to allow limited access to data depending upon the use of a computer "sign-on code". You have indicated that those procedures will allow general access to some individuals based upon need and limited access to others based upon the purpose of a request and data needs.

The Freedom of Information Law does not generally distinguish among applicants for information or the purposes for which a request is made. This Committee has consistently advised and the courts have upheld the principle that accessible information shall 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].

Further, in view of the definition of "record" information contained within a computer falls within the scope of the Freedom of Information Law. However, as stated earlier, an agency need not create or compile a record in response to a request. Therefore, if, for example, a person requests information from a computer and the information can be made available only by altering or modifying a program, such steps would essentially involve the creation of a record and, therefore, need not be taken.

With respect to the "interpretation" of a request, it is suggested that you might want to acknowledge receipt of a request that requires interpretation and seek greater specificity concerning the nature of the information sought. If a request involves an interpretation, agency officials might spend an inordinate amount of time in locating the records or evaluating rights of access. Perhaps such activities can be diminished or rendered unnecessary if the applicant for the information can narrow the request or provide greater direction regarding the information sought.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1658

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

August 21, 1980

Mr. Harold A. Frediani, Supervisor
Town of Pompey
R.d. 2
Manlius, NY 13104

Dear Supervisor Frediani:

Thank you for sending a copy of the Local Law passed some years ago by the Town of Pompey Town Board and your interest in complying with the Freedom of Information Law.

Having reviewed the Local Law, I would like to make several comments. However, prior to so doing, I direct your attention to the attached regulations promulgated by the Committee, as well as model regulations. The regulations govern the procedural implementation of the Freedom of Information Law and have the force and effect of law. The model regulations are designed to assist agencies, such as the Town, in complying with the Committee's regulations by filling in the appropriate blanks.

First, with respect to the Local Law, §4 provides that Town records may be inspected during the regular business hours of the Town Clerk or by appointment. My only question here is what the regular business hours are. If they are, for example, 9 a.m. to 5 p.m., Monday through Friday, they are sufficient. However, if the regular business hours of the Town Clerk are limited, I believe that an appointment procedure should be devised in accordance with the regulations and the model regulations.

Second, §5 concerning fees requires that the town clerk charges a fee for duplicating records "in accordance with the fee schedule of the Onondaga County Clerk." Although a town could have charged based upon such a fee schedule under §66 of the Public Officers Law, that provision was repealed by the enactment of

the Freedom of Information Law in 1974. Consequently, the fees for duplicating records must be assessed in accordance with the direction provided by §87(1)(b)(iii) of the Freedom of Information Law (see attached). The cited provision states that an agency may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other records (i.e., microfilm, tape recordings, computerized information].

Third, §6A provides that a request must be made on an application form prescribed by the Town. In this regard, the Committee has long advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for denial. On the contrary, any request made in writing that reasonably describes the records sought should be sufficient [see Freedom of Information Law, §89(3)].

Fourth, §6B3A requires that a records access officer review records sought and make appropriate deletions to protect against unwarranted invasions of personal privacy. It is noted in this regard that §87(2)(b) of the Freedom of Information Law concerning the protection of privacy is but one among eight grounds for denial listed in §87(2) of the Freedom of Information Law. It is suggested that the privacy provisions need not be singled out as a basis for denial and that the regulations be followed.

Fifth, §7 concerning a denial of access, does not conform to the direction provided by §1401.7 of the Committee's regulations. For example, the regulations require that a denial of access be made in writing stating the reasons therefor and that the denial indicate the name of the person to whom an appeal should be directed. There is nothing in the Local Law that makes reference to the capacity to appeal a denial. Once again, I recommend that you review both the regulations and the model regulations in order to conform or amend your Local Law according to those requirements.

Although additional comments of a technical nature could be made with respect to the Town's Local Law, rather than making such comments, it is suggested once again that the regulations and the model regulations be reviewed.

Lastly, with respect to the subject matter list, since I am unfamiliar with the various kinds of records

maintained by the Town, it would be inappropriate to conjecture as to the sufficiency of the list appended to the Local Law. However, it is important to note that §87(3)(c) of the Freedom of Information Law requires that such a list makes reference by catagory and in reasonable detail to all records in possession of the Town, whether or not such records are available. Further, to assist you in devising a subject matter list, it is suggested that you might want to review the schedules for the retention and disposal of town records that have been developed by the State Education Department. Often the schedules provide a basis for the development of a subject matter list and may in fact be more detailed in some areas 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

Robert J. Freeman
Executive Director

RJF:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1657

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

August 22, 1980

Ms. Marjorie E. Karowe
Roemer and Featherstonhaugh
Twin Towers
99 Washington Avenue
Suite 1130
Albany, NY 12210

Dear Ms. Karowe:

As you are aware, I have received your inquiry concerning a request for records directed to the Chairman of the Board of Supervisors of Steuben County. I apologize for the delay in response.

Please note that the address of the Committee is different from that used in your letter.

In brief, your client, the CSEA, requested information concerning positions within Steuben County government that are presently vacant. According to the correspondence attached to your letter, the request was denied on the ground that release of the information "might impair imminent contract negotiations".

In my opinion, to the extent that the information that you are seeking exists within a record or records, it is accessible.

It is noted that the Freedom of Information Law generally grants access to existing records and that an agency, such as a county, unless specific direction is given to the contrary, need not create records in response to a request [see Freedom of Information Law, §89(3)].

Further, the Law is based upon a presumption of access. All records of an agency 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. In my view, none of the grounds for denial could justifiably be cited as a basis for withholding the information in which you are interested.

In fact, as you indicated, one of the exceptions to rights of access provides direction to the effect that the records sought must be made available. Specifically, §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 provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the record or records sought may be characterized as "intra-agency" materials. Nevertheless, based upon your description of the information, it consists solely of "statistical or factual tabulations or data". Therefore, I believe that the information should be made available to you.

With respect to the ground for denial offered by the County, §87(2)(c) of the Freedom of Information 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..."

I agree with your contention that the language cited above could not justify a denial of access to the records. This opinion is based upon several considerations. First, it is likely that the County has possession of a record indicating the breakdown of its budget relative to personnel expenditues. Such a record would likely indicate every position that is or may be filled, including vacancies. Such a record would in my view clearly be available under §87(2)(g)(i) for the reasons described earlier.

Further, §87(3)(b) of the Freedom of Information Law requires that each agency compile a payroll record reflective of the name, public office address, title and salary of every officer or employee of the agency. The payroll record, which is required to be compiled and made available on an ongoing basis, could be compared with the listing of titles or positions that may be filled or that have been funded. By so doing, one could determine the positions that are vacant.

In my opinion, rights of access to the equivalent of such information in the form of a list or lists of vacant positions are not diminished because the information exists in a different form, for instance. Further, it is emphasized that the state's highest court has held that an agency cannot merely assert a ground for denial and prevail; on the contrary, the agency must prove that the harmful effects of disclosure described in an exception to rights of access would indeed arise [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); Doolan v. BOCES, 46 NY 2d 906 (1979)]. Based upon the nature of the records sought, it is in my opinion doubtful that the County could meet its burden of proof. Therefore, once again, it is my view that the records in question are accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frederick Lewis, Chairman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1658

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

August 25, 1980

Mr. Peter Maxwell
74 B 1319
P.O. Box 149
Attica, New York 14011

Dear Mr. Maxwell:

As you are aware, I have received your letter concerning your unsuccessful efforts to gain access to records pertaining to your trial.

You wrote that your initial request was directed to the court in which your case was tried. However, you were informed by the clerk that the request should be directed to the Police Department of the City of Buffalo, which denied access to the records.

In my opinion, assuming that the records continue to exist, they should be made available by either the court or the Police Department.

Although the Freedom of Information Law does not apply to the courts and court records, as a general rule, §255 of the Judiciary Law requires that a clerk of a court diligently search for and provide access to virtually all records in his or her possession. Since the documents that you are seeking were introduced as exhibits during your trial, it appears likely that they would be included in the court records that are in my opinion accessible to you.

With regard to the Police Department, the provisions of the Freedom of Information Law are applicable. It is emphasized 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 grounds for denial listed in §87(2)(a) through (h) of the Law.

While I am not familiar with the specific records that you are seeking (i.e., a "P-73" report), since the records were introduced as exhibits during a public trial, it is in my opinion doubtful that any of the grounds for denial could justifiably be cited.

Further, the most applicable basis for denial is §87(2)(e) concerning records compiled for law enforcement purposes. The cited provision is based upon the effects of disclosure. For example, §87(2)(e)(i) states that an agency may withhold records compiled for law enforcement purposes when disclosure would interfere with a law enforcement investigation. Under the circumstances, since the investigation and the trial have been completed, it is in my opinion unlikely that the harmful effects of disclosure envisioned by §87(2)(e) would arise.

It is suggested that you renew your requests to both the clerk of the court and the Police Department. Further, in order to ensure that you are familiar with the appropriate procedures and rights of access, I have enclosed copies of the Freedom of Information Law, regulations that govern its procedural implementation and an explanatory pamphlet that may be helpful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1659

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

August 25, 1980

The Honorable Robert J. Connor
Member of the Assembly
Room 404C
The Capitol
Albany, New York 12248!

Dear Assemblyman Connor:

Thank you for your letter of August 12 in which you described a problem brought to your attention by one of your constituents.

According to your letter, a number of Rockland County commuters park at a lot operated by the Village of Tarrytown. However, there has been a continuing problem regarding facilities at the lot for non-residents of the Village. In an effort to communicate with other users of the lot in order to attempt to improve the situation, your constituent applied to the Village for the names and addresses of Rockland County residents who pay the Village for a non-resident parking permit. In response, the Mayor wrote that the applicant, your constituent, "does not fall within the category of persons who have statutory right to Tarrytown local lists".

I disagree with the statement made by the Mayor and believe that the information sought should be made available.

It is emphasized at the outset that the Freedom of Information Law does not distinguish among individuals with respect to rights of access. In fact, as a rule, this Committee has consistently advised and the courts have upheld the principle that accessible records 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]. Further,

the Court of Appeals has held that the only bases for withholding records are those appearing in §87(2)(a) through (h) of the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979)]. Consequently, the status of your constituent as a non-resident of the Village has no bearing upon his rights of access to records in possession of the Village.

I would like to point out that §87(2) of the Freedom of Information Law states that an agency, such as a village, may withhold records when disclosure would result in "an unwarranted invasion of personal privacy." Further, §89(2)(b)(iii) provides that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

Nevertheless, under the circumstances described, I do not believe that the language quoted above could appropriately be cited as a basis for withholding. Clearly you constituent does not seek to use the information sought for either a commercial or a fund-raising purpose. On the contrary, it appears that he seeks to use the list for what might be considered a "public" purpose.

Lastly, a license or permit, for example, has long been considered a public document. From my perspective, a license or permit is intended to let the public know that a particular individual is qualified or able to engage in a particular vocation or service that is regulated in some way by government. In this situation, I cannot envision any reason for withholding records indicating the identities of the permit holders.

I hope that 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-1660

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

August 25, 1980

Mr. Thomas E. Walsh, II
The County of Rockland
Rockland County Department of Health
Pomona, NY 10970

Dear Mr. Walsh:

As you are aware, I have received your letter of August 7 concerning two applications for records directed to the Rockland County Health Department.

According to your letter, the applicant for records is an not-for-profit corporation operating a "swimming facility" that is seeking information pertinent to an Article 78 proceeding initiated by the applicant against the Rockland County Board of Health and the Commisioner of Health. The information sought consists of documentation regarding two other swimming facilities and in your opinion may be withheld due to the pendency of the litigation. Specifically, you have contended that your "records in the County Attorney's Office, as well as those of the Health Department are not subject to disclosure in a pending proceeding without recourse to the appropriate discovery devices under the CPLR."

Since I am not familiar with the records sought I cannot provide specific direction. However, I would like to offer the following comments.

First, and perhaps most importantly, rights of access to records granted by the Freedom of Information Law are not diminished because an applicant for records is or may become a litigant. As a general rule, this Committee has consistently advised and the courts have upheld the principle that records should be made equally available to any person, without regard to status or interest [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. In Burke, the applicant for records was involved in litigation with the City of Rochester. Nevertheless, the court held that the use of the Freedom of Information Law could not be restricted

due to the status of the applicant as a litigant. Therefore, I do not believe that the applicant for the records in this situation can be restricted to the use of the discovery devices in the CPLR.

Second, the Freedom of Information Law is based upon a presumption of access. All records of an agency are available, except to the extent that they fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, it appears there may be two grounds for denial that would be applicable to some of the records sought. For example, you wrote that some of the records are in the possession of the County Attorney. In this regard, it is possible that at least some of the records may consist of attorney-work product, which is exempt from disclosure under §3101(c) of the CPLR. Some of the material may have been developed pursuant to an attorney-client relationship. To that extent, they would be considered privileged under §4503 of the CPLR. It is possible, too, that some records consist of material prepared for litigation. Such materials would also be exempt under §3101 of the CPLR. In each of the instances cited in this paragraph, the records would be specifically exempt from disclosure by statute, and therefore may be withheld under §87(2)(a) of the Freedom of Information Law.

The other ground for denial that might be applicable is §87(2)(g). The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. I would conjecture that some of the materials sought that are in

possession of the County Health Department might be reflective of statistical or factual information, or determinations, for example, which should be made available.

Lastly, you directed my attention to §87(2)(e) of the Freedom of Information Law as a basis for withholding. As you are aware, that provision enables an agency to withhold records compiled for law enforcement purposes under certain conditions specified in the Law. In my opinion, §87(2)(e) could not be cited to withhold the records in question. In judicial interpretations of both the original Freedom of Information Law and the amended Law, it has been held that the "law enforcement purposes" exception may be cited only by a criminal law enforcement agency [see Young v. Town of Huntington, 388 NYS 2d 978 (1976); Broughton v. Lewis, Sup. Ct. Albany Cty. (1978)]. Although the Health Department may be involved in administrative law enforcement, I do not believe that it could be considered a "criminal" law enforcement agency. Therefore, I do not believe that §87(2)(e) could justifiably be cited to withhold the records sought in this situation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1661

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

August 26, 1980

Mr. Anthony R. Giles
Box R
74 A 304
Napanoch, NY 12458

Dear Mr. Giles:

As you are aware, I have received your letter and apologize for the delay in response.

In all honesty, I have little knowledge of motion practice relative to criminal cases. Nevertheless, I beileve that much of the information that you are seeking should be made available from the court clerk in which your case was tried.

Specifically, §255 of the Judiciary Law has long required that a clerk of a court diligently search for and provide access to virtually all records in his or her possession. In directing your request to the clerk, it is suggested that you provide as much identifying information as possible, such as dates, docket numbers, file designations, etc.

You made reference to "Bronx and Kings County Districts". In this regard, I do not know whether you intended to make reference to the courts in those counties. If you are speaking of courts, again your request should be directed in the same manner as describe above to the clerks of the relevant courts.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-
FOIL-AO-1663

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

August 26, 1980

Mr. Gilbert Henoch
Dalton, Henoch and Kadin
50 Clinton Street
Hempstead, NY 11550

Dear Mr. Henoch:

As you are aware, I have received your letter of July 23. I apologize for the delay in response and thank you for your interest in complying with the Freedom of Information Law.

Your question concerns rights of access to:

> "...written preliminary budget materials, i.e., proposals from Superintendents of Schools and other administrators of the Board of Education and related correspondence to them which occurs prior to adoption by the Board of Education of the budget in final form."

In my opinion, rights of access to the materials in question are governed largely by §87(2)(g) of the Freedom of Information Law.

As you know, 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 of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

Barring unusual circumstances, I believe that §87(2)(g) would be determinative of rights of access. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is important to emphasize that the provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In the context of your inquiry, I believe that virtually all of the documentation would consist of "intra-agency" materials. However, it is likely that a large portion of the materials would consist of "statistical or factual tabulations or data" that must be made available. It is possible, too, that some of the materials may reiterate policy adopted by the District in the past.

What remains to be denied would be statements of advice, recommendation, suggestion and the like.

I would like to direct your attention to Dunlea v. Goldmark, which dealt with a request for "budget worksheets" developed in the budget process at the state agency level [380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)]. From my perspective, the key issue in that litigation concerned the status of numbers appearing on the worksheets that were essentially reflective of advice. For example, projections made by agencies and directed to the Division of Budget and recommendations appearing in the form of numbers by budget examiners appeared on the worksheets. However, it was determined that the numbers in question, although advisory in nature, constituted "statistical tabulations" accessible under the Freedom of Information Law.

The only other ground for denial that I can envision would be §87(2)(c), which enables an agency to withhold records or portions of records when disclosure would impair present or imminent collective bargaining negotiations. If the District is involved in collective bargaining negotiations while it is preparing its budget, and if the figures are inextricably intertwined with the collective bargaining process, it is possible that portions of the materials could be withheld if disclosure would impair the collective bargaining negotiations.

Lastly, I would conjecture that the Board of Education at its meetings discusses the materials in question. If that is the case, it is likely that the discussions would be required to be open to the public pursuant to the Open Meetings Law. Further, as in the case of the Freedom of Information Law, all meetings of public bodies must be open except to the extent that executive sessions may properly be convened pursuant to §100 of the Law. In my view, discussions of a budget by a public body must generally be conducted during open meetings. Consequently, the contents of the materials might in many instances be publicly discussed and effectively disclosed by the Board under the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1663

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

August 26, 1980

[redacted]
Lic. Real Estate Broker
Hortonville, NY 12745

Dear [redacted]:

As you are aware, I have received your letter of July 25 and apologize for the delay in response. Your inquiry concerns rights of access to records in possession of the Committee on Professional Standards of the Third Judicial Department. According to your letter, you initiated a complaint which was rejected and thereafter requested a copy of the response mady by the attorney about whom you complained to the Committee. However, your request was denied.

In my view, the records that you requested were justifiably denied.

First, the Freedom of Information Law specifically excludes the courts and court records from its coverage [see definitions of "agency" and "judiciary" in §§86(3) and 86(4) respectively].

Second, I direct your attention to §90(10) of the Judiciary Law, which states that:

> "[A]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the

> justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisidiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

In view of the foregoing, the records can be disclosed only "upon good cause" by written order of the justices of the Appellate Division, of if the charges are sustained.

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

OML-AO-527
FOIL-AO-1664

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

August 26, 1980

Mr. Albert Sutter
[redacted]

Dear Mr. Sutter:

As you are aware, I have received your letter of July 24 and apologize for the delay in response.

In brief, you have requested assistance with respect to the means by which you can learn of the bases for substantial increases in the budget of the village where you reside. In addition, you wrote that you are having difficulty in gaining financial records regarding a particular project carried out by a town, a village, and a school district.

Although I cannot provide specific direction, I would like to offer the following comments.

First, assuming that the information in which you are interested exists at any of the units or levels of government that you identified, I believe that it is available under the Freedom of Information Law.

Second, it is important to emphasize that the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as a town, a village, or a school district, for example, are available, except to the extent that records or portions of records fall within one or more grounds for denial that appear in §87(2)(a) through (h) of the Law.

Third,under the circumstances, I believe that one of the bases for withholding provides direction in favor of access to the records in question. Specifically, §87(2)(g) states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Based upon the information that you provided, it would appear that many of the records that you are seeking could be characterized as inter-agency or intra-agency materials. Inter-agency materials are those documents transmitted from a town to a village. Intra-agency materials would be those developed and communicated within a particular agency, as in the case of materials transmitted from a town supervisor to a town board.

In the context of your request, it appears that you are seeking information that led to an increase in expenditures. From my perspective, it is likely that the information sought consists of "statistical or factual tabulations or data" that must be made available.

Fourth, each agency is required to adopt rules and regulations consistent with and no more restrictive than those promulgated by the Committee on Public Acccess to Records. The regulations require that each agency designate one or more "records access officers" who are responsible for responding to requests and ensuring compliance with the Freedom of Information Law [see regulations, §1401.2(a)].

Fifth, an agency is required to respond to a request within specific periods of time. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of

the receipt of a request. The response can take one or three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of acces that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Sixth, although the supervisor and the town attorney, for example, may have temporary possession of town records when the records are needed by those individuals to carry out their duties, as a general rule, the town records should in my view be in possession of the town clerk. Section 30 of the Town Law states that the town clerk shall be the legal custodian of all town records.

Seventh, with respect to fees, §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". Stated differently, an agency can charge no more than twenty-five cents per photocopy, unless there is some other provision of law, such as a local law, that provides to the contrary.

Lastly, I direct your attention to the Open Meetings Law. That statute requires that all meeting of public bodies be convened open to the public. Further, all deliberations of a public body must be conducted during an open meeting, unless there is a basis for entry into executive session. In my view, in most instances, a discussion of a budget or expenditures by a public body would have to be held during an open meeting. I believe that attending meetings of public bodies often may serve to shed light upon the means by which determinations are made, and in this case, perhaps the reasons for increases in expenditures.

Enclosed for your consideration are copies of the Freedom of Information Law,the regulations promulgated by the Committee, the Open Meetings Law, and an explanatory pamphlet that deals with both statutes.

I hope that 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-1665

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

August 26, 1980

Ms. Karen Martini
[redacted]

Dear Ms. Martini:

As you are aware, I have received a great deal of correspondence from you regarding your efforts in obtaining records from Dutches County. I apologize for the delay in response, which is due in part to my absence on vacation.

In brief, your correspondence indicates that you have attempted to gain access to records reflective of the period of public employment of various CETA workers, and particularly, Ms. Corrinne Richer. The records have been sought in relation to a CETA work project performed in conjunction with the Fantasia Corps De Ballet. In addition, you have requested records reflective of an inventory of items purchased for the CETA project, and monthly reports required by the Office of Human Resources from the CETA project.

The correspondence makes reference to numerous issues, and I will seek to deal with each.

First, as you are aware, the Freedom of Information Law does not require an agency to create a record in response to a request, unless specific direction is provided to the contrary [see Freedom of Information Law, §89(3)]. Consequently, Dutchess County need not create a record or records in response to your request.

Nevertheless, it is emphasized that §86(4) of the Freedom of Information Law defines the term "record" broadly 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..."

Further, the Freedom of Information Law is based upon a presumption of access. Specifically, §87(2) states that all records of an agency 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 the cited provision. It is also important to note that the introductory language of §87(2) makes reference to the capacity to deny access to "records or portions thereof". As such, it is clear that the Legislature envisioned situations in which a single record might be accessible or deniable in part. It is also clear that an agency is obliged to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Therefore, if, for example, the information sought is contained in a variety of records, I believe that the County is obliged to make available accessible portions of such records in response to your request.

Second, if records exist that indicate the periods of public employment for employees, such as Ms. Corrinne Richer, I believe that such records should be made available. Although the information might relate to particular public employees, judicial interpretations of the Freedom of Information Law in my view indicate that disclosure in such circumstances would result in a permissible as opposed to an unwarranted invasion of personal privacy. In general, the courts have held that records relevant to the performance of the official duties of public employees are available, 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)]. Under the circumstances, I believe that records indicative of the period of employment of a public employee would be relevant to the performance of the duties of the employee as well as the County as an employer.

It appears that there was some misunderstanding regarding a "directive" given by this office. Specifically, letters addressed to you by Louis Crepet on July 21 and Timothy O'Reilly on July 31 indicate that I confirmed or directed that the only information regarding public employees that is accessible is that found within the payroll record

required to be compiled by §87(3)(b) of the Freedom of Information Law. The cited provision requires that each agency maintain a payroll record indicating the name, public office address, title and salary of all officers or employees of an agency. Nevertheless, any other records pertaining to public employees are subject to rights of access due to the definition of "record" described earlier as well as the direction given in §87(2) of the Law. This is not to say that all records pertaining to public employees are available; however, all such records are subject to rights of access granted by the Law and should be reviewed when requested to determine the extent to which any exception to rights of access may be applied. Therefore, it is reiterated that a record indicating the period of employment of a public employee is in my opinion accessible, even if that information is maintained in records separate and distinct from payroll records required to be compiled under §87(3)(b) of the Freedom of Information Law.

Third, with respect to the inventory of items that you requested, again, if such information exists within one or more "records", it is in my opinion available.

I must admit that I am confused by the language regarding your request for the inventory used by Mr. O'Reilly, the Senior Assistant County Attorney. In his letter of July 30, he wrote that "the inventory which you request is not in existence in a record type fashion subject to disclosure under the Freedom of Information Law." I do not know what the phrase "record type fashion" is intended to mean. Nevertheless, if the information exists, I believe that it is available pursuant to the direction provided by §87(2)(g)(i) of the Freedom of Information Law.

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..."

It is important to point out that the provision quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instuctions to staff that affect the public, or final agency policy or determinations must be made available. Under the circumstances, if an inventory exists, it appears that it would consist of "intra-agency" materials. Nevertheless, it also appears that it would consist of solely factual data that is available.

Fourth, based upon the information provided, rights of access to the monthly reports that you requested would also be governed by §87(2)(g) of the Freedom of Information Law. If, for example, the monthly reports contain information of a factual nature, they are available to that extent. I am unfamiliar with the sense of the term "evaluation" in the context of your request. However, if an evaluation is reflective of advice, impression, suggestion, or recommendation, for instance, I believe that such portions of a report might justifiably be withheld.

Fifth, your correspondence raises questions regarding the procedural implementation of the Freedom of Information Law by Dutchess County. For instance, it appears that the time limits for responses required by the Law may not have been followed. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt

of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Further, you have indicated that in the course of your requests, the identity of the "records access officer", the person to whom your request must be directed, has changed four times. There is nothing in the Freedom of Information Law that prohibits the head or governing body of an agency from changing or designating a new or different records access officer. Nevertheless, the rules and regulations adopted by an agency are required to identify one or more records access officers by name or by specific job title and business address [see regulations, §1401.2(a)]. If such a step has not been taken by means of regulation, I believe that it should be taken to comply with the regulations promulgated by the Committee.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch

cc: Charles B. Back
Louis H. Crepet
Timothy P. O'Reilly
Lucille Pattison
Stephen Wing

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1666

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

August 26, 1980

Mr. Robert C. Glennon
Adirondack Park Agency
P.O. Box 99
Ray Brook, NY 12977

Dear Mr. Glennon:

Thanks for your recent letter. You raised questions in areas in which questionable or uncertain answers must be given. Nevertheless, I will do my best to provide my interpretation of the existing state of the Law.

First, it appears that the governmental privilege as enunciated in Cirale has all but disappeared. I direct your attention to Doolan v. BOCES [48 NY 2d 341, 347 (1979)], in which the Court of Appeals stated that:

> "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 561, supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of , or waste of public funds".

Although I would like to see further clarification from the Court of Appeals relative to the governmental privilege, it appears that the privilege is dead.

You mentioned a decision dealing with "the sheriff's budget". I believe that you were citing Delaney v. DelBello. For reasons expressed in an advisory opinion that I have attached, I believe that the Delaney decision, very simply, is wrong.

Also enclosed are a number of opinions regarding the "trade secrets" exception to the rights of access. With respect to the quoted provision of the regulations promulgated by the Office of Business Permits, I believe that the Office has exceeded its authority. To the best of my knowledge, there is nothing in Article 39 of the Executive Law concerning the Office of Business Permits regarding confidentiality. Further, as you are aware, an agency cannot by means of regulation promise or require confidentiality [see, Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d]; on the contrary, I believe that records may be considered "confidential" and therefore deniable under §87(2)(a) of the Freedom of Information Law only when a statute specifically so requires or permits.

Nevertheless, in the situation that you described, it is possible that certain aspects of the applications that you receive might contain trade secrets. For instance, perhaps financial information disclosed to the APA might if disclosed cause substantial injury to the competitive position of a particular corporation. To that extent, I would conjecture that §87(2)(d) of the Freedom of Information Law could be justifiably cited to withhold.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1667

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

August 26, 1980

Dr. Robert C. McGruder
Superintendent
Mexico Academy & Central School District
Academy and Liberty Streets
Mexico, NY 13114

Dear Dr. McGruder:

Thank you for your letter and your interest in complying with the Freedom of Information Law, I apologize for the delay in response. You have asked for an opinion regarding a proposed policy relative to access to records that is being studied by the School Board.

Having reviewed the proposed policy statement, it is suggested that the proposal is inappropriate.

The proposal seeks to "classify" information due to its "apparent inclusion" within grounds for denial appearing in §87(2) of the Public Officers Law.

First, in my opinion, an agency cannot "classify" information as confidential or deniable. The only instance in which records can be characterized as "confidential" would involve situations in which an act of the State Legislature or Congress specifically precludes or prohibits disclosure of particular records. In such instances, those records could be withheld under §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". One such statute that is applicable to school district records is the Family Educational Rights and Privacy Act (20 USC §1232g), which is commonly known as the "Buckley Amendment". As you are aware, the Buckley Amendment generally prohibits the disclosure of student records to all but the parents of the students.

Second, the Freedom of Information Law is flexible. In the majority of cases, the grounds for denial are written in terms of the effects of disclosure. There is often an operative verb indicating potentially harmful effects of disclosure upon which a denial of access might be based. For instance, §87(2)(c) states that an agency may withhold records or portions of records when disclosure "would impair present or imminent contract awards or collective bargaining negotiations". If the District is involved today in collective bargaining negotiations, it is likely that disclosure of some of the records related to the negotiations would impair the negotiations. However, if an agreement is signed tomorrow, the impairment disappears and the records become available. Again, the flexibility of the Law in my view removes both the necessity and the capacity of an agency to classify records as deniable. If information is "classified" it is possible that, due to the disappearance of harmful effects of disclosure, rights of access on the part of both the public and members of the Board may be violated.

Third, based upon case law, it is in my view doubtful that a school board can restrict access to records sought by a member of the board if that person is acting in the performance of his or her oficial duties [see Gustin v. Joiner, 95 Misc. 2d 277, 407 NYS 2d 138 (1978)].

Lastly, I feel that it is somewhat dangerous and inappropriate to attempt to "legislate" at the school board level in a situation in which the State Legislature has acted and provided specific direction. Stated differently, in passing the Freedom of Information Law, the Legislature has provided a framework for determining rights of access to records. To the extent that an agency seeks to modify legislation by means of policy or regulation, it does so at its peril, and any policy or a regulation, for instance, would in my view be void to the extent that it is inconsistent with a 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:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1668

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

August 27, 1980

Mr. William Wallens
Roemer and Featherstonhaugh
The Twin Towers - Suite 1130
99 Washington Avenue
Albany, New York 12210

Dear Mr. Wallens:

As you are aware, I have received your letter of July 30 and apologize for the delay in response.

Your inquiry concerns a situation in which a job classification questionnaire has been distributed to Putnam County employees for completion. You wrote, however, that the County has refused to permit employees to review the questionnaire after completion of question 25 on the questionnaire, a copy of which was enclosed. Your question is whether an employee has the right to review the questionnaire after part 25 has been completed.

Part 25 requires that a department head comment on the statements made in the preceding 24 responses by the employee and his or her supervisor.

In my view, there are several possible answers to your inquiry.

First, there is in my view only one ground for denial in the Freedom of Information Law that might appropriately be cited to withhold the contents of part 25 of the questionnaire. Specifically, §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 determination..."

It is important to note that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, I believe that the questionnaire could properly be characterized as an "intra-agency" document. Therefore, to the extent that the comments are factual in nature, for example, they are in my opinion available to the subject of the record, the employee. However, to the extent that the comments are reflective of advice, opinion, suggestion or impression, for instance, I believe that they may be withheld.

Second, it is emphasized that the introductory language in §87(2)(g) of the Law enables an agency to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. As such, it is clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Therefore, to the extent, if any, that the response given in part 25 may be withheld, that portion of the questionnaire might be deleted while providing access to the remainder.

And third, often collective bargaining agreements provide rights of access to employees in excess of those granted by the Freedom of Information Law. It is possible that the agreement between the employees and Putnam County may provide employees with the right to inspect the questionnaire in its entirety.

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
cc: Putnam County
Personnel Office

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1669

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

August 27, 1980

Mr. Richard C. Ingraham
Licensed Private Investigator
12 Fawn Ridge Road
Henrietta, New York 14467

Dear Mr. Ingraham:

As you are aware, I have received your letter of July 28 and I apologize for the delay in response.

You have requested information that will assist you in the performance of your duties as a licensed private investigator with respect to access to records.

It is difficult to provide specific direction in response to a request so general. This office has preparec hundreds of opinions regarding the interpretation of the Freedom of Information Law concerning specific issues. Consequently, when you encounter a particular problem in gaining access to records in New York, it is suggested that you seek the services of this office.

However, as a general rule, it is important to emphasize 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 grounds for denial listed in §87(2)(a) through (h) of the Law. Further, upon review of the grounds for denial, the majority are based upon potentially harmful effects of disclosure, which in many instances disappear over the course of time. As such, there may be situations in which records might justifiably be withheld today but accessible tomorrow due to an event which has removed the potentially harmful effects of disclosure. It is also noted that an agency has the burden of proof in a judicial proceeding initiated under the Freedom of Information Law. Therefore, if records are denied and the denial is challenged in court, an agency must demonstrate that the records withheld fall within one or more of the grounds for denial listed in the Law.

Enclosed for your consideration are copies of the 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 and a summary of judicial determinations written under the Freedom of Information Law as of December of 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:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1670

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

August 27, 1980

Ms. Gail C. Pocock
Educational Designs for Justice
17 Masse Place
Suite 25
Batavia, NY 14020

Dear Ms. Pocock:

As you are aware, I have received your most recent letter and apologize for the delay in response.

The correspondence attached to your letter indicates that you have not yet received the "commitment sheets" that you requested from the Genesee County Sheriff.

In all honesty, I do not know what the most appriate course of action might be. However, from my perspective, there are two possible courses.

First, as you know, the Freedom of Information Law requires that response to requests and appeals be given within a specific period of time. Apparently, no response to your appeal has been rendered, even though §89(4)(a) of the Freedom of Information Law requires that a determination of an appeal be rendered within seven business days from the receipt of an appeal by the person or body designated to determine appeals. Since the time for reordering an appeal has elapsed, I believe that you may consider your request to have been "constructively" denied. As such, assuming that you have effectively exhausted your administrative remedies, you may challenge the denial in a judicial proceeding initiated under Article 78 of the Civil Practice Laws and Rules.

In the alternative, in an effort to avoid litigation, it is suggested that an effort to "educate" the appropriate officials regarding the provisions of the Freedom of Information Law be made. In order to begin

that process, I will send copies of the Freedom of Information Law, regulations that govern its procedural implementation, and §500-f of the Correction Law concerning a record of commitments to both the County Attorney and the Sheriff.

Lastly, in my view based upon the provisions §500-f of the Correction Law, it is clear that the information that you are seeking is available, for the book containing information regarding commitments and discharges of all prisoners, according to the cited provision, "shall be a public 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
Executive Director

RJF:ch

cc: County Attorney John Rizzo
Sheriff Roy Wullich

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1671

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

August 27, 1980

Mr. Ira M. Ball
Attorney at Law
298 Genesee Street
Utica,NY 13502

Dear Mr. Ball:

As you are aware, I have received your letter and Ipapologize for the delay in response.

Your inquiry concerns a fee of one dollar for a photocopy of a deed assessed by the Oneida County Clerk. You have questioned the charge, because the service in question is not specifically dealt with in the provisions of §8021 of the CPLR.

In all honesty,I am not sure of what the appropriate fee for copying should have been. However, I agree with your contention that subdivision (c) does not contain the authority for the assessment of the fee that you were charged. That provision deals with services rendered "other than in connection with papers or instruments relating to real property..." I also agree that since you did not request a certified copy, no fee should have been charged for certification.

In short, if none of the provisions of §8021 of the CPLR are applicable to the service that you sought, I would agree that the fee for copying should be restricted to twenty-five cents on the ground that no other provision of law concerning fees would be applicable.

However, I direct your attention to §8021(a)(11). Under that provision the clerk may charge:

> "For searching for any filed or recorded instrument, upon a written request specifying the kind of instrument, the location by town, city,

> or block of a real property instrument, and the names and period to be searched, such fee as may be fixed by the county clerk subject to review by the supreme court."

Although I am not aware of any fee that may have been approved by the supreme court, there may be such a fee. Consequently, it is possible that the clerk may charge one dollar for photocopying a deed. Nevertheless, if no such fee has been set, again, I would agree that the maximum charge should have been 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
Executive Director

RJF:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1673

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

August 27, 1980

Ms. Martha P. Judson
Taxpayers Group
Town of Kinderhook
Niverville, NY 12130

Dear Ms. Judson:

As you are aware, I have received your letter concerning the interpretation of the Freedom of Information Law, and I apologize for the delay in response.

The correspondence attached to your letter indicates that the Town Attorney of Kinderhook had requested an opinion from the Attorney General. However, your request for a copy of the opinion has to date been turned down. I contacted Assistant Attorney General Robert Imrie on your behalf to determine whether an opinion had indeed been rendered, and as you are aware, due to the initiation of litigation, no opinion was rendered.

With respect to your request for a copy of the judicial opinion rendered in conjunction with the controversy as well as papers submitted in relation with the litigation, I believe that they are available from either the town or the court in which the case was heard.

Section 255 of the Judiciary Law provides that a clerk of the court must diligently search for and provide access to virtually all records in his or her possession. Consequently, you may obtain the records sought from the clerk of a court. Further, in my opinion, since the records in question are public, there is no reason of which I am aware for withholding on the part of Town 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

Robert J. Freeman
Executive Director

RJF:ch

cc: Thomas Griffin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1673

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

August 27, 1980

Mr. David V. DeCinto
Auto Sales
R.D. 2
Altamont, NY 12009

Dear Mr. DeCinto:

I have received your letter of July 30, and I apologize for the delay in response.

Your inquiry deals with rights of access to assessment information and the obligation, if any, to compile information in response to a request made under the Freedom of Information Law.

I am in general agreement with your statement that governmental agencies, such as the Assessor's Office of the Town of Guilderland, are obligated to supply information in response to reasonable requests. Further, judicial interpretations rendered as long as approximately thirty years ago have held that virtually all records used in the process of developing assessments, as well as the assessment roll itself, are available to the public.

Nevertheless, it is emphasized that §89(3) of the Freedom of Information Law specifically provides that an agency need not create records in response to a request. Therefore, if no records exist that are reflective of the information that you have sought, the Office of the Assessor has no obligation to create such records on your behalf.

For instance, having reviewed your request, there may be no compilation in existence that indicates the "exact number of Guilderland property owners that filed an application for review of real property assessment for 1980". Similarly,

the other areas of information that you requested may not exist in the form of a record.

Certainly, you have the right to inspect and copy the majority of records pertaining to assessments. However, the Freedom of Information Law does not require agency officials to compile or create records in response to requests.

Lastly, the final item of your request concerns the names and addresses of members of the Board of Assessment Review. In this regard, the names of the members of the Board are clearly available. However, based upon the direction provided by §87(3)(b) of the Freedom of Information Law (see attached), the public office address rather than the home address of a public employee should be provided 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:ch

cc: Shirley Royak

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1674

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

August 27, 1980

Mr. William B. Olson
[redacted]

Dear Mr. Olson:

I have received your letter of July 31 and apologize for the delay in response. You have asked for my help in locating a person who once lived in the Saratoga/Albany area.

In all honesty, I am not sure that I can provide you with substantial assistance.

It is noted at the outset that the Committee is responsible for advising with respect to the Freedom of Information Law. It does not have possession of records generally, nor does it have the capacity to compel agencies to comply with the Freedom of Information Law.

Second, access to the records in which you are interested is governed not by the Freedom of Information Law, but by other provisions of law. Specifically, Article 41 of the Public Health Law governs rights of access to birth and death records. Section 19 of the Domestic Relations Law governs rights of access to marriage records. In each of the provisions cited, the standard for gaining access is in my opinion unclear at best, for they state that marriage, birth and death records shall be made available upon a showing of "judicial or other proper purposes". The problem is that the phrase "proper purpose" is undefined. Further, regulations concerning the implementation of the cited provisions have been promulgated by the Department of Health which are in my opinion somewhat restrictive in terms of access.

As you may be aware, vital records are kept in two locations. The State Health Department maintains possession of the original records, while the local registrars in towns and cities maintain possession of duplicates.

I remember discussing the matter with Mrs. Dorothy Alsdorf, and I believe that we considered as many possibilities as we could imagine. We discussed everything from vital records to burial permits to medical records, for example. Nevertheless, there appeared to have been a dead end with respect to each area.

It is suggested that you contact the Bureau of Vital Records at the State Health Department in Albany. As noted earlier, the Health Department is the central repository of all vital records. After explaining your predicament to representatives of the Department, perhaps they can provide you with direction. If you wish to write, the address is:

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

The Bureau can be reached by phone by calling (518) 474-3038.

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-1675

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

August 28, 1980

Mr. Jack Kaufman
[redacted]

Dear Mr. Kaufman:

As you are aware, I have received your letter and I apologize for the delay in response.

You have asked for my advice with respect to your unsuccessful efforts in gaining access to a transcript of a proceeding before the New York City Civilian Complaint Review Board. The proceeding was precipitated by your complaint against a particular police officer.

While I disagree with the statement made by William T. Johnson, Executive Director of the Board, in response to your request, I am not sure that I can provide you with substantial assistance.

Mr. Johnson wrote that "no records may be removed" from the offices of the Civilian Complaint Board without a subpoena duces tecum ordered by a court of competent jurisdiction.

I disagree with his contention and believe that the records of the Board are subject to the rights of access granted by the Freedom of Information Law. Moreover, case law indicates that records in possession of the Board are subject to disclosure, except to the extent that the grounds for denial appearing in §87(2) of the Freedom of Information Law (see attached) may be appropriatly cited, [see attached, Walker v. City of New York, 408 NYS 2d 811 (1978)].

Nevertheless, I have recently received a copy of a letter addressed to you by Rosemary Carroll, Assistant Commisioner for Civil Matters of the New York Police Department. Her letter indicates that there is

no transcript of the proceeding, nor are there minutes.

Consequently, if neither a transcript nor minutes is in existence, there is no record to be made available. Ms. Carroll did indicate, however, that the determination of the matter was sent 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:ch

cc: Rosemary Carroll
William T. Johnson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1676

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

August 28, 1980

Ms. Alice Murray
[redacted]

Dear Ms. Murray:

As you are aware, I have received your letter of August 2 as well as the materials attached to it, and I apologize for the delay in response.

You have asked for my comments with respect to the materials and indicated that you were required to sign a certification to the effect that you would not copy materials provided by the East Islip School District that you have copied.

First, the materials that you sent consist of the rules promulgated by the East Islip School District to implement the Freedom of Information Law. I have but two comments to offer in relation to the rules.

Section 5(a) requires that a written request for records must be made on forms provided by the District's records access officer. In this regard, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for denying access to records. On the contrary, any request made in writing that reasonably describes the records sought should suffice [see Freedom of Information Law §89(3)]. Therefore, although a specific form may be used, it need not.

Section 7 of the rules pertaining to the subject matter list is in my view appropriate. Nevertheless, the attached subject matter list does not in my opinion comply with the direction provided by §87(3)(c) of the Freedom of Information Law. The cited provision requires that each agency compile a list in reasonable detail by subject matter of all of its records, whether or not the

records are available. While the first six descriptions of records appearing in the list are reflective of categories of records, the remaining classifications do not pertain to particular categories of records. It has been suggested in the past that the schedules for the retention and disposal of records developed by the State Education Department provide a useful tool for the development of a subject matter list.

Second, I do not believe that an agency can generally compel the recipient of records to sign a certification to the effect that he or she will not copy the materials provided. From my perspective, once records have been made available, the agency that supplied them loses control of the copies and the recipient is free to do with the records as he or she sees it.

The only circumstance in which such a certification might be proper would involve the disclosure of a list of names and addresses made available based upon the proviso that such a list would not be used for commercial or fund-raising purposes [see Freedom of Information Law, §89(2)(b)(iii)]. In any other instances in which records are made available, I believe that the recipient of the records is free to copy and distribute the records at will.

Lastly, as you may be aware, I was contacted by Doris Wenger, a member of the Residents for Quality Education, in conjunction with a denial of access to records by the East Islip School District. Ms. Wenger informed me that the records sought would not be provided due to the fact that she is not a qualified voter of the District. Although I have attempted to contact District officials on two occasions, my calls have not yet been returned.

With respect to the denials, this Committee has advised and the courts have upheld the principle that accessible records shall 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]. Consequently, although you may not be a resident or qualified voter of the school district in which your request was made, your status does not affect or diminish rights of access to District records.

It is noted that §2116 of the Education Law has long provided access to school district records to "qualified voters of the district". However, in construing the cited provision of the Education Law with the Freedom of Information Law, it has been held that the qualification contained within §2116 of the Education Law has been rendered void due to the enactment of the Freedom of Information Law, which does not distinguish among applicants for records and requires that accessible records be made available to any person [see Matter of Duncan (Bradford Central School District), 394 NYS 2d 362].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

cc: Dr. Michael F. Griffen
Edward J. Milliken

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1677

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

August 28, 1980

Mr. Max Gordon
O'Connell and Aronowitz, P.C.
Attorneys at Law
100 State Street
Albany, NY 12207

Dear Mr. Gordon:

As you are aware, I have received correspondence transmitted by you and the Department of Motor Vehicles regarding a request made under the Freedom of Information Law.

Specifically, you have sought "a list of all licensed motor vehicle inspection stations in the State of New York as of any date during the year ending July 29, 1980."

It is emphasized at the outset that the following opinion is intended to assist you and the Department in reaching an accord and avoiding the initiation or necessity of litigation.

Your request was initially denied by James F. McGuirk, and the denial was affirmed following an appeal that was rendered by Abraham Shapiro, Acting Chairman of the Administative Appeals Board. The denial in both instances is based upon §87(2)(b) and 89(2)(b)(iii) of the Freedom of Information Law.

Section 87(2)(b) states generally that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Section 89(2)(b)(iii) provides that an unwarranted invasion of personal privacy includes:

> "...sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

From my perspective, the basis for withholding is inappropriate. In my view, a key word appearing in both §87(2)(b) and 89(2)(b) is "personal" I believe that the language concerning the protection of privacy is intended to be applicable to those records that relate to individuals, for example, as opposed to corporations or other business enterprises. Further, it is my opinion that the provisions concerning personal privacy are intended to protect against disclosures pertaining to the details of individuals' lives. Consequently, not every disclosure of an identifying detail would constitute an "unwarranted" invasion of personal privacy; on the contrary, some disclosures constitute a permissible invasion of personal privacy.

Of equal importance is your contention that any invasion of privacy is minimized due to the fact that licensed motor vehicle inspection stations post and display signs to that effect. In fact, §303(c) of the Vehicle and Traffic Law requires that:

> "[E]ach official inspection station shall prominently display in an area of the station where the orderly transaction of business of such stations occurs a sign provided by the department..."

In addition, §303, which deals with official inspection stations, provides that "persons"are not licensed for the purpose of making inspections, but rather "stations" are so licensed. Again, I believe that the foregoing diminishes the privacy considerations envisioned by the Freedom of Information Law.

In view of the foregoing, neither §87(2)(b) or §89(2)(b)(iii) of the Freedom of Information Law could in my opinion justifiably be cited as a basis for withholding the records in which you are interested.

Lastly, I do not believe that there are any remaining grounds for denial that could be cited to withhold the information sought. In fact, it appears that §87(2)(g) provides direction to the contrary. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

The language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the lists of licensed motor vehicle inspection stations could be characterized as "intra-agency"material. However, I believe that its contents would consist solely of "statistical or factual tabulations or data" that must 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:ch

cc: Abraham Shapiro

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-529
FOIL-AO-1678

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

August 28, 1980

Mr. Norman J. Goldman
[redacted]

Dear Mr. Goldman:

I have received your letter of August 3, which raises questions under both the Freedom of Information Law and the Open Meetings Law.

Specifically, you have asked several questions regarding the application of both statutes with respect to various groups created by the Town of Clifton Park and its Board. The groups include a Citizens Task Force appointed by the Town Board to make recommendations regarding the growth and development of the Town; a Special Committee designated to assist the Town Board to review the recommendations of the Citizens Task Force; and a Committee consisting of four designated to make recommendations to the Town Board concerning the employment of a traffic engineering firm to conduct a study regarding the implementation of a possible expansion of the Clifton Country Mall.

First, the focal point of your inquiry with respect to the Open Meetings Law is the definition of "public body" appearing in §97(2) (see attached). Although, the status of advisory bodies was questionable under the original Open Meetings Law, amendments to the Law that went into effect on October 1, 1979, clearly indicate that each of the entities to which you made reference is a "public body" subject to the Open Meetings Law in all respects.

"Public body" is defined 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."

By viewing the definition in terms of its components, I believe that each of the conditions precedent required for a finding that an entity is a public body is present. Each of the groups that you identified is an entity consisting of two or more members. Although they may not have any specific quorum requirements, §41 of the General Construction Law has for decades required that any group of three of more persons or public officers designated to perform a public duty collectively, as a body, can only act by means of a quorum. Further, it is clear that the entities in question conduct public business for a public corporation, the Town of Clifton Park. In addition, the last clause of the definition makes specific reference to committees, subcommittees, and similar bodies. In view of the foregoing, I believe that the entities that you described are subject to the Open Meetings Law.

Second, since the groups are public bodies, they are required to comply with the notice requirements described in §99 of the Law. In brief, §99 requires that all meetings be preceded by notice given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations.

Third, you asked whether the groups are required to hold open meetings, which may be distinguished from public hearings. Since "meeting" is defined by §97(1) of the Law to include the official convening of a quorum of a public body for the purpose of conducting public business, any time a quorum of any of the groups convenes to conduct public business, such gatherings are "meetings" that fall within the scope of the Law.

Fourth, §101 of the Law requires that public bodies compile and make available minutes. Without going into detail, minutes of open meetings must be compiled and made available within two weeks of such meetings, and minutes of executive session must be compiled and made available within one week of executive sessions.

Although the groups in question are in my view public bodies, it is emphasized that they may appropriately enter into executive sessions in conjunction with §100 of the Open Meetings Law.

Lastly, with respect to the availability of records in general, I direct your attention to the Freedom of Information Law. That statute applies to all "agencies", and the term "agency" is broadly 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."

In my opinion, the language quoted above includes the Town and the creations of Town government, such as the committees and task forces to which you made reference. The definition of "agency" should in my view be construed expansively due to the breadth of a decision recently rendered by the state's highest court, the Court of Appeals, which held that public accountability should be extended "wherever and whenever feasible" [see Westchester Rockland Newspapers v. Kimball, ___ NY 2d ___, July 3, 1980].

Further, 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 thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

It is noted that I have discussed the matter with Supervisor Daley of the Town of Clifton Park, and I believe that the Supervisor and I are in general 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

Enc.

cc: Supervisor Daley

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1679

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

September 2, 1980

Paul J. Baroncelli, Esq.
[redacted]

Dear Mr. Baroncelli:

I have received your inquiry of August 8, and apologize for the delay in response. Your questions is whether your attached request directed to the State Department of Taxation and Finance made under the Freedom of Information Law is permissible.

Although I cannot provide a specific answer, I would like to make the following comments.

First, the Freedom of Information Law is an access to records law. As a general rule, the Law provides access to existing records and does not require an agency to create or compile a new record or records in response to a request [see Freedom of Information Law, §89(3)]. As you indicated, however, "factual data" contained within existing records would in my view likely be available. Nevertheless, if determinations related to the controversy were based upon oral communications, rather than "records" as defined by §86(4) of the Freedom of Information Law, there would be no "record" to be made available.

Second, your request was directed to a regional supervisor of the Department of Taxation and Finance. In this regard, the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, require that the head of an agency designate one or more records access officers responsible for coordinating the agency's responses to requests for records [see attached regulations, §1401.2(a)]. I have no knowledge of whether the person to whom your request was directed is a designated records access officer. According to my state agency directory, the designated records access officer is Karen Townsend, whose office is in the Executive Bureau of the Department of Taxation and Finance. It is possible that your request should have been directed to Ms. Townsend.

It is suggested in the future that you attempt to determine the identity of the records access officer prior to making a request. In the alternative, requests should simply be directed to the records access officer at the main office of an agency.

Enclosed for your consideration is a copy of an explanatory pamphlet that may be useful to you. The pamphlet contains model letters of request and appeal.

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.

cc: Dominic J. De Ricco

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1680

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

September 2, 1980

Mr. Peter A. Szikszay
Quality Tree Service
357 Villa Avenue
Buffalo, NY 14216

Dear Mr. Szikszay:

As you are aware, I have received a great deal of correspondence from you regarding your efforts to gain access to information regarding tax maps and the tax roll of Cattaraugus County.

Although the tax maps and the tax roll exist as individual documents, which are available to you for inspection and copying, you have indicated that the same records exist in computerized form in the format that you desire, or that they could be converted to the format that you are interested in using. The County has denied access on the basis of §87(2) and 89(2) of the Freedom of Information Law, as well as §5 and 8 of Act 337 of 1978 of the Cattaraugus County Legislature.

I would like to offer the following comments with respect to the controversy.

First, 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 the County, are available, except to the extent that records or portions of records fall within one or more of the grounds for denial listed in §87(2) of the Law. Further, §89(4)(b) of the Freedom of Information Law provides that an agency shall have the burden of proving in a judicial proceeding that records withheld in fact fall within one or more of the grounds for denial [see e.g., Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979)].

Fifth, the provisions of the Freedom of Information Law cited as a basis for withholding deal with the protection of privacy. Sections 87(2)(b) and 89(2)(b) provide that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". Nevertheless, it would in my view be difficult to justify a denial when the County has offered you the ability to inspect and copy all of the information sought by reviewing and/or copying the records individually. Moreover, the courts have long held that virtually all information used in the assessment process is available [see e.g., Sears Roebuck and Co. v. Hoyt, 107 NYS 2d 756 (1951) and Sanchez v. Papontas, 303 NYS 2d 711 (1969)]. Again, if the records are available when provided individually, I question the capacity to deny simply because the same information in large quantities can now be made available more efficiently due to advances in technology.

Lastly, the remaining bases for withholding concern citations of acts passed by the County Legislature. Although I am not familiar with those acts, it is suggested that a local legislative body cannot abridge or diminish rights of access granted by a statute enacted by the State Legislature. It is noted that §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." Since a local law, for instance, could not be equated with a "statute", I do not believe that an enactment of a County Legislature could appropriately be cited to abridge rights of access granted by a statute such as 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: Bernice Boyer
John Suda
Dennis Tobolski, County Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1681

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

September 3, 1980

Mr. Gregory G. Szurnicki
President, CSEA Local 411
75 East Main Street
Kings Park, NY 11754

Dear Mr. Szurnicki:

I have received your letter of August 13 in which you questioned the propriety of responses to requests for records directed to the New York State Office of Mental Health.

First, according to a letter dated July 30 addressed to you by H. J. Bloch, Director of Manpower Management at the Kings Park Psychiatric Center, it was indicated that a search fee of ten dollars an hour would be charged with respect to your request. In this regard, please note that §87(1)(b)(iii) of the Freedom of Information Law provides that an agency may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, unless a different fee is otherwise prescribed by law, or the actual cost of reproducing other records that are not subject to conventional photocopying means. Further, the regulations promulgated by the Committee (see attached), which govern the procedural implementation of the Freedom of Information Law and have the force and effect of law, specifically state that "there shall be no fee charged for...search for records" [1401.8(a)(2)]. Consequently, I do not believe that the search fee to which reference was made in Mr. Bloch's response is permissible.

Second, §87(3)(b) of the Freedom of Information Law requires that each agency maintain a payroll record consisting of the name, public office address, title and salary of all officers and employees of the agency. Therefore, it would appear that the information that you are seeking should be maintained and made available on an ongoing basis and without resort to a "search".

Third, with respect to a response dated July 29 by Ken Meyer, Business Officer II, your request for " a complete listing of all public records" available at Kings Park Psychiatric Center was denied. I disagree in part with Mr. Meyer's response.

As a general rule, an agency need not create a record in response to a request, "except the records specified in subdivision 3 of section 87..." Section 87(3) of the Freedom of Information Law requires that each agency compile and maintain three types of records, one of which is the payroll record to which reference was made earlier. Another record that must be compiled is the so-called "subject matter list". According to §87(3)(c), each agency is required to 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."

Based upon the language quoted above, an agency is required to create a list in reasonable detail of all of its records, whether or not the records are available. It is noted, however, that the list need not make reference to every record, public or otherwise, that is maintained by an agency. According to the Committee's regulations, the subject matter list "shall be sufficiently detailed to permit identification of the category of records sought" [§1401.6(b)]. Therefore, although an agency need not identify by means of a list each of its "public" records, it must nonetheless maintain a subject matter list that provides reasonable detail with respect to the categories of records that it maintains.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

cc: H. J. Bloch
Ken Meyers

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1682

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

September 3, 1980

Mr. Neil Fabricant
Empire State Report
17 Lexington Avenue
New York, NY 10010

Dear Mr. Fabricant:

I have received your letter of August 27, in which you requested an opinion regarding the rights of Empire State Report, Inc., a non-profit corporation, "to secure from any state or local agency the names, office address, title and salary of each employee thereof and further where such list is maintained on computer to secure a copy of the computer tape by paying a reasonable copy charge".

I would like to make several points with respect to your inquiry.

First, as a general rule, the Freedom of Information Law does not require an agency to create or compile a record in response to a request. Specifically, §89(3) of the Law states in relevant part that:

> "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight."

In this regard, §87(3)(b) of the Law requires 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 foregoing, each agency subject to the Law is required to compile and maintain on an ongoing basis a payroll record containing the information in which you are interested.

Second, §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 or the state legislature, in any physical form whatsoever..."

The remainder of the definition makes reference to particular types of records, including "computer tapes or discs". Therefore, if the payroll information that you are seeking is maintained on a computer tape, the tape constitutes a "record" subject to rights of access granted by the Freedom of Information Law.

And third, with respect to the fees that may be assessed for reproduction of a computer tape, §87(1)(b)(iii) provides that an agency may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other records. As such, if an agency maintains the information that you are seeking on a computer tape, the fee assessed for the reproduction of the tape should be based upon the actual cost of its reproduction.

Further, it is noted that the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, state that the fee for reproducing records that are not subject to conventional photocopying methods:

> "...shall not exceed the actual reproduction cost, which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [see attached, §1401.8(c)(3)].

For the reasons expressed above, it is my opinion that Empire State Report, or any person, has the right to seek and obtain copies of computer tapes that contain the information that you 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:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1683

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

September 4, 1980

Mr. David Goodman
[redacted]

Dear Mr. Goodman:

As you are aware, I have received your letter of August 8, as well as the correspondence pertaining to it. Your inquiry concerns a denial of access to records by the State Education Department. Specifically, you requested information regarding professional positions filled by the Department since January 1, 1980, including records reflective of job requirements, the names of persons hired, the dates they were hired, the means by which the positions are funded, and similar, related areas of inquiry.

In response, Charles J. Byrne, Director of Personnel, indicated that the Department is "not in a position to answer most of the questions you have asked."

Although I have no knowledge of the nature and scope of the information that you are seeking, I would like to offer the following comments. In addition, it is noted that I contacted Gene Snay, Records Access Officer for the Department and discussed your inquiry with him.

First, as you are aware, §89(3) of the Freedom of Information Law provides that, unless otherwise stated, an agency need not create a record in response to a request. Therefore, if, for example, there are no records that identify the Assistant or Deputy Commissioner under whom a position falls, the Department has no obligation to compile or create such a record on your behalf.

Nevertheless, it is important to point out that the Freedom of Information Law is based upon a presumption of access. All records of an agency are accessible,

except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law. As such, when an agency receives a request, it is my opinion obliged to search and review the relevant records, to determine which portions of the records, if any, fall within any of the grounds for denial.

Second, §89(3) of the Law requires that an applicant "reasonably describe" the records sought. While I do not know whether the information in which you are interested exists in the form of a record or records, it appears that you have met your responsibility of "reasonably" describing the records that you are seeking.

Third, to the extent that the information sought exists in the form of a record or records, I believe that it is available. Most relevant under the circumstances is §87(2)(g) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy of determinations"

The provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations found within such materials must be made available.

In this instance, it would appear that any existing records reflective of the information sought could be characterized as "intra-agency" materials. However, it would also appear that the information sought would consist solely of "statistical or factual tabulations or data" that are accessible.

Fourth, it was mentioned earlier that an agency need not create a record unless otherwise provided. One of the records that must be compiled and maintained on an ongoing basis is a payroll record. Specifically, §87(3)(b) of the Freedom of Information Law requires that each agency maintain a record indicating the name, public office address, title and salary of all officers or employees of the agency. By comparing payroll records before and after January 1, 1980, one might have the capacity to identify professional positions and the approximate date on which they began their jobs.

Lastly, I would conjecture that at least some of the information that you are seeking does exist in the form of a record or records. For instance, having been employed by the Department of State for several years, I believe that every position has specific written job requirements. Further, records developed in the preparation of a budget indicate salaries and the means by which particular positions are funded.

I would like to reiterate that I have no knowledge as to whether the Education Department maintains the information that you are seeking in the form of a record or records. Nevertheless, assuming that the Department functions in a manner similiar to the Department of State, I would conjecture that much of the information does exist, and if that is so, I believe that it is accessible to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

cc: Charles Byrne
Eugene Snay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1684

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

September 8, 1980

[redacted]

Dear [redacted]:

I have received your most recent letter concerning your attempt to gain access to information pertaining to your daughter.

Apparently in 1975 and 1976 a number of reports were prepared concerning your daughter by the Suffolk Hearing and Speech Center, a private non-profit corporation. Although you have attempted to gain access to those reports from both the Speech Center and the BOCES III in Suffolk County, you have yet received the records. In addition, you have raised questions regarding the BOCES' implementation of the Family Educational Rights and Privacy Act as well as the existence of particular records.

First, as you are aware, this Committee is responsible for advising with respect to the New York State Freedom of Information Law. From my perspective, that law has limited application with respect to the controversy in which you are involved. Most important are the provisions of the Family Educational Rights and Privacy Act (FERPA) and the regulations promulgated thereunder. Consequently, it is suggested that you continue your correspondence with the office that oversees the implementation of the FERPA.

Second, the FERPA is applicable to certain educational agencies and institutions. Based upon the information provided, it does not appear that the Suffolk Hearing and Speech Center would be subject to the FERPA. Further, I am not aware of any rights that you may have with respect to records in possession of the Speech Center. Nevertheless, if, for example, records pertaining to your daughter have been transmitted from the Speech Center to an educational agency or institution such as BOCES III those records would become subject to the FERPA and would in my view be accessible to

you and your husband.

And third, a BOCES or other educational agency in New York State cannot dispose of or otherwise destroy records at will. Section 65-b of the Public Officers Law prohibits units of local government, including a BOCES, from disposing of records without the consent of the Commissioner of Education. In order to assist the Commissioner in carrying out his duties, the State Education Department has developed a series of retention schedules that indicate the periods of time that particular records must be kept prior to their disposal. Therefore, if you feel that records have been destroyed, it is suggested that you attempt to determine whether they were disposed of in conjunction with §65-b of the Public Officers Law and the schedules to which reference was made earlier.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-532
FOIL-AO-1685

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

September 8, 1980

Mr. James R. Wilson
[redacted]

Dear Mr. Wilson:

I have received your letter of August 13 and apologize for the delay in response. Your questions deal with the implementation of the Freedom of Information and Open Meetings Laws by the Canastota School District.

It is emphasized at the outset that the Superintendent, Thomas Mitchell, and a new school board member visited me in Albany to discuss and attempt to resolve the problems that have arisen regarding both statutes. I believe that the issues cited in your letter will no longer arise and that the Superintendent and Ms. Cianfa are now familiar with the obligations imposed by both laws.

For instance, the changes in the Open Meetings Law that became effective October 1, 1979, were considered, with particular attention given to the redefinition of "public body" appearing in §97(2) of the Law. As you are aware, the amended definition makes specific reference to committees and subcommittees of a public body, which, under §101 of the Law, are required to keep minutes of their meetings. Based upon our discussion, I believe that the committees to which you made reference will now comply with the Open Meetings Law in all respects.

With respect to your request for a "voting record of the immediately past school board president", I offer the following comments.

First, it is true that §87(3)(a) of the Freedom of Information Law requires that a public body maintain a record of votes indicating the manner in which each member voted in each instance in which a vote is taken. From my perspective, the record of votes contained within minutes of a meeting should suffice, so long as the identities of the members are given when a vote is not unanimous. For example, if a board consists of seven members, and the vote on a particular issue is six to one, the voting record in my view must indicate the identity of the member who dissented. By so doing, it is clear that the six remaining members voted in the affirmative.

Second, I do not believe that there is any requirement that a public body under the Open Meetings Law or an agency under the Freedom of Information Law compile a voting record that identifies a single individual in each instance in which that individual cast a vote. Again, based upon the direction suggested above, the minutes of meetings should in my view be sufficient.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Mitchell

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1686

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

September 8, 1980

Ms. Joan Levine
N.Y.S. PTA Chairman
Committee on Confidentiality
42 Deepdale Parkway
Roslyn Heights, NY 11577

Dear Ms. Levine:

I have received your correspondence and apologize for the delay in response. Despite the lateness of my comments, I hope that they will be useful to you and your organization.

During our telephone conversation, we discussed the pro's and con's of the Family Education Rights and Privacy Act, commonly known as the "Buckley Amendment". In addition,the special committee on which you serve has prepared a draft resolution concerning a proposed right of confidentiality to exist between students and officials of educational institutions.

First, and perhaps most importantly, I do not believe that legislation passed by New York state creating a "privileged relationship" between students and officials of educational institutions with respect to particular areas of communication would be valid. For better or worse, an act of Congress, such as the Buckley Amendment, is the law of the land. Consequently, I do not believe that New York could enact legislation that conflicts with the direction provided by a federal act. In this instance, the proposed legislation would abridge rights of parents that currently exist under the Buckley Amendment. Therefore, to accomplish your goal of creating categories of confidential communications or records relative to the relationship between students and educational officials, an act of Congress altering the Buckley Amendment would in my view be required.

Second, as I indicated to you by telephone, I believe that the Buckley Amendment is well-intentioned, but unenforceable and, therefore, somewhat hollow. The penalty for failure

to comply with the Buckley Amendment is the termination of funding under any federal program in which an educational agency or institution obtains funds directly or indirectly. In short, the penalty is so severe that it has never been used and my guess is that it never will be used. Further, based upon my experience in this office, I believe that school districts violate the Buckley Amendment constantly, knowingly or otherwise. Nevertheless, it is inconceivable that the Department of Education would close a school district for failure to comply with the Buckley Amendment.

Third, there are other areas of deficiency in the Buckley Amendment. For instance, there are numerous advantages in the New York State Freedom of Information Law that do not carry over to the Buckley Amendment. For example, the Freedom of Information Law requires that copies of accessible records be made available upon payment of the requisite fees. There is no provision for gaining a copy of a record under the Buckley Amendment. In addition, the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. The Buckley Amendment, however, requires that an educational agency or institution comply with the request "within a reasonable period of time, but in no case more than 45 days after the request has been made". From my perspective, the rules promulgated by the Department of Health, Education and Welfare provide an inordinately long period of time for a request. I believe that the Buckley Amendment or the regulations should require that less restrictive provisions of law with respect to rights of access remain in effect.

In a related area, often full compliance with the Buckley Amendment requires that burdensome steps be carried out by a school district, for example. My guess is that an infinitesimal percentage of school districts have adopted policies on directory information. I believe that the reason for failure to adopt such a policy is due to the steps required to be taken under §99.37 of the regulations. Very simply, it may be difficult and costly to go through the required procedure. Moreover, I would conjecture that directory information in one form or another is routinely disclosed, notwithstanding the absence of a policy on the subject. For instance, a program published for a football game indicates the names, heights and weights of members of the team. Unless a policy on directory information has been established, it would appear that the Buckley Amendment would be violated. Similarly, when a yearbook is sent to the local public library, unless a policy on directory information has been established, again, it would appear that the Buckley Amendment would be violated. I believe that some reasonable middle

ground can be found that provides the appropriate protection of privacy and a reasonable amount of disclosure.

In sum, it is in my view likely difficult for a school district to fully comply with the letter and spirit of the Buckley Amendment. Further, and perhaps more importantly, due to the stiffness of the possible penalty and the lack of likelihood that it would ever be imposed, there is no incentive to comply with Buckley. I believe that Congress should amend Buckley by providing a middle ground that gives a school district a reasonable opportunity to comply fully and concurrently instituting a reasonable penalty for non-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:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1687

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

September 8, 1980

David D. Tanner
#77C336
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821

Dear Mr. Tanner:

I have received your letter of August 18 and apologize for the delay in response. Your inquiry concerns a request for various records in possession of the Great Meadow Correctional Facility that was denied due to a failure to waive a fee of twenty-five cents per photocopy.

I would like to offer the following comments with respect to your inquiry.

First, your letter is addressed to me as an appeal following a denial of a request to waive the fees. In this regard, the Committee is charged with the duty of advising with respect to the Freedom of Information Law; it is not an appeals body, nor does it have the capacity to compel an agency to comply with the New York Freedom of Information Law. Further, §89(4)(a) of the Freedom of Information Law requires that appeals be transmitted to the head of an agency or whomever is designated to determine appeals. In the case of the Department of Correctional Services, I believe that the designated appeals officer is Patrick Fish, Counsel, whose office is located at the Department of Correctional Services, State Campus, Correctional Services Building, Albany, New York, 12226.

Second, although the federal Freedom of Information Act, which applies to records in possession of federal agencies, contains a provision whereby the fees for searching and copying records may be waived, the New York Freedom of Information Law contains no such provision. Consequently, an inmate may be assessed the same fee as any member of the public for copies of records.

Third, the Freedom of Information Law of New York does not permit the imposition of a search fee, and no fee may be assessed for inspecting accessible records. Therefore, if you do not have the resources to pay for photocopies, perhaps you can request inspection of the records, thereby eliminating any charge.

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-1688

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

September 9, 1980

Ms. Clara B. Simons
[redacted]

Dear Ms. Simons:

I have received your letter of August 18 and apologize for the delay in response.

Your inquiry concerns a situation in which some sixty persons, including yourself, took a Civil Service examination. You indicated that, at the time of the test, the examinees were denied permission to retain a copy of the exam and were required to turn in all notes and scrap papers that were issued during the exam. Upon your request for a copy of the examination questions as well as your test papers, you were informed that you could review both the examination and your responses, but that you would not be permitted to copy any portion of the examination questions or your answers. You have questioned the propriety of the response by the New York City Department of Personnel.

I agree with your contention that the examination is a "record" as defined by §86(4) of the Freedom of Information Law. With respect to §87(2)(h), I believe that it is intended to permit agencies to withhold examination questions or answers if the questions are to be administered at some time in the future.

In terms of background, §87(2)(h) was included in the Freedom of Information Law at the request of the State Department of Civil Service, which often administers a single examination or portion of its contents many times. The Department contended that if the examination questions or answers to be used again are disclosed, the value of examinations might be destroyed.

In this instance, if the questions administered in the examination that you took will be given again, the New York

City Personnel Department may in my view justifiably withhold the questions and answers, pursuant to §87 (2)(h). It is possible that the examinations that are reviewable at the public library will not be given again. Moreover, I have been led to believe that, until recently, New York City did not administer the same examination twice. In order to avoid the cost of devising new examinations, I believe that New York City now administers the same examinations or contents of examinations more than once.

In sum, if the questions on the examination in which you are interested will be given at some time in the future, the questions and answers for that examination may in my view be withheld pursuant to §87(2)(h) 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:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1689

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

September 16, 1980

Beatrice Miller Montanye
[redacted]

Dear Ms. Montanye:

As you are aware, your letter addressed to the Attorney General has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

In your letter, you requested a copy of a "committment order" signed by Justice J. B. Perry of Old Forge on August 28, 1964. Although I cannot provide you specific direction, I would like to offer the following comments and advice.

First, the Department of Law does not generally maintain possession of either originals or copies of judicial orders. As such, that Department is not in a position to furnish you with the document sought.

Second, the Freedom of Information Law (see attached) specifically excludes the courts and court records from its coverage [see definition of "judiciary", §86(1) and "agency", §86(3)]. Nevertheless, most court records are available under various provisions of the Judiciary Law and particular court acts. Under the circumstances, I do not know the nature of the "committment order" that you are seeking. Consequently, I could not advise you with certainty that is is available.

Third, I would conjecture that the order in which you are interested may be found in one of two locations. It may be in possession of the clerk in the municipality where the order was signed. For example, if Justice Perry is or was a town justice, the order may be in possession of the town clerk. In the alternative, the re-

cords may have been transferred to the clerk of a regional judicial district. In either event, it is suggested that you contact the town or village clerk of the municipality in which the order was signed. I believe that the clerk can inform you whether the order is in his or her custody, or whether it has been transported to another repository of records.

With regard to your question regarding the height of bridges, I regret that I do not have the expertise to provide an accurate response. It is suggested, however, that you contact the Office of Bridge Planning and Construction at the State Department of Transportation, Building 5, State Campus, Albany, New York 12232.

I hope that 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-1690

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

September 16, 1980

Mr. David V. DeCinto
[redacted]

Dear Mr. DeCinto:

I have received your letter of August 30, which deals generally with the obligations of agencies under the New York Freedom of Information Law. I hope that the following points will answer your questions. If they do not, please call me. Perhaps a conversation would be the best method of resolving problems or questions that you might have.

First, I am in general agreement with the advice given to you by a friend. In general, judicial determinations dating back as far as the 1950's have held that virtually all records used in the development of assessments and the assessment process itself are available.

Second, in my earlier letter I mentioned that the Freedom of Information Law does not require an agency to create or compile a record in response to a request. Certainly if a compilation does exist, it would be subject to rights of access granted by the Law. My previous comments were intended only to indicate that an assessor, or any government official, is not usually required to prepare totals or statistics, for instance, in response to a request. Very simply, if information exists in the form of a record or records it is subject to the Freedom of Information Law.

Third, with respect to copies of records, agencies are required to permit inspection and copying of accessible records. No charge may be assessed for the inspection of records. If copies of records are requested, an agency

may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches. If records are larger or are not subject to conventional photocopying methods, the agency may assess a fee based upon the actual cost of reproduction. Further, it has consistently been advised that copies should be mailed to an applicant, so long as the applicant is willing to pay the appropriate fees for copying and postage.

I would like to point out the possibility that one might not be able to copy the contents of an assessment roll due to its physical size. For example, the pages may be too large for photocopying, or the book in which the information is contained might not be able to be copied with a conventional copier.

I hope that 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-1691

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

September 16, 1980

Mr. Wilfredo Quiles
78-A-0090
Ossining Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Quiles:

I have received your letter of August 27 concerning a request for medical records pertaining to you that are in possession of the Ossining Correctional Facility.

You have indicated that, following direction given to you by Thomas Coughlin, Commissioner of the Department of Correctional Services, you served your request upon Superintendent Walters on August 19. However, as of August 27, you had received no response.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days in necessary to revies or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7 (b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89 (4) (a)].

In view of the foregoing, if you have received neither a grant or denial of access, nor an acknowledgment of the receipt of your request, it would appear that you have been constructively denied access and that you may appeal to the Commissioner.

Lastly, it is suggested that you contact a representative of Prisoners' Legal Services. Perhaps that organization can help 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:ch

cc: Superintendent Walters

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1692

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

September 16, 1980

Mr. Robert K. Lanza
[redacted]

Dear Mr. Lanza:

I have received your letter of September 1, in which you described unsuccessful attempts to gain access to records regarding your arrests from the Clerks of the Albany and Colonie Police Departments, as well as documents pertaining to you in possession of the Supreme Court, Albany County, regarding a trial conducted in September of 1979.

I would like to offer the following suggestions and direction.

First, enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation, an explanatory pamphlet on the subject, and §160.50 of the Criminal Procedure Law.

Second, both the Freedom of Information Law and case law rendered prior to its enactment have granted access to arrest or "booking" records. Therefore, to the extent that such records exist and are in possession of the two police departments named, they should in my view be made available to you upon payment of the appropriate fees for copying.

Third, §160.50 of the Criminal Procedure Law concerns the disposition of records in cases in which criminal actions have been terminated in favor of an accused. In brief, records related to such cases are in many instances sealed and some of the records may be returned to an accused or his attorney, for example. It is suggested that you review §160.50 closely to determine the extent to which it may be applicable to your situation.

Fourth, you can obtain a copy of your "rap sheet" or criminal history record from the New York State Division of Criminal Justice Services. I suggest that you write to the:

Division of Criminal Justice Services
Stuyvesant Plaza
Executive Park Tower
Albany, NY 12203

in order to learn exactly what procedure should be followed and that type of information that you must submit in order to gain a copy of your current rap sheet.

And fifth, with respect to the court records in which you are interested, it is noted that the Freedom of Information Law specifically excludes the courts and court records from its scope [see definitions of "judiciary", §86(1) and "agency" §86(3)]. Nevertheless, unless the records in question have been sealed, they should in my view be made available to you under §255 of the Judiciary Law (see attached). In renewing your request, you should provide as much identifying information as possible, such as the name of the case, dates, file designations, index numbers, etc.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch

cc: Public Information Officer, Albany Police Department
Public Information Officer, Colonie Police Department

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1693

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

September 16, 1980

Mr. Robert F. Reninger
[redacted]

Dear Mr. Reninger:

I have received your letter of August 30, which raises questions relative to the implementation of the Freedom of Information Law by the Greenburgh Central School District.

Specifically, in a letter addressed to the District Clerk, you requested records indicating whether

> "...[M]rs. Hutcheson at any time during 1979 or any time prior to January 29, 1980 served as a substitute or student teacher in the School District or provided any services to the District by reason of her association with a provider of temporary employees to the School District."

According to your letter, in response to the request, the District provided you with a copy of its subject matter list and informed you "to go find the information."

If your description of the facts is accurate, it would appear that District officials have failed to meet their obligation under both 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.

First, as you intimated in your letter, an applicant for records must "reasonably describe" the record or records in which he or she is interested [see attached, Freedom of Information Law, §89(3)]. One of the tools that may enable an individual to reasonably describe the records is the subject matter list, which is required to be compiled under §87(3)(c) of the Law and which was provided to you.

If the subject matter list does not provide a sufficient basis for reasonably describing the record sought, or if a request does not

in the opinion of the records access officer reasonably describe the records,

> "[T]he records access officer is responsible for assuring that agency personnel...assist the requester in identifying requested records, if necessary..." [see attached, regulations, §1401.2(b)(2)].

As such, it is clear that a records access officer or his or her designee should assist in identifying the records sought if there are questions regarding the nature of the information requested.

Second, I concur with the contention made in your letter in which you suggested that "the responsibility of identifying and locating records...rests basically with the public agency...". In this regard, assuming that a request has reasonably described the record sought, provisions in both the Law and the regulations indicate that it is largely the responsibility of the agency to locate the records and make them available for inspection and copying.

For example, the regulations describe the types of actions that may be taken by a records access officer "[U]pon locating the records" [§1401.2(b)(3)]. Section 1401.5(b) of the regulations states that an agency "shall respond to any request reasonably describing..." the records sought. Section 89(3) of the Law states that an agency "shall make" a record available or deny access as the case may be. In view of the foregoing, it is in my opinion clear that the agency is obliged to locate the records, except in rare circumstances. One such rare circumstance would involve a request for minutes that are found in a minute book that is kept on a desk for public view during regular business hours. However, in situations in which records are not so readily available for public inspection, I believe that agency is responsible for locating the records requested.

Lastly, once again, if the facts described in your letter are accurate, it would appear that the response to your request ("go find the information") is inappropriate for another reason. In short, I believe that agencies and agency officials are responsible for maintaining both the physical and legal custody of records. While searching records in one particular file cabinet might not compromise their security, in other instances, disclosures might violate specific provisions of law. For example, an unauthorized disclosure of education records that identify particular students would constitute a violation of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g). Please note, that I am not seeking to be overly technical or literal; on the contrary, I am merely suggesting that the public should

not have the ability to leaf through any and all records in possession of a school district.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch

cc: Ms. Myrna Freyman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1694

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

September 17, 1980

Hon. Melvin Miller, Chairman
Assembly Committee on Codes
Room 658
Legislative Office Building
Albany, New York

Dear Chairman Miller:

On behalf of the New York State Committee on Public Access to Records, which is responsible for overseeing the implementation of the Freedom of Information Law, I would like to offer the following comments regarding the Proposed Code of Evidence for the State of New York.

The focal point of my comments will be Article 5 of the Proposed Code regarding privileges.

Perhaps the most important aspect of the proposed Article 5 relative to the Freedom of Information Law is §509, entitled "Secrets of State and other official information". Specifically, §509(b) would, if enacted, provide that:

> "[F]or the purpose of this section official information means confidential communications between public employees, and to public employees, in the performance of their duties and not open, or officially disclosed to the public prior to the time the claim of privilege is made. When such information is claimed to be privileged by the government, the court shall determine whether there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice."

The commentary regarding proposed §509 indicates that the language is essentially intended to codify the so-called "governmental privilege" created by common law and also expresses the viewpoint that the revised Freedom of Information Law (Ch. 933, Laws of 1977) does not significantly alter rights of access granted by the Freedom of Information Law as originally enacted in 1974.

Recent judicial interpretations, however, indicate that the revised Freedom of Information Law provides substantially greater rights of access than the original enactment, and that the "governmental privilege" may no longer exist. Further, I believe that the proposed §509 would unnecessarily diminish rights of access, serve as a delaying mechanism for agencies from which records have been requested, and encourage litigation, thereby adding a burden to the courts.

In terms of background, the governmental privilege has stood for the principle that an agency may withhold information if it is determined judicially that disclosure would, on balance, result in detriment to the public interest. The leading decision concerning the assertion of the governmental privilege was rendered by the Court of Appeals in Cirale v. 80 Pine Street Corp., 35 NY 2d 113. It is interesting and important to note that Cirale was decided after the passage of the Freedom of Information Law in 1974, but prior to its effective date, September 1, 1974. In a footnote appearing in Cirale (supra, at 117), the Court of Appeals indicated that the enactment of the Freedom of Information Law did not "abolish" the privilege. Consequently, it appeared that the governmental privilege continued to exist and could be asserted, notwithstanding the passage of the Freedom of Information Law.

Nevertheless, most recently, the Court of Appeals appears to have abolished the privilege. In Matter of Doolan v. BOCES (48 NY 2d 341), the Court of Appeals held that:

> "The public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which the law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571, supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the

> constitutional argument which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" (id. at 347).

In view of the foregoing, I believe that the Court of Appeals provided new and specific direction regarding the relationship between the governmental privilege and the Freedom of Information Law, and effectively "overruled" the apparent direction given in the Cirale footnote. Moreover, the Court made clear that records may justifiably be withheld only under one or more of the eight grounds for denial found within §87(2) of the Freedom of Information Law.

Due to the direction provided by the Court of Appeals in Doolan, I believe that the enactment of §509 of the Proposed Code would be reflective of a codification of old law, i.e., the governmental privilege, that has been abolished by the state's highest court.

In addition, upon review of the grounds for denial found within §87(2) of the Freedom of Information Law, it is evident that the majority of the grounds for withholding are based upon potentially harmful effects of disclosure; most of them contain an operative verb that indicates what would happen if government were to disclose. From my perspective, the language concerning potentially harmful effects of disclosure itself represents what might be considered a codification of common law relative to rights of access and the governmental privilege. To add an official information privilege would in my view be a step backward that could severely detract form rights of access granted by the Freedom of Information Law. Moreover, as indicated earlier, the scheme envisioned by §509 would require a court to make a judgment in each instance in which the privilege is asserted. Thus a new basis for denial would exist which contains no specific standard upon which the public, the government or a court could rely with a degree of certainty. Again, I believe that such steps would be unnecessary in view of the structure and specific language of the Freedom of Information Law.

Also important is the flexibility of the Freedom of Information Law. For example, if an agency is today involved in collective bargaining negotiations and disclosure of particular records would "impair" the collective bargaining process, the records may justifiably be withheld [see §87(2)(c)]. However, if an agreement is signed tomorrow, the "impairment" essentially disappears, removing the basis for withholding under the Law.

Section 509(b) makes reference to "confidential communications" between public employees and to public employees. In my view, the term "confidential" is much overused, for it has a precise meaning in New York law which is rather narrow. Under the Freedom of Information Law as well as the cases cited in the commentary following §509 it is clear that records cannot be marked or otherwise classified as "confidential" without more. It is also clear that a request for confidentiality is all but meaningless under the Freedom of Information Law and extant case law. I believe that the word "confidential", particularly in view of the Doolan decision, has but one meaning. Specifically, a record can be considered "confidential" only when a statute passed by either the State Legislature or Congress specifically precludes an agency from disclosing. In such instances, an agency could deny access under §87(2)(a) of the Freedom of Information Law, which concerns records that are "specifically exempted form disclosure by state or federal statute". Consequently, to characterize communications as "confidential", as in the proposed language of §509, would cause confusion, possible conflicts with the case law and statutory law, and result in unnecessary assertions of confidentiality. It is reiterated that the Freedom of Information Law is designed to enable agencies to withhold records when disclosure would cause harm. To add a privilege for official information would in my opinion constitute a confusing and unnecessary step backward.

The flexibility of the Freedom of Information Law mentioned earlier has also increased rights of access granted by the original statute, which provided access to specified records, to the exclusion of all others. Rather than characterizing particular records as accessible, the amended statute requires that all records be made available, except to the extent that records "or portions thereof" fall within one or more of the eight grounds for denial, which are written to provide standards regarding the effects of disclosure.

I would like to take this opportunity to comment with respect to other areas of the Proposed Code regarding privilege information.

First, §502 is entitled "Required reports privileged by statute." However, the text of §502 regers to the "law" requiring confidentiality. It is noted in this regard that the term "statute" represents an act passed be Congress or the State Legislature. The word "law" might include regulations, ordinances, or a local law, for example. Consequently, it is suggested that the use of the term "law" in the text of §502 be replaced with "statute".

Second, §503 concerning the attorney-client privilege in subdivision (d)(5) makes reference to an exception regarding communications between an attorney and a public officer or agency. The language of the cited provision

makes reference to communications concerning a "proceeding". I question the intended scope of the term "proceeding". Is it intended to mean only a legal proceeding or virtually any communications pertaining to the performance of the official duties of an officer or an agency with whom the communication is made? In short, I believe that the language is unclear.

And third, §508 concerns a privilege relative to trade secrets. Without a specific definition of what constitutes a "trade secret", I believe that it would be difficult to determine the application of such a privilege. Perhaps the phrase "trade secrets" should in some manner be defined or given parameters.

I thank you and your staff for providing an opportunity to comment with respect to the Proposed Code of Evidence. Once again, I believe that the proposed privilege for official information is inappropriate for the reasons expressed 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:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1695

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

September 19, 1980

Mr. Louis Milburn
#71-A-0356
Drawer "B"
Stormville, NY 12582

Dear Mr. Milburn:

I have received your most recent inquiry and I apologize for the delay in response. Once again, you have raised questions regarding rights of access to records pertaining to your case.

First, you wrote that "it is apparent" that an attorney for the New York City Police Department, Mr. Reers, denied your request without examining the records sought and that, therefore, the Freedom of Information Law has in your view been violated. If your contention is accurate, I would agree.

As you are aware, the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the New York City Police Department, are available, except those records or portions thereof that fall within one or more grounds for denial listed in §87 (2) of the Law. As such, when a request is received, agency officials are obliged to review the records requested in their entirety to determine the extent, if any, to which the records or portions of records may justifiably be withheld.

Second, you have indicated that notes introduced into evidence in a drug case are no longer in possession of the Bronx County Clerk, because the detective who investigated "took back these items". Again, if your contention is accurate, I agree that the clerk should maintain the legal custody of the records in question. Further, a county clerk acting as a clerk of the court would in my view generally be required to provide access to such information under §255 of the Judiciary Law.

Your third area of inquiry concerns a number of questions dealing with particular records. In all honesty, without knowing more about the contents of the records, I cannot provide specific direction. Moreover, as indicated in previous correspondence, I have no knowledge of whether the records in every instance continue to exist. It is possible that they may have been destroyed. Nevertheless, the following paragraphs seek to review the status of the records that you have identified.

First, you asked for the names of all police officers who investigated the homocide with which you were charged. The question here is whether there are records reflective of the names of the officers who investigated the case. There may have been many or few, and again, it is possible that records indicating the names may no longer exist. However, to the extent that such records do exist, it would appear that they are available.

I believe that the response must be the same with respect to your second question in which you requested the name of the partner of Detectives Statfeld and Califano. The only basis for denial that I can envision would be §87 (2)(f), which enables an agency to withhold records or portions of records when disclosure would "endanger the life or safety of any person."

Your third question concerns access to copies of reports in the homocide case that were submitted to the Chief of Detectives, particularly to the extent that such reports "constitute factual data". As you intimated, the reports likely may be characterized as inter-agency materials which are available to the extent that they contain factual data. However, if other grounds for denial appearing in the Freedom of Information Law may appropriately be raised, those grounds could be cited to withhold the records. For instance, §87(2)(e)(iii) states that agencies may withhold records compiled for law enforcement purposes when disclosure would:

> "identify a confidential source or disclose confidential information relating to a criminal investigation..."

Without having seen the records, I cannot conjecture as to their contents. Nevertheless, they may identify confidential sources or other information that may justifiably be withheld under §87(2)(e)(iii).

The same type of reasoning would be applicable to your fourth and fifth questions concerning the unusual occurrence reports to which you made reference and the report of Detective Patterson. In addition, if any aspect of the materials was compiled for law enforcement purposes and is reflective of a non-routine investigative technique or procedure, a denial would be justified on that basis under §87(2)(iv).

Lastly, you asked whether you were entitled to all police reports of the homocide "upon which the police department made a final determination that [you] committed the crime." I am not sure that any of the records could be characterized as constituting a "final determination". Although the records in toto may have led the police to arrest you, I believe that the only final determination made occurred in court. However, I believe that the Police Department must review the materials in question, to the extent that they exist, to determine the extent to which a denial may properly be made.

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: Bronx County Clerk
Mr. Reers

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1696

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

September 19, 1980

Mr. Anthony Comparato
[redacted]

Dear Mr. Comparato:

As you are aware, your letter of August 26 has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

In your letter of August 18, you made reference to another letter dated June 12 that had been referred by the Department of Law to this office. You wrote that you have received no response from the Committee.

The reason for the failure to respond on the part of this office is simply that your initial request was directed to the New York City Police Department with copies sent to the Attorney General and Senator Moynihan. Since no request for assistance was ever directed to this office, it was assumed that the copy of your letter was sent merely for information and not in the expectation of a response.

Nevertheless, I would like to offer the following comments regarding your request.

First, although the Police Department may have a "Pistol Department", I believe that all requests made under the Freedom of Information Law should generally be directed to the "records access officer". In order to assist you, I have enclosed a copy of an explanatory pamphlet regarding the Freedom of Information Law, which includes sample letters of request and appeal.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records in which he or she is interested. From your request, I can not determine whether your request reasonably describes the records sought. However, it is suggested that in the future you provide as much information as possible that will help the agency in receipt of the request in locating the records.

Third, whether or not you have reasonably described the records sought, an agency is obliged to respond within particular time limits. The time

limits are described in the enclosed copy of regulations promulgated by the Committee [see §1401.5].

Fourth, the New York Freedom of Information Law applies to records in possession of agencies of New York, such as the New York City Police Department. The federal Freedom of Information Act applies only to records in possession of federal agencies. Therefore, although you cited the federal Act in your request, that statute has no application in this instance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ch

Enclosure

cc: Joseph Cooper

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-A-O-1692

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

September 22, 1980

Mr. Theodore W. Roth
Missing Heirs International, Inc.
19 West 44th Street
New York, NY 10036

Dear Mr. Roth:

I have received your thoughtful letter of August 22 and apologize for the delay in response.

I agree with many of your contentions, particularly those regarding the dedication of many who obviously do not practice their professions due solely to a profit motive. In addition, I have reviewed my letter of July 15 to Scott Weinstein, who, like you, is involved in searching for missing heirs.

Your letter provides information in excess of that given to me by Mr. Weinstein, as well as a great deal of clarification. For instance, Mr. Weinstein requested advice regarding records "concerning beneficiaries of deceased members" of the New York City Retirement System "who have not yet received money due them from the System". In all honesty, I assumed that Mr. Weinstein was requesting a list of living beneficiaries. Your letter, however, indicates that you are interested in gaining information apparently identifiable only to deceased members of the System. From my perspective, as you intimated, there is a significant difference between gaining access to records identifiable to living beneficiaries as opposed to deceased members of the System. Further, I also agree that any right to privacy that may have existed likely disappears with respect to an individual who has died. Since the New York Freedom of Information Law is relatively new, there are no cases of which I am aware dealing with rights to privacy of the deceased. However, I have read of cases decided under the federal Freedom of Information Act, which has been in effect for some fourteen years, which indicate that deceased persons have no right to privacy. If the New York State statute is interpreted in the same fashion as its federal counterpart, disclosure regarding deceased persons would not result in a "clearly unwarranted invasion of personal privacy" in the words of the federal Act, or an "unwarranted invasion of personal privacy" under the New York State statute [see §89(2)(b)].

Perhaps most importantly, you stated your belief that the New York State Retirement System does indeed maintain a separate file kept on "deceased members". In Mr. Weinstein's letter to me, there was no indication that such a file exists. Consequently, I was compelled to respond that, as a general rule, the Freedom of Information Law does not require an agency to create a record in response to a request. Nevertheless, if such a list does exist, I believe that it would be available. From a technical point of view, the list would constitute a "record" as defined by §86(4) of the Law that is subject to rights of access. Second, although it may be characterized as "intra-agency" material, it would appear that it consists solely of "factual" data required to be made available under §87(2)(g)(i) of the Freedom of Information Law. And third, as indicated earlier, if the files relate to or identify only deceased members, it would appear that §87(2)(b) of the Law concerning unwarranted invasions of personal privacy could not be cited as a basis for withholding.

Perhaps with the foregoing interpretation coupled with the new facts that you have provided, the records that you are seeking will be made available. Again, as explained more fully in my letter to Mr. Weinstein, classification of records as "confidential" without any statutory basis for so doing cannot in my opinion constitute a valid basis for denying access to records.

Lastly, I am sure that you are familiar with the provisions of §1401 of the Abandoned Property Law. In the event that you are not familiar with the cited provision, it requires that "[T]he state comptroller shall maintain a public record of all names and last known addresses of the person or persons appearing to be entitled to abandoned property..." I believe that §1401 of the Abandoned Property Law has been a useful tool to many seeking to locate missing heirs.

I regret that I cannot be of greater assistance and thank you once again for your thoughtful letter. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch

cc: Harold E. Herkommer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1698

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

September 22, 1980

Mr. David V. De Cinto
Auto Sales
Road 2
Altamont, NY 12009

Dear Mr. De Cinto:

I have received your letter of August 30, 1980, in which you made reference to a letter directed to this office dated November 17, 1978. You wrote that you are still awaiting a reply.

I reviewed the correspondence of nearly two years ago and would like to inform you that no response was given because I felt that the matter was at an end. Further, in your letter of November 17, no request for advice or an opinion was made. For those reasons, your letter of November 17 was not answered.

Further, the correspondence attached to your 1978 letter appears to indicate that the Department of Transportation furnished all of the records that it has that are related to your inquiry. Unless I am mistaken, records were sent to you and it was suggested that you seek additional information that might exist in the possession of the City Engineer of the City of Albany. Moreover, on November 2 an invitation to inspect existing files was made by James Moroney of the Department of Transportation. In short, again, no response was given to you by this office for I believed the matter was at an end, at least with respect to the Department of Transportation.

Lastly, as you are aware, the Freedom of Information grants access to existing records. Therefore, if the records in which you are interested no longer exist because they were destroyed, for example, the Freedom of Information Law cannot be cited to provide access to the records. Very simply if the records do not exist, there are none to be made available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1699

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

September 22,1980

Mr. Kenneth E. McLaughlin
New York Job Development Authority
3 Park Avenue - 34th Floor
New York, New York 10016

Dear Mr. McLaughlin:

I have received your letter of September 3 in which you requested guidance regarding the application of Chapter 677 of the Laws of 1980 to particular records of the Authority.

Specifically, you wrote that the Job Development Authority, in the process of making secured loans for industrial development, requires the submission of an application by a local development corporation on behalf of a borrower. In the application, "[T]he borrower submits financial information as well as some personal information in connection with the loan process." Your question question concerns the impact of Chapter 677 on such information.

In the event that you have not yet received it, I have enclosed a package of materials designed to implement the requirements of Chapter 677. The package includes a cover memorandum, a form to be completed by agencies in which they give notices of their systems of records, a model response, and on the back of the form, an explanation of several of the definitions.

Relevant to your inquiry is the interpretation of "person" [§2(b) of the legislation]. In brief, "person" is intended to include individuals and not corporations. As such, if a borrower is a corporate borrower, Chapter 677 does not apply. If, however, the borrower is an individual who submits financial information and personal information, it would appear that the applications would constitute a "system of records" as defined by §2(e) of the legislation, for the applications would constitute a group of records pertaining to one or more persons from which personal information may be retrieved by means of a name or other identifier. Consequently, I believe that

you would be required to complete a notice of a system of records regarding your application files.

It is emphasized, however, that Chapter 677 has nothing to do with rights of access to records. As indicated in the memoranda of July 21 and September 16, the legislation is intended only to enable the Governor and the Legislature to determine the extent to which legislation in the area of privacy is necessary. As such, although Chapter 677 requires the disclosure of information regarding systems of records, in no way does it require disclosure of specific aspects of information pertaining to individuals maintained within a system of records.

Further, if certain aspects of the information could generally be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy, for example, certainly you may continue to withhold, notwithstanding Chapter 677. I believe that the model response will be of substantial assistance to you in determining the nature of the information required to be submitted by agencies pursuant to Chapter 677. The model itself concerns a relatively simple system of records and is designed to enable state agencies to know that their responses may be brief where appropriate and need not be extremely detailed.

I hope that I have been 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-1700

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

September 22, 1980

Mr. Frederick L. Roth
[redacted]

Dear Mr. Roth:

I have received your letter of September 2 and apologize for the delay in response.

Your letter indicates that you requested from the Personnel Bureau of the New York State Department of Labor "a list of those Employment Counselors, and their work locations, who took the test for Senior Employment Counselor (No. 39-413)." However, as of September 2 you have not yet received a response. You wrote further that if a list of those who took the examination could not be found, you would be interested in obtaining a list of all Employment Counselors employed by the Job Service Division of the Department of Labor.

I would like to offer the following observations with respect to your inquiry.

First, as a general rule, an agency need not create a record in response to a request [see Freedom of Information Law, §89(3)]. Consequently, if no list exists, the Department would have no obligation to create such a record on your behalf.

Second, from my perspective, if there is a list identifying those who took the promotional exam, it could be withheld. As you are likely aware, when an examination is given and the results become known, an "eligible list" is created. The eligible list indicates the names of those who passed and their scores. In this regard, it has consistently been advised that the eligible list is available, but that the list of those who took an exam may be withheld. The rationale for the advice is that a comparison between the eligible list and a list of those

who took an exam would identify those who failed. Consequently, disclosure would likely result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. As such, although a list of those who passed would be available, a list of those who took the examination would in my view be deniable.

Third, I believe that you can learn the identities and work locations of all of the employment counselors working for the State Department of Labor by reviewing a payroll record. Specifically, §87(3)(b) of the Freedom of Information Law requires that each agency shall maintain a payroll record that includes the name, public office address, title and salarly of all officers or employees of the agency. By reviewing the payroll record, I believe that you can determine the identities and work locations of those employed as employment counselors.

Lastly, you have indicated that a response to your request was not given in a timely fashion. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

The same information will be sent to Mr. Baldassare Abruzzo.

I hope that 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: Mr. Baldassare Abruzzo

FOIL-AO-1201

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Ellen McDonald

September 22, 1980

FROM : Bob Freeman

SUBJECT : Subscription List

As you are aware, I have received your memo of September 16 in which you requested an opinion regarding access to a list.

Specifically, you indicated that the Department is involved in contract negotiations with private vendors for bids on printing, marketing and distributing the official compilation of codes, rules and regulations (NYCRR). One aspect of the negotiations concerns a requirement in the contract that a complete list of all the subscribers to the NYCRR "shall be the property of the state". The vendors have expressed concern that a subscription list would be available under the Freedom of Information Law to other vendors who might seek the list to compete against the successful bidder. You have asked whether the list is in my view deniable under one of the exceptions, particularly §§87(2)(c) and (d).

In my opinion, a list of subscribers would be deniable under either one of two grounds for withholding in the Freedom of Information Law.

It is important to note at the outset 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 thereof fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law.

Relevant to your inquiry are §§87(2)(b) and (d).

Section 87(2)(b) 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 illustrative examples of unwarranted invasions of personal privacy. One of the examples, §89(2)(b)(iii), indicates that an unwarranted invasion of personal privacy includes:

> "sale or release of names and addresses if such lists would be used for commercial or fundraising purposes..."

In my view, a request made for a subscription list could be withheld on the basis of the privacy provisions described above.

Section 87(2)(d) states 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..."

Under the circumstances, a subscription list could likely be considered a trade secret, for disclosure would likely cause substantial injury to the competitive position of "the subject enterprise", the supplier of the list. Consequently, I believe that the list could be withheld under §87(2)(d) as well as §87(2)(b).

You cited §87(2)(c) as a possible basis for withholding. That provision enables an agency to withold when disclosure would impair present or imminent contract awards or collective bargaining negotiations. In my opinion, §87(2)(c) is largely irrelevant and could not be cited as a basis for withholding.

In sum, based upon the facts that you have provided, I believe that the subscription list would be deniable under the Freedom of Information Law under either §§87(2)(b) or (d).

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

RJF:ch

cc: Fred Koster

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 1702

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

September 22, 1980

Ms. Bernice M. Boyer, Director
Real Property Tax Service
Cattaraugus County
Little Valley, New York 14755

Dear Ms. Boyer:

I have received your letter of September 9 in which you raised several questions regarding access to tax maps maintained by Cattaraugus County.

According to your letter, the Equalization Committee of the Cattaraugus County Legislature on March 6, 1979, established a fee for copies of tax maps at $4.00 per map when obtained in person and $4.50 per map if it is mailed. You have indicated further that the maps are a source of revenue for the County and that any individual may purchase any number of tax maps at the rate of $4.00 per map.

Your first question is whether the tax maps are covered by the Freedom of Information Law. In this regard, §86(4) of the Law defines "record" expansively 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" (emphasis added).

In view of the foregoing, a tax map is clearly a "record" subject to rights of access granted by the Law.

Further, I believe that the tax maps contain what may be considered factual information. If that is so, they are available under §87(2)(g)(i), which grants access to "statistical or factual tabulations or data" found within intra-agency materials. Consequently, the tax maps are in my opinion available under the Freedom of Information Law.

Your second question is whether "items that produce revenue for a municipality" are subject to the Freedom of Information Law. The response to this question must be in the affirmative, for the Freedom of Information Law merely deals with access to records; it does not distinguish among records that may or may not produce revenue for a municipality.

Your third question is whether, if the tax maps are subject to the Freedom of Information Law, a municipality can establish a fee above twenty-five cents per photocopy in view of the fact that tax maps measure thirty inches by forty-two inches.

Here I direct your attention to §87(1)(b)(iii), which in relevant part pertains to fees for copies of records. The cited provision states that fees:

> "...shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law."

The language quoted above indicates that an agency may charge up to twenty-five cents per photocopy for records not in excess of nine by fourteen inches. Since the tax maps are larger than nine by fourteen inches, Cattaraugus County may in my view assess a fee based upon the actual cost of reproduction.

With respect to the fee established by the Equalization Committee of the Cattaraugus County Legislature, I do not believe that it is valid unless the actual cost of reproduction is four dollars per map. As indicated earlier, §87(1)(b)(iii) states that an agency may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches or the actual cost of reproduction, "except when a different fee is otherwise prescribed by law". From my perspective, a policy established by resolution, for instance, by a committee of the County Legislature could not be characterized as "law". If, however, the County Legislature had enacted a local law

requiring the fees that you have described, that local law would remain in effect. Consequently, it appears that the County may charge on the basis of the actual cost of reproduction for copies of tax maps.

Lastly, you have asked for copies of records reflective of the discussions and deliberations that led to the passage of the Freedom of Information Law, which was enacted initially in 1974.

To the best of my knowledge, there was no significant debate on the floor of either house of the Legislature preceding its initial passage. Amendments to the Law were passed during the 1977 session ofthe Legislature and became effective on January 1, 1978. Having attended the convenings of both the Senate and the Assembly when those houses passed the amendments in 1977, I can inform you with certainty that there was no debate in either house. Unlike the Congress, there are often no debates before the State Legislature with respect to individual bills. Moreover, there is no record of proceedings in the State Legislature analogous to a Congressional Record, for example, which often indicates legislative intent. As such, I regret that I am unable to provide you with records indicating specific aspects of legislative intent.

There are in existence documents known as "bill jackets", which consist of letters and memoranda sent to the Governor by interested parties prior to the Governor's signature or veto of bills. Although I have reviewed the contents of bill jackets relative to the passage of the Freedom of Information Law, I do not have them in my possession. For the most part, they contain general statements recommending approval or veto. To the best of my recollection, there is little if any specific comment relative to fees. Nevertheless, if you wish to obtain copies of the bill jackets, you can do so by writing to the Legislative Reference Bureau at the State Library, 7th Floor, Cultural Education Center, Albany, New York 12230. The bill jackets should be identified as those pertaining to Chapters 578-580 of the Laws of 1974 and Chapter 933 of the Laws of 1977.

I hope that I have been 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-1203

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

September 23, 1980

Robert R. Prince, Esq.
Seward & Kissel
Wall Street Plaza
New York, NY 10005

Dear Mr. Prince:

Thank you for your letter of September 10 concerning the applicability of Chapter 677 of the Laws of 1980 to the Battery Park City Authority ("BPCA").

Please accept my apology at the outset for failing to transmit information to you regarding Chapter 677. The list of state agencies provided to the Committee for the purpose of contacting state agencies failed to include the BPCA. Enclosed for your consideration now are copies of a memorandum sent to state agencies in July announcing the enactment of Chapter 677 and a package of materials transmitted to state agencies within the past week. The package includes a cover memorandum, a form upon which agencies provide notice of a system of records, a completed model notice, and on the back of the form, an explanation of several definitions. The model notice concerns a relatively simple system of records that is intended to demonstrate that the agencies' responses need not be long or detailed.

With respect to your inquiry, it is emphasized that Chapter 677 does not in any way alter rights of access to records. On the contrary, the notices of systems of records are intended to enable the Governor and the Legislature to learn what types of records that identify individuals are maintained by state agencies in order to determine the extent to which privacy legislation may be necessary. Although records identifying individuals that are maintained by BPCA may be clearly accessible or deniable under the Freedom of Information Law, that would

not alter their status as a "system of records" required to be reported under Chapter 677. Further, please note that completion of a notice would not in any way identify a particular individual.

The term "system of records" is defined to include:

> "...any group of records pertaining to one or more persons from which personal information may be retrieved by use of the name or other identifying particular or combination of particulars of a person."

In view of the definition, the records to which you made reference, lists of owners of registered bonds and applicants for apartments in multiple dwellings would in my view likely constitute "systems of records". The legislation and the form require that the categories of information within systems of records be identified and that specific responses be given with respect to each category of information within a system of records.

In addition, I would like to point out that the term "personal information" is broadly defined to include "any information concerning a person...that can be particularly associated with that person."

I would conjecture that there may be other systems of records maintained by the BPCA, such as employee personnel and payroll records,and other mailing lists, for example.

As indicated on the memorandum accompanying the form, a workshop will be held in New York City at 270 Broadway on October 3 at one p.m. If you or a representative of BPCA have questions regarding the implementation of Chapter 677, I would be happy to attempt to answer any questions that you might have at the workshop or by phone.

I hope that 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-536
FOIL-AO-1204

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

September 23, 1980

Mr. Albert E. Smith
[redacted]

Dear Mr. Smith:

I have received your letter of September 8, which raises questions relative to the Open Meetings Law, as well as the Freedom of Information Law.

In general, your inquiry concerns the propriety of a series of executive sessions held to discuss "personnel". In this regard, I believe that the focal point of your questions concern the interpretation of §100(1)(f) of the Open Meetings Law. The cited provision states that a public body may enter into an 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."

First, in my opinion, executive sessions held to discuss issues characterized as "personnel" matters without more is insufficient. The introductory language of §100(1) requires that a motion to enter into executive session be made that identifies the "general area or areas of the subject or subjects to be considered". In the context of §100(1)(f), if, for example, a particular teacher and his or her performance on the job is the subject to be considered, a motion might be made to enter into executive session to discuss "the employment history of a particular person". To cite "personnel" as the basis for entry into executive session is in my view inadequate.

Second, it is emphasized that §100(1)(f) represents an amended version of the analogous exception for executive session that appeared in the Open Meetings Law as originally enacted. The original language made no reference to the term "particular". Consequently, under the original Law, public bodies often entered into executive session to discuss personnel matters generally, rather than those matters dealing

with particular individuals.

In view of the addition of the term "particular" in §100 (1)(f) of the Open Meetings Law, executive sessions regarding personnel, for instance, are permitted only when the discussions concern a "particular person", rather than personnel generally or matters that bear upon policy but which do not relate to any particular individual.

With respect to the first executive session to which you made reference, a discussion was held to consider the salaries of school administrators presently under the contract. You wrote further that no party to the agreement had requested that the contract be renegotiated.

In my opinion, if the discussion dealt with salary increases for the administrators in general, it should be likely have been held open to the public. Contrarily, if the discussion reviewed the performance of an individual administrator, that discussion could justifiably have been held in an executive session.

It is also noted that §100(1)(e) of the Law permits a public body to enter into executive session to discuss collective bargaining negotiations under the Taylor Law. As you may be aware, the Taylor Law ocncerns the relationship between the government and public employee unions. Based upon the correspondence you provided, the discussion does not appear to have concerned collective bargaining negotiations.

The third executive session to which you made reference dealt with changing a half time nurse position to a clerical position. You wrote that no person was at the time under consideration for the position. If your contention is accurate, and if the discussion dealt with the position, rather than a "particular person", the discussion in my opinion should have been held in public.

The fourth executive session to which you made reference concerned an inquiry about the availability of school property no longer used by the District. In this regard, the only ground for executive session that could have properly been cited is §100(1)(h), which states that a public body may enter executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such

public body, but only when publicity would substantially affect the value thereof."

Without additional information, I could not conjecture to the propriety of the executive session.

Lastly, the second executive session that you identified raises questions related to the Open Meetings Law and the Freedom of Information Law. Specifically, a grievance brought by the teachers' association dealing with teachers' workloads was considered behind closed doors due to a provision in the collective bargaining agreement requiring that "all grievances shall be kept secret".

In my opinion, no ground for executive session could likely have been cited to close the discussion.

Moreover, and perhaps of greater importance, grievances are in my opinion generally accessible under the Freedom of Information Law. Further, a contractual agreement cannot abridge rights granted by a statute enacted by the State Legislature.

The Freedom of Information Law, in brief, is based upon a presumption of access. All records of an agency, such as a school district, 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. Further, it has been held by the state's highest court that the only grounds for denial are those appearing in the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979)].

Consequently, a unit of government by means of a contractual agreement or otherwise, cannot create a new exception to rights of access. Therefore, in my view, to the extent that the contract abridges rights of access granted by the Freedom of Information Law, it is void and of no effect.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1705

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

September 24, 1980

Mr. Peter Pirnie
Personnel Officer
Wayne County Civil Service
P.O. Box 386
30 Church Street
Lyons, NY 14489

Dear Mr. Pirnie:

I have recently received your letter addressed to Dennis Hughes, a copy of which was sent to Secretary of State Paterson. Secretary Paterson is a member of the Committee on Public Access to Records, which is housed in the Department of State.

While I have no expertise with regard to GED testing or CETA requirements, I would like to comment with respect to a "suspension" notice sought under the Freedom of Information Law.

If I have interpreted your letter correctly, pending the outcome of a particular controversy, you intend to suspend granting access to records relating to the controversy that may be available under the Freedom of Information Law. In my opinion, an agency cannot unilaterally "suspend" rights of access granted by the Freedom of Information Law.

In brief, the Freedom of Information Law in §86(4) defines "record" broadly 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..." Further, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing §87(2)(a) through (h) of the Law. Unless one or more

of the grounds for denial may be cited in response to a request for records, the records must in my view be made available. I believe that this is particularly so in view of a recent decision rendered by the state's highest court in which it was held that the capacity to deny access to records is fixed by the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979)]. From my perspective, by suspending the Freedom of Information Law, the County would essentially be acting in the capacity of the State Legislature and creating additional exceptions to the Law which do not exist. Therefore, I must reiterate my contention that your office cannot "suspend" the Freedom of Information Law for any period of time.

I hope that I have been 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 Hughes

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1706

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

September 24, 1980

Mr. Gerald Nappa
[redacted]

Dear Mr. Nappa:

I have received your letter of September 10 in which you raised questions regarding the Freedom of Information Law.

First, following a determination to deny access to records on appeal, you asked whether a successful plaintiff may pursuant to an Article 78 proceeding be awarded costs and reasonable attorney fees, as in the case of §102 of the Public Officers Law, commonly known as the "Open Meetings Law". In this regard, although efforts have been made to amend the Freedom of Information Law in a manner consistent with the federal Freedom of Information Act relative to the award of attorney fees, those efforts have been unsuccessful. In fact, legislation passed this year which would have enabled a court, in its discretion, to award reasonable attorney fees to a person who substantially prevails in a proceeding brought under the Freedom of Information Law, was vetoed by the Governor. I am hopeful that attorney fees legislation will be passed during the coming session that meets the Governor's objections to the bill passed in 1980.

Second, you also inquired with respect to fees for copies and whether they can be waived by an agency for a reasonable cause, such as the indigency of an applicant. I am familiar with the provisions of the federal Act, which enable an agency to waive fees for copies in some instances. However, there is no similar provision in the New York Freedom of Information Law. As you may be aware, agencies are required to adopt regulations in which fees must be established. Further, the

fees for copies of records up to nine by fourteen inches cannot exceed twenty five cents per photocopy, unless a different fee is prescribed by another provision of law. Consequently, agencies are in my view required to assess fees for copies based upon the direction given by their respective rules and regulations. Some agencies charge twenty-five cents per copy in all instances; others provide copies for free up to a particular number. For example, there are situations in which an agency may charge no fee for up to ten photocopies and begins to assess a fee only when the number of copies requested exceeds a particular number.

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-1707

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

September 25, 1980

Mr. Eddie Rizzo
80-A-825
Box 51
Comstock, NY 12821

Dear Mr. Rizzo:

I have received your letter of September 11 in which you asked for advice regarding rights of access granted by the Freedom of Information Law.

Specifically, your question involves how you can obtain copies of directives or guidelines used by the Department of Criminal Services to classify inmates.

First, the Freedom of Information Law is relatively easy to use. All that is required is a written request reasonably describing the records sought and offering to pay whatever fees for copies there might be. A request should be directed to the designated "records access officer". It is suggested that you attempt to determine who is designated as access officer at your facility. In the alternative, you can write to the main office of the Department of Correctional Services in Albany and address your inquiry to the records access officer.

I have enclosed an explanatory pamphlet that may be useful to you. The pamphlet contains model letters of requests and appeal.

Second, I believe that the records in which you are interested are available.

The Freedom of Information Law is based upon a presumption of access. All records of an agency are available, except those records or portions thereof that fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law.

Relevant to your inquiry, is §87(2)(g). The cited provision states that an agency may withhold 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..."

It is important to note that the exception quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, or instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the directives or guidelines to which you made reference may be characterized as "intra-agency" materials. Nevertheless, I believe that they consist of either instructions to staff that affect the public or the policy of the Department with respect to a particular issue. Consequently, I believe that such records 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:ch

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 539
FOIL-AO- 1708

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

September 24, 1980

Mr. William E. McIlwaine
[redacted]

Dear Mr. McIlwaine:

I have received your letter of September 9 and thank you for your interest in complying with the Open Meetings Law.

You have asked for confirmation of an oral opinion given to you in which it was advised that a board or committee "need only supply the media with a meeting notice and that information material, such as budgets, etc., need not be supplied either in advance or at the meeting."

In order to respond to your question, I would like to offer comments relative to both the Open Meetings Law and the Freedom of Information Law.

First, the only step required to be taken by a public body prior to a meeting involves the provision of notice, which must be given in accordance with §99 of the Open Meetings Law. In brief, subdivision (1) of §99 concerns meetings scheduled at least a week in advance and requires that notice of the time and place of a meeting be given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings.

Subdivision (2) of §99 concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and posted for the public in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Consequently, it is clear that notice must be given to the news media and to the public by means of posting prior to all meetings, whether regularly scheduled or otherwise.

Second, it is noted that the Open Meetings Law makes no reference to an agenda. Consequently, there is no requirement that an agenda be created or made available prior to a meeting.

Third, with respect to the materials to which you made reference, the Open Meetings Law does not specifically require that such materials be distributed prior to or at a meeting. Nevertheless, such materials would be subject to rights of access to records when requested under the Freedom of Information Law. For instance, if an agenda is prepared prior to a meeting, it constitutes a "record" as defined by §86(4) of the Freedom of Information Law that is subject to rights of access as soon as it exists. In the case of other informational materials distributed to a public body in advance of a meeting, rights of access would depend upon their contents.

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. All records af an agency 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. Again, the nature and content of the materials would determine rights of access to the records.

Further, the Freedom of Information Law does not require an immediate response to a request for records. Section 89 (3) of the Law requires an agency to respond to a written request for records reasonably described within five business days of the receipt of a request. I have enclosed copies of that Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law (see §1401.5 regarding time limits for response.).

You also wrote that the Health Department mails to members of the Board of Health minutes of its previous meeting when a meeting notice is sent to the members. You asked whether you are required to supply the minutes to the news media.

Here I direct your attention to §101(3) of the Open Meetings Law (see attached). The cited provision requires that minutes of open meetings [see §101(1)] be compiled and made available within two weeks of such meetings, and that minutes of executive sessions [see §101(2)] must be compiled and made available within one week of the executive sessions to which they relate. As such, any person, including a member of the news media, has the right to gain access to minutes of open meetings and executive sessions within the time periods specified in §101(3). The Committee recognizes that there may be instances in which a public body might not meet within two weeks, for example, to approve minutes or make them "official". Consequently, it has been suggested that unapproved minutes be made available within the appropriate time limits, but that such minutes might be marked as "unapproved", "draft","non-final", etc. By so

doing, the public has an opportunity to learn generally what transpired at a meeting, and at concurrently, the members of a public body 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:ch

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1709

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

September 25, 1980

Ms. Grace D'Ambrosio
[redacted]

Dear Ms. D'Ambrosio:

I have received your letter of September 19 concerning your efforts to gain an application form for access to records of the John Jay College of Criminal Justice, which is part of the City University of New York, You have indicated that your telephone inquiries have failed to lead you to the appropriate person or form.

Please be advised that there may be no specific application form upon which a request under the Freedom of Information Law must be made. In fact, this Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for denial of access. On the contrary, any request made in writing that reasonably describes the records sought [see Freedom of Information Law, §89(3)] should suffice.

To assist you, I have enclosed copies of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, and have the force and effect of the Law, and an explanatory pamphlet that contains a model letter of request.

In addition, I have contacted the City University of New York on your behalf and have learned that your request should be addressed to David Rigney, City University of New York, 535 East 80th Street, New York, NY 10021.

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

Sincerely

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ch
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-540
FOIL-AO-1710

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

September 26, 1980

Mr. Leighton B. Wilklow
Barker Central Schhol
1628 Quaker Road
Barker, NY 14012

Dear Mr. Wilklow:

As you are aware, I have received your letter of September 16, concerning a situation in which the Board of Education of the Barker Central School District interviewed two candidates for a vacant position. Questions have arisen regarding the identification of the candidates in the Board's minutes. You have contended that disclosure of the identities of the candidates could be detrimental to their careers.

I am in general agreement with your contentions.

First, I believe that the subject matter under consideration could properly have been discussed during an executive session. Specifically, §100(1)(f) of the Open Meetings Law provides that a public body may enter into executive session to discuss:

> "...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 the discussion concerned both the employment history of particular individuals and constituted a matter leading to the employment of appointment of a particular individual, the topic could in my view have been discussed behind closed doors in compliance with the Open Meetings Law.

Second, I would like to make several comments with respect to requirements concerning minutes.

It is noted initially that a public body may generally vote or take action during a properly convened executive session, un-

less a vote is taken to appropriate public monies [see Open Meetings Law, §100(1)]. However, in the case of school boards, it appears that such boards cannot vote during an executive session due to the provisions of the Education Law. Specifically, §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 tis 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.

The minutes attached to your letter indicate that action was not taken during an executive session, but rather that two candidates were interviewed. Since a school board cannot take action and in fact did not take action in this instance, there

need not be minutes of the executive session.

Moreover, as you indicated, minutes need not include information that is not required to be made public under the Freedom of Information Law.

Under the circumstances, I do not believe that any existing minutes available to the public must identify the two candidates. The Freedom of Information Law in brief provides that all records of an agency, such as a school district, are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) fo the Law.

Relevant here 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". From my perspective, the disclosure of the identities of the candidates could result in an unwarranted invasion of personal privacy and, therefore, reference to their identities could be deleted from a record, such as minutes of a meeting. I agree with your contention that disclosure of the identity of a candidate for a position, successful or otherwise, could result in personal hardship, particularly if a current employer learns of his or her application for a new position.

In sum, I agree with your contention that minutes need not identify the candidates for the position under 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:ch

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-541
FOIL-AO-1711

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

September 29, 1980

Mr. Charles DelMastro
[redacted]

Dear Mr. DelMastro:

I have received your letter of September 16 concerning your requests for records of the William Floyd School District.

According to your letter, on August 21 you contacted Mr. Wright, the access officer, who informed you that the contracts that you requested were in the process of being typed and that you should contact him upon his return from vacation on September 8. Response to your request was also delayed because the Board of Education "had suspended" access to records until after September 1. You indicated that as of September 9, Mr. Wright was holding all requests until after the Board of Education had developed a new policy. On September 15, the School Board met and reviewed the requests in public and asked why particular records were sought. Upon the advice of the attorney for the School District, the requests were considered during an executive session.

I would like to offer several comments with respect to the foregoing, assuming that the facts you presented are accurate.

First, I do not believe that an agency, such as a school district, has the capacity to "suspend" its implementation of the Freedom of Information Law. In short, the Freedom of Information Law requires that responses to requests be given within specific periods of time [see attached Freedom of Information Law, §89(3); regulations, §1401.5]. Consequently, I believe that an agency is required to respond to requests within the time limits specified in the Freedom of Information Law and the regulations promulgated by the Committee, notwithstanding an absence due to vacation or a review of an old policy.

In a related vein, the "policy" on the disclosure of records is fixed by the Freedom of Information Law. From my perspective, the only policy that may be adopted by an agency must concern its procedural implementation of the Freedom of Information Law. An agency cannot in my view adopt a policy that conflicts with the direction given by the Law concerning rights of access to records. As the state's highest court noted recently, "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Third, the Freedom of Information Law is based upon a presumption of access. All records of an agency are available, except to the extent that records or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through of the Law. Further, §86(4) of the Law defines "record" broadly to include "...any information kept, held, filed, produced or reproduced by,with of for an agency or the state legislature, in any physical form whatsoever..."

In the case of the contracts that you requested, I believe that they should have been made available to the public on request as soon as they were in existence. In terms of the legal rationale for that advice, the contracts when in existence would constitute "records" subject to rights of access, and further, no ground for denial could in my view have been cited to deny access.

Fourth, you wrote that members of the School Board asked why particular requests had been made. In this regard, the Committee has long advised and the courts have upheld the notion that accessible records shall 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]. In view of that principle as well as the structure of the Freedom of Information Law, the only question that an agency may ask when it receives a request involves the extent, if any, to which the records sought fall within one or more of the grounds for denial. The interest of the applicant for records is irrelevant to rights of access.

Lastly, you indicated that a discussion of the requests was considered by the School Board during an executive session. Here I direct your attention to the Open Meetings Law, a copy of which is attached. The Open Meetings Law requires that the deliberations of public bodies be open, except to the extent that an executive session may properly be convened. Section 100(1)(a) through (h)

of the Open Meetings Law specifies the areas of discussion that may appropriately be considered behind closed doors.

From my perspective, a discussion of requests made under the Freedom of Information Law would not likely fall within any of the grounds for entry into executive session.

Further, the discussion of requests by the Board raises questions regarding its implementation of the Freedom of Information Law. For example, the Committee's regulations, which have the force and effect of law, require that a designated records access officer make initial determinations to grant or deny access. In the case of a denial, an applicant may appeal to the governing body of the agency, in this instance the School Board, or whomever has been designated by the governing body to render determinations on appeal. Additionally, §1401.7(b) of the regulations states that the "records access officer shall not be the appeals officer". In the context of the situation described in your letter, it appears that the School Board may effectively be engaged in making initial responses to requests. If that is so, the right to appeal a denial of access to records would be abridged.

I hope that I have been 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: James Wright
Frederic Block
Nicholas Poulos

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1712

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
MARIO M. CUOMO
[redacted]ER W. GRUNFELD
MARCELLA MAXWELL
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

September 30, 1980

Mr. Almon L. Wait
[redacted]

Dear Mr. Wait:

I have received your letter of September 17 in which you described continuing problems in gaining access to records of the St. Regis Falls Central School District, notwithstanding an advisory opinion written at your request dated March 7, 1980.

You wrote that a later request was never answered by the clerk of the School District who, according to your letter, told you that "he did not have time to give [you] this information." Further, your calls to the President of the School Board have remained unanswered.

You have raised questions regarding the individual to whom you may appeal a denial of access.

In order to provide you with a complete response, I offer the following comments.

First, as indicated in my earlier letter to you, the records that you are seeking appear to be available, for they are reflective of "statistical or factual tabulations or data" that are required to be made available under §87(2)(g) of the Freedom of Information Law.

Second, §89(3) of the Freedom of Information Law requires that an applicant put his or her request in writing "reasonably describing" the records sought. When an agency receives a request, it must respond within time limits specified in the Law. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's

regulations provide that an agency must respond to a request within five business days of the receipt of a request. The respond can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Third, if, for example, you are denied access to records in writing or you are constructively denied access due to a failure to respond, you may appeal the denial within thirty days of the denial [see regulations, §1401.7].

Fourth, §89(4)(a) of the Freedom of Information Law states that:

> "[A]ny person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor 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 record the reasons for further denial, or provide access to the record sought."

In view of the provision quoted above, the School Board, as the governing body of the School District, is required either to render appeals itself or to designate a person or body to do so on its behalf.

Fifth, the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law. In turn, §87(1) of the Law requires agencies to adopt their own regulations consistent with and no more restrictive than those promulgated by the Committee. The regulations require that each agency designate one or more records access officers and an appeals person or body by name or title. In addition, §1401.9 of the regulations requires in part that each agency:

> "...shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation...the name and business address of the person or body to whom an appeal is to be directed."

Lastly, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee, model regulations that are designed to assist agencies in complying and an explanatory pamphlet that may be useful to you. Several copies of each have been included in order that you may distribute them to the appropriate officials of the School District. In addition, a copy of this response will be transmitted to the Board of Education.

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

Encs.

cc: Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1713

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

September 30, 1980

Mr. Roger French, Secretary
Longvale Homeowners' Association
P.O. Box 177, Centuck Station
Yonkers, New York 10710

Dear Mr. French:

I have received your letter of September 20 in which you requested a "ruling" regarding an unanswered request for records directed to the Municipal Housing Authority of the City of Yonkers.

It is emphasized at the outset that the Committee has no legal authority to issue "rulings". On the contrary, the Committee has only the authority to advise. Nevertheless, as you may be aware, the Committee is the administrative agency charged with the duty of overseeing the implementation of the Freedom of Information Law, and as a consequence, judicial determinations have increasingly cited the Committee's advice.

Your inquiry deals with a situation in which materials were requested in writing in a letter addressed to the Municipal Housing Authority dated August 26. However, as of September 20, no response had yet been given.

The only item of correspondence that you received in conjunction with your request is a letter indicating that your request was directed to the Counsel to the Authority for review. That letter, which is dated August 28, indicated that Counsel would be on vacation until September 8.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the

reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

The letter of August 28 could likely be considered an acknowledgment of the receipt of your request. If that is so, the Authority could have legally taken up to ten business days following August 28 to render an initial determination to grant or deny access. Nevertheless, the period for response has clearly been exceeded.

In addition, the response of August 28 in my view raises questions regarding the extent to which the Authority has complied with the procedural aspects of the Freedom of Information Law. As you may be aware, §89(1) of the Freedom of Information Law requires the Committee to promulgate regulations regarding the procedural implementation of the Law. In turn, §87(1) requires agencies to adopt regulations consistent with and no more restrictive than those adopted by the Committee. Among the requirements in the regulations is the obligation to designate one or more records access officers, as well as an appeals person or body. In view of the response by Francis A. Reagan, the Secretary-Director of the Authority, it is questionable in my opinion whether procedures have been adopted. In order to assist you and the Authority, copies of the Committee's regulations and model regulations designed to assist agencies in complying will be transmitted to you and the Director of the Authority.

With respect to rights of access to the records that you have requested, it is important to note that the Freedom of Information Law is based upon a presumption of access. All records of an agency 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 Freedom of Information Law. Based upon a review of your request and the legal notices attached to your letter, I believe that the records sought are available.

The first legal notice indicates that the proposal solicited would "be opened" at a particular time and place. From my perspective, the language of the notice indicates implicitly that the proposals would be opened publicly and available for public inspection. Similar language is used with respect to a second legal notice.

Moreover, once the proposals have been submitted and opened, it would appear that each applicant would be placed upon an equal footing. Consequently, I do not believe that it could be argued that disclosure would "impair" present or imminent contract awards, in the words of §87(2)(c) of the Freedom of Information Law.

Further, if portions of the information requested was transmitted by HUD, I do not believe that they would fall within any of the grounds for denial listed in the Freedom of Information Law.

In sum, I believe that the Authority failed to respond to your request within the requisite periods of time, and that the records in which you are interested, based upon my understanding of their contents, 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

Encs.

cc: Francis A. Reagan

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1714

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

September 30, 1980

James G. Hill
Dean of Administration
Herkimer County Community College
Reservoir Road
Herkimer, New York 13350

Dear Dean Hill:

I have received two packages of correspondence regarding requests made under the Freedom of Information Law by Dean G. Burt. I must admit that I am somewhat confused, for one response on appeal dated September 11 apparently grants access to the records sought by Mr. Burt. However, a second similar request to which you responded on September 24 was denied.

As a basis for the denial, you wrote that:

> "[U]nder the Freedom of Information Law the public does not have the right to access to personnel files. College policy does not permit former employees to have access to their college personnel records."

I disagree with your determination to deny access to the records sought by Mr. Burt.

The Freedom of Information Law does not in any of its provisions specifically exempt personnel records from disclosure. From my perspective, such records are subject to rights of access granted by the Law.

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the Herkimer County Community College, 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. Moreover, §86(4) defines "record" broadly 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..." Consequently, the personnel files requested constitute "records" that are subject to the Law, regardless of whether the person requesting them continues to be an employee of the Community College.

It is also important to note that the Freedom of Information Law does not distinguish among applicants for records. In short, the Committee has advised and the courts have upheld the principle that accessible records shall 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].

Therefore, again, it is emphasized that the fact that Mr. Burt may no longer be in your employ is of no relevance in terms of rights of access granted by the Freedom of Information Law.

With respect to the grounds for denial, it appears that there is one ground which likely enables the Community College to withhold some of the records in whole or in part, but which also directs that some of the information contained within personnel files be made available. Specifically, I direct your attention to §87(2)(g), which states that an agency may withhold 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 language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. Under the circumstances, it would appear that many of the records contained within the personnel file in question could be categorized as "intra-agency" materials. Nevertheless,

to the extent that they contain "statistical or factual tabulations or data", for example, they must be made available, so long as no other ground for denial may appropriately be asserted.

Lastly, you wrote that "college policy" forbids former employees to gain access to their personnel records. Again, if the records exist, they are subject to rights of access, whether or not the person to whom the records relate is a current employee. In addition, I do not believe that an agency can unilaterally adopt a "policy" that abridges rights granted by a statute enacted by the State Legislature. Stated differently, the College in my view has no legal authority to create what essentially constitute new exceptions to rights of access that do not appear in 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: Robert McLaughlin
Dean G. Burt

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1715

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

September 30, 1980

Mr. Martin Lansky
[redacted]

Dear Mr. Lansky:

I have received your letter of September 17 in which you raised questions regarding the interpretation of §89(2)(h) of the Freedom of Information Law.

Your inquiry pertains to a situation in which you requested examination materials from the State Education Department that have not been used "for over two decades" but which were denied.

Section 87(2)(h) of the Law 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."

From my perspective, the language quoted above is intended to enable an agency to withhold examination questions and answers when the questions will be used in the future. The exception in question was placed in the Law at the request of the State Department of Civil Service, which often uses examination questions and answers many times over. That Department's contention in brief is that if the questions to be used again are disclosed, the answers would become known, thereby hampering the examination process.

As you indicated, there are no judicial determinations of which I am aware that deal with the provision in question. Further, I agree that the construction of the term "final" is difficult to determine in terms of its scope. Nevertheless, it is noted that the Law

places the burden of proof in a judicial proceeding upon the agency that denies access to records. Specifically, §89(4)(b) states that an agency must demonstrate that records withheld in fact fall within one or more of the grounds for denial listed in §87(2)(a) through (h) of the Freedom of Information Law. Moreover, the Court of Appeals, the state's highest court, 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 Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979)].

All that I can recommend is that you renew your request and suggest that if a judicial proceeding is initiated, it would apparently be extremely difficult for the Education Department to meet its burden of proof in situations in which examinations have not been given for years. In addition, if you are denied again, you should appeal in accordance with §89(4)(a) of the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation and 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
Executive Director

RJF:jm

cc: Gene Snay, Records Access Officer
NYS Education Department

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1716

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

October 2, 1980

Mr. Lee DeCecco
Claims Representative
Prudential Insurance Company
P.O. Box 600
DeWitt, New York 13214

Dear Mr. DeCecco:

I have received your letter of September 19 in which you described your unsuccessful attempts to gain access to a copy of motor vehicle accident report from the Limestone Police Department.

Barring unusual circumstances, I believe that the accident report in which you are interested should be made available to you

As you may be aware, the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the Limestone Police Department, 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 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."

Stated differently, nothing in the Freedom of Information Law can be construed to limit rights of access granted either by means of judicial determination or pursuant to other provisions of law. In this instance, I direct your attention to §66-a of the Public Officers Law, which has been in effect since 1941. The cited provision states that:

> "[N]otwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, villageeor other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agency, event though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection 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."

Based upon the provision quoted above, it is in my view clear that the motor vehicle accident report that you are seeking is available, except to the extent that portions of the report would if disclosed interfere with investigation or prosecution of a crime connected with the accident. If it is clear that there was no crime committed, the report is in my view accessible in its entirety.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating thetreasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

The same information and a copy of this letter will be sent to the Limestone Police Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: William Walker, Chief of Police

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1717

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

October 6, 1980

Ms. Myrna Freyman
District Clerk
Greenburgh Central School
District No. 7
475 West Hartsdale Avenue
Hartsdale, New York 10530

Dear Ms. Freyman:

I have received your letter of September 22. Please understand that my response to Mr. Reninger's letter was based upon information that he provided.

Assuming at this juncture that your contentions are accurate, it would appear that your responses to his requests have been made in compliance with the Freedom of Information Law and the regulations promulgated by the Committee.

As you are aware, §89(3) of the Freedom of Information Law requires that an applicant for records "reasonably describe" the records in which he or she is interested. In turn, §1401.2(b)(2) of the regulations indicates that a records access officer "assist the requestor in identifying requested records, if necessary." Based upon your letter of August 22 sent to Mr. Reninger, it is clear that you attempted "to assist" him in identifying the records sought after having received a request that was unclear. In short, your letter is reflective of an effort on your part to comply with the Law and the regulations.

Further, I concur with your contention that the Freedom of Information Law does not generally require an agency to compile information on behalf of an applicant. The Law grants access to existing records, and §89(3) states that an agency need not create a record in response to a request, unless specific direction to the contrary is provided.

Once again, I appreciate your letter. If I can be of assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Reninger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1718

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

October 6, 1980

Ms. Etta C. Gray
[redacted]

Dear Ms. Gray:

I have recently received your letter of September 23 in which you requested advice regarding the procedural aspects of the Freedom of Information Law.

According to your letter, a request for records directed to the City of Ithaca was considered within the requisite period of time, but the information supplied was incomplete. Further, you indicated that you informed the Records Access Officer that the information provided did not fulfill your request and that he, in turn, told you that "he would have to check it out with someone else and get back to [you]." Your last contact with the Records Access Officer was September 11, and you have received no response since then.

As you are aware, the Freedom of Information Law and the regulations promulgated by the Committee (see attached), which govern the procedural implementation of the Law, require that an agency respond to requests within specific period of time.

Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is

given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Under the circumstances, it appears that you have been constructively denied access to the records sought, for no response has been given. It is suggested that you attempt to learn the name and address of the person or body designated to determine appeals and forward an appeal as soon 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:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1719

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

October 6, 1980

Mr. Jase Felix
78-A-3814
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Dear Mr. Felix:

I have received your letter of September 25. You have indicated that your request for various records directed to the Office of the Sheriff in Kings County was never answered.

The records sought, all of which are related to your conviction in Supreme Court, Kings County, include scientific reports, the names of arresting officers, radio logs and police blotters, statements made by a co-defendant, hospital records, the indictment, transcripts and other related records.

It is noted that the Committee on Public Access to Records has no authority to compel an agency to comply with the Freedom of Information Law; on the contrary, the Committee has only the capacity to provide advice.

In my opinion, it is likely that much of the information in which you are interested is in possession of the court in which you were convicted. Consequently, it is suggested that you direct a request to the Clerk of Kings County Supreme Court. The request should provide as much identifying information as possible, such as dates, index or docket numbers, etc.

It is also likely that some of the records sought are in possession of the New York City Police Department. Again, in making a request, you should provide as much specific information as possible to enable the Department to identify the records sought. Your request should be directed to the Records Access Officer, New York City Police Department, 1 Police Plaza, New York, New York 10038.

Lastly, it is recommended that you contact a representative of Prisoners' Legal Services. Often that organization can provide significant assistance in solving problems such as yours.

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-1720

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

October 6, 1980

Mr. Dean Higgins
Real Estate Appraiser & Broker
25 Myrtle Avenue
Troy, New York 12180

Dear Mr. Higgins:

I have received your letter of September 25. Your inquiry concerns your unsuccessful attempts to gain access to records regarding the lobbying activities of John B. Walsh carried out on behalf of the City of Buffalo. The information that you are seeking was requested in March, 1977 and concerns lobbying activities occurring from January to July of 1975.

Having reviewed your original request and the correspondence that followed, to the extent that the records in question exist, they are in my view available.

The Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the City of Buffalo, are available, except to the extent that records or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

However, it is important to note that the Freedom of Information Law is applicable to existing records. As a general rule, an agency is not required to create or compile a record in response to a request. In this instance, a key question is whether the information in which you are interested exists in the form of a record or records. If it does not, the City of Buffalo is not obliged to create records on your behalf.

For instance, your request of 1977 made reference to an agreement between the City of Buffalo and Mr. Walsh, as well as records of expenses. In this regard, any existing contracts, vouchers, bills, checks and similar documents reflective of expenditures would in my opinion be clearly available. Similarly, if there is any breakdown indicating the persons contacted, the bills before the Legislature that were the subjects of lobbying efforts, they too would in my view be available to the extent that they exist.

I have enclosed copies of the Freedom of Information Law, regulations that govern its procedural implementation, and an explanatory pamphlet that may be particularly useful 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1721

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

October 6, 1980

Mr. Anthony J. Lomio
#79A2461
Box 51
Comstock, NY 12821

Dear Mr. Lomio:

I have received your letter of September 23 in which you requested advice regarding the means by which you can obtain particular records, as well as copies of the laws governing rights of access to records.

According to your letter, you have unsuccessfully attempted to gain access to various records related to your arrest and conviction. You have indicated further that the records sought are needed to perfect an appeal, and that the Appellate Division, Second Department, has ordered that the records be made available.

I would like to offer the following comments and advice regarding your inquiry.

First, the Freedom of Information Law is applicable to all agencies of government in New York, except the courts [see Freedom of Information Law, §86(1) and §86(3), which respectively define "judiciary" and "agency"]. Consequently, records in possession of a court or a court clerk are not subject to the Freedom of Information Law.

Nevertheless, most court records are available pursuant to provisions of the Judiciary Law and various court acts. Under the circumstances, if a court maintains custody of the records in which you are interested, they are in my view accessible to you.

You wrote, for example, that the proceedings in which you were involved took place in the Village Court in Goshen. Assuming that the court was a "justice court", the records would be accessible to you under §2019-a of the Uniform Justice Court Act, which grants broad rights of access to records concerning criminal proceedings before such courts.

If the case was tried in Orange County Court, which is also located in Goshen, the records would be available from the county court clerk under §255 of the Judiciary Law.

Second, if the records have been transferred from a court to the District Attorney, the Freedom of Information Law applies, for the office of the District Attorney is an "agency" subject to the Freedom of Information Law in all respects.

Moreover, although the Freedom of Information Law enables an agency to withhold records compiled for law enforcement purposes in some instances [see §87(2)(e)], it is in my view doubtful that any of the harmful effects of disclosure described in the "law enforcement" exception would arise. Specifically, §87(2)(e) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, woud:
>
> 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."

Since the investigation and the trial have been completed, any records in possession of the District Attorney that you are seeking are in my opinion accessible at least in part, and perhaps in their entirety.

Third, you wrote that your requests to the District Attorney have to date gone unanswered. In this regard, the Freedom of Information Law requires that agencies respond to requests within the limits described in the Law and the regulations promulgated by the Committee, which have the force and effect of law.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Fourth, you made reference to your attempts to gain access to a copy of the "NYCRR's". "NYCRR" is the abbreviation for "New York Code of Rules and Regulations." The NYCRR consist of dozens of volumes and contains all the regulations promulgated by all state agencies. I would conjecture that you do not want all the volumes, but perhaps only the regulations promulgated by the State Department of Correctional Services, which I am sure are maintained by the library at your facility.

Lastly, I have enclosed the following materials for your consideration, including:

- the Freedom of Information Law;
- the regulations promulgated by the Committee which govern the procedural aspects of the Freedom of Information Law;
- an explanatory pamphlet that contains sample letters of request and appeal which may be helpful to you;
- §2019-a of the Uniform Justice Court Act; and
- §255 of the Judiciary Law.

In addition, it is suggested that you might want to contact 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1722

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

October 6, 1980

Ms. Ellen R. Skoviera
School Business Executive
Windsor Central Schools
District Office
Windsor, New York 13865

Dear Ms. Skoviera:

I have received your letter of September 22. According to your letter, the Windsor Central School District assesses a fee of ten cents per photocopy. However, the District's collective bargaining units have contended "that fees should not be levied since they have certain records access privileges under the Taylor Law."

You have asked for a "ruling" concerning whether the bargaining units are exempt from payment of fees for photocopying.

It is noted at the outset that the Committee has no authority to issue "rulings". On the contrary, the Committee is charged with the responsibility of advising with respect to the Freedom of Information Law.

In my opinion, having reviewed the provisions of the Taylor Law, there is no "exemption" in that law of which I am aware that would require an agency, such as a school district, to waive fees for copying. While the Taylor Law does provide direction regarding the relationship between public employee unions and government, there is no provision, to the best of my knowledge, that deals specifically with fees for copying or any exemption from fees that may generally be assessed. As such, I believe that the District may continue to charge the bargaining units when copies of District records are requested.

Further, the Freedom of Information Law does not generally distinguish among applicants for records in terms of rights of access. The Committee has consistently advised and the courts have upheld the principle that accessible records shall 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]. Therefore, with respect to access to records, a representative of a bargaining unit in my view has no greater or lesser rights or privileges than any member of 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1723

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

October 6, 1980

Mr. David V. De Cinto
David V. De Cinto Auto Sales
Route 20 - R.D. #2
Altamont, New York 12009

Dear Mr. De Cinto:

I have received your letter of September 22 in which you seek the assistance of the Committee and contend once again that I "seem to fail to understand the situation."

In this regard, I believe that I do understand the situation. However, I feel that you do not understand the Freedom of Information Law or the role of the Committee.

As I have explained in previous correspondence, the Freedom of Information Law generally grants access to records in possession of government in New York. Stated differently, if records exist, they are subject to rights of access granted by the Law. If records do not exist, the Freedom of Information Law does not require that they be prepared [see Freedom of Information Law, §89(3)].

In this instance, it appears that you are essentially requesting the Department of Transportation to create a record that does not exist in order to resolve a controversy. Nevertheless, the Department of Transportation has no obligation to prepare the information that you are seeking.

Neither the Freedom of Information Law nor the Committee provide authority to force an agency to perform any duty. This office cannot direct the Department of Transportation to repair a road; but if a road is repaired and records are created regarding the project, those records fall within the scope of the Freedom of

Information Law. In this case, the Committee cannot direct the Department of Transportation to create a map or survey, if, however, such a map or survey is prepared, it would fall within the scope of the Law.

While I sympathize with you and understand the situation, I do not believe that the Freedom of Information Law or the Committee can assist you at this juncture.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1724

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

October 6, 1980

Thomas E. Walsh, II
Assistant County Attorney
The County of Rockland
Office of the County Attorney
County Office Building
New City, New York 10956

Dear Mr. Walsh:

I have recently received your letter of September 23 in which you requested advice regarding "what constitutes a formal certification by a State Department that requested records do not exist."

As you are aware, §89(3) of the Freedom of Information Law states in part that an agency "shall certify that it does not have possession" of a record or that a record requested "cannot be found after diligent search". Further, §1401.2(b)(6) of the regulations promulgated by the Committee, which have the force and effect of law, provide that the records access officer is responsible for assuring that agency personnel:

> "[U]pon 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."

In my view, the certification provisions to which reference was made are intended to be simple and brief. For instance, I believe that it would be appropriate for arecords access officer or another person having authority to do so to prepare a certification as follows:

> "I, John Doe, records access officer for the State Department of_____, pursuant to the provisions ____ NYCRR ____, hereby certify that the records requested by _____ on _____, 1980, specifically (a description of the records sought), are not maintained by or in custody of the Department of _____."

The certification should, of course, be signed and dated. Although there are no determinations of which I am aware that require a certification made under the Freedom of Information Law to be witnessed or notarized, for example, it would in my view be appropriate to have such a certification notarized.

If my memory serves me, I recall the problem you have encountered and the agency that is the subject of your inquiry. In this regard, I would like to point out that the definition of "record" appearing in §86(4) of the Freedom of Information Law may essentially expand rights of access to records beyond the walls or the "possession" of an agency.

"Record" is defined to include "any information kept, held, filed, produced or reproduced, by, with or for an agency...in any physical form whatsoever..." (emphasis added). In view of the breadth of the definition, it is in my opinion possible that records may be produced "for" an agency and, therefore, subject to rights of access, even though they may never come into the physical custody or possession of the agency.

In such a case, a case in which records are produced for an agency but in which the agency does not have possession of the records, the records access officer may be obliged to obtain such records on request.

This opinion is in my view bolstered by the holding in a recent decision rendered by the Court of Appeals. In Westchester Rockland Newspapers v. Kimball, ____ NY 2d ____, the state's highest court cited the statement of legislative intent appearing in §84 of the Freedom of Information Law which stresses that "it is incumbent upon

the state and its localities to extend public accountability wherever and whenever feasible" (emphasis added by the Court). If the information that you are seeking was produced for an agency, it may fall within the scope of the definition of "record" and, therefore, rights of access granted by the Freedom of Information Law, even though the information does not come into the possession of a particular agency.

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-1725

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

October 9, 1980

Ms. Angelina Sinicropi
[redacted]

Dear Ms. Sinicropi:

Thank you for your letter of September 25.

I, too, regret that your motion for leave to appeal to the Court of Appeals was denied.

With respect to your request directed to the Clerk of the Court of Appeals, Mr. Joseph Bellacosa, it is in my view unlikely that records exist that would indicate why leave was not granted. Moreover, as you are aware, the Freedom of Information Law is not applicable to court records, for the "judiciary" is specifically excluded from the scope of the Freedom of Information Law [see definitions of "judiciary" and "agency" in §§86(1) and (3) respectively of the Freedom of Information Law].

I regret that I cannot be of greater assistance. If you have need for the services offered by the Committee in the future, please feel free to contact me.

Sincerely,

Robert J. Fre

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1726

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

October 9, 1980

Mr. John T. Scull
Auburn Correctional Facility
79C264
Auburn, New York 13021

Dear Mr. Scull:

I have received your letter of September 23 in which you requested assistance in gaining access to records from the court clerk of the City of Niagara Falls.

You have requested the records under §160.50 of the Criminal Procedure Law, which, in brief, requires that records be returned to the subject of an arrest when a criminal action or proceeding against a person has been terminated in favor of that person.

Please be advised that the Freedom of Information Law specifically excludes court records from its coverage. Nevertheless, provisions of the Judiciary Law and various court acts grant broad rights of access to records in possession of the courts. For instance, §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."

In addition, it is possible that the court in possession of the records that you are seeking is subject to the provisions of the Uniform Justice Court Act. If that is the case, §2019-a of the Uniform Justice Court Act grants access to the records in which you are interested.

While the Committee has no authority to compel a court clerk to produce records, a copy of this letter and the applicable provisions of law will be sent on your behalf to the City Court Clerk in Niagara Falls.

I hope that 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: City Court Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1727

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

October 9, 1980

Terence E. Smolev
Naidich & Smolev, P.C.
2631 Merrick Road
Bellmore, NY 11710

Dear Mr. Smolev:

I have recently received your letter of September 29 in which you requested an advisory opinion under the Freedom of Information Law and the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment".

Your inquiry concerns a situation in which a teacher was given an evaluation pursuant to the collective bargaining agreement between the North Merrick Faculty Association and the Board of Education. Attached to the evaluation were "numerous letters" sent to the principal by parents of children who asked not to have their children placed in the teacher's class. Prior to placing the letters in the teacher's file, the names of children and the parents were deleted "to protect their privacy and prevent any possible chance of retaliation or retribution". Proceedings have been initiated by the teacher and the Faculty Association to remove the evaluation and the letters from the teacher's file, or to obtain the names of the children and the parents.

In my opinion, the New York Freedom of Information Law permits the School District to withhold any identifying details regarding the children or their parents found within the letters. Further, I believe that the Buckley Amendment, a federal act, likely precludes disclosure of the information in question.

As you are aware, §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." Although only

a court can make definitive determinations regarding the intrepretation of §87(2)(b), the Freedom of Information Law and its exceptions to rights of access are presented in great measure in terms of the effects of disclosure. Stated differently, the grounds for denial listed in §87 (2)(a) through (h) of the Law generally enable an agency to withhold records or portions of records when disclosure would be damaging either to a person or to some governmental process. Under the circumstances, if there is a possibility of retribution, I believe that §87(2)(b) justifies a deletion of identifying details on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy.

Perhaps more important is the Buckley Amendment. In brief, that statute provides that any "education records" identifiable to a particular student or students are confidential to all but the parents of the students, unless the parents consent to disclosure in writing. Therefore, in my opinion, the North Merrick Union Free School District is prohibited from disclosing the information in question. Further, if the information is disclosed in violation of the Buckley Amendment, the School District would face the possible removal of funds made available under any federal program for which the United States Department of Education has administrative responsibility.

Lastly, you indicated that the teacher and the Faculty Association are seeking to remove the evaluation and the attached letters from the teacher's file. If "remove" is interpreted to mean "destroy", I believe that there is another consideration that may be relevant. Specifically, §65-b of the Public Officers Law prohibits a school district from destroying or otherwise disposing of records without the consent of the Commissioner of Education. In turn, the Commissioner has developed a series of detailed schedules for the retention and disposal of particular records in an orderly fashion. Although I am not familiar with the specific schedules that may be applicable to the records sought, it is questionable whether the records in question could legally be "removed" or "destroyed" 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

Robert J. Freeman
Executive Director

RJF:jm

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

October 10, 1980

Mr. Anthony Comparato
[redacted]

Dear Mr. Comparato:

I have recently received your letter of September 27 in which you described your problems in gaining access to records pertaining to you from the New York City Police Department.

Please accept my apologies for not enclosing the materials identified in my earlier letter, which are now enclosed.

According to your letter, you have on several occasions requested your "file" from the New York City Police Department, which contains information concerning you from 1968 to the present. You wrote further that you have friends who have seen the file, which apparently contains allegations that you have been connected with underworld activities and that you have been placed under surveillance by the Police Department and its Intelligance Division.

Without knowing more about the contents of the file, I cannot offer specific direction. Nevertheless, I would like to make the following comments.

It is noted initially that the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the New York City Police Department, are available, except those records or portions thereof that fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Freedom of Information Law. Under the circumstances, there are several grounds for denial which might be relevant.

Perhaps most important 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 presented in terms of the effects of disclosure. For instance, if the file concerning you was compiled for law enforcement purposes but disclosure would not interfere with an investigation or result in any of the other harmful effects of disclosure described in the remainder of §87(2)(e), the records could not be denied on that basis.

A second ground for denial that could be relevant is §87(2)(g), which states that an agency may withhold 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 provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials, such as internal police reports, may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations are available.

Another possible ground for denial is §87(2)(b), which provides that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". If the records concerning you identify others, it is possible that the references to other individuals could be deleted.

Lastly, it is suggested that you renew your request and address it to the records access officer, New York City Police Department, 1 Police Plaza, New York, New York 10038.

I hope that 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- 1729

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

October 10, 1980

Mr. Robert F. Blair
Auburn Correctional Facility
79-D-193
135 State Street
Auburn, New York 13021

Dear Mr. Blair:

I have received your letter of September 29 in which you requested a pamphlet regarding the Freedom of Information Law in order to provide guidance relating to your ability to gain access to medical records.

As requested, enclosed are copies of the Freedom of Information Law, regulations which govern the procedural implementation of the Law, and the explanatory pamphlet on the subject.

It is noted that the Freedom of Information Law applies only to records in possession of government. Therefore, if, for example, the hospital that you mentioned is private, the Freedom of Information Law would not be applicable to records of that hospital.

Further, medical records in possession of the hospital are not directly available to the subject of the records. However, I have enclosed a copy of §17 of the Public Health Law, which states in brief that a physician or another hospital acting on your behalf may request and obtain medical records pertaining to you from a hospital or another physician.

With respect to medical records in possession of a correctional facility, it is suggested that you attempt to specify which aspects of the records you are seeking. It is my understanding that factual information, such as laboratory results and similar medical tests are made available by the Department of Correctional Services, but that medical

advice or evaluative material is generally withheld [see Freedom of Information Law, §87(2)(g)]. Since the Freedom of Information Law is applicable to the Department of Correctional Services, it is suggested that you review the Freedom of Information Law and the pamphlet prior to directing your request to that 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-543
FOIL-AO-1730

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

October 10, 1980

Mr. Gordon W. Larson
[redacted]

Dear Mr. Larson:

As you are aware, I have received your letter in which you requested an advisory opinion under the Freedom of Information Law. In addition, enclosed are the two copies of your letter and the materials attached to it that you also requested.

You have contended that the Freedom of Information Law provides access to any records that identify a particular individual to that individual. Further, you have been denied access to a copy of a resignation submitted to the Director of the Greene County Planning Department. It also appears that you have requested copies of minutes of the Greene County Legislature and related materials.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as Greene County and its component agencies, are available, except to the extent that records or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law (see attached).

While it appears that the information that you are seeking is available in great measure, I disagree with your contention that the Law grants access to all records that identify a particular individual to that individual. For instance, one of the grounds for denial concerns records compiled for law enforcement purposes which if disclosed would interfere with an investigation [§87(2)(e)]. Although I am not suggesting that you are the subject of an investigation, if an individual knew that he was being

investigated, by gaining access to records pertaining to him, he could likely evade the law. Nevertheless, as a general rule, I would agree that the majority of the records pertaining to an individual are accessible to him or her.

With respect to the specific records in which you are interested, it appears that they are likely available in part, if not in their entirety. A letter of resignation is in my opinion generally available. Although §§87(2)(b) and (g) of the Freedom of Information Law were cited by Mr. Fred Flack, Chief Administrative Officer of the Greene County Legislature, I believe that neither basis for withholding could be justified to withhold the letter of resignation in its entirety.

Section 87(2)(b) states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." In this regard, there have been several judicial determinations rendered that deal with the cited provision regarding records that identify public employees. In brief, the courts have held that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than 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, if records identifiable to a public employee contain information that is not relevant to the performance of his or her duties, the privacy provisions may appropriately be asserted and the information may be deleted.

From my perspective, a letter of resignation is clearly relevant to the performance of the official duties of both the person who resigned and the person or office to whom the letter of resignation is submitted. However, as I indicated to you by telephone, portions of a letter of resignation might be withheld, if, for example, the reason for the resignation is based upon a medical problem or something of a personal nature that is unrelated to the position.

Section 87(2)(g) states that an agency may withhold 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 language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Under the circumstances, a letter of resignation could be characterized as an intra-agency document. Nevertheless, a statement of resignation itself is in my view reflective of factual information. Further, the acceptance of the resignation might be considered a final determination.

In view of the foregoing, I do not believe that the letter of resignation could be withheld under §87(2)(b) or (g), unless the letter contains information of a purely personal nature that does not relate to the position. Further, if the letter does contain such information, that portion may be deleted while access should be granted to the remainder.

You wrote that the letter of resignation names you. Since I have no idea why the reference to you was made, it is difficult, if not impossible, to provide specific direction. However, I would like to point out that §89(2) of the Freedom of Information Law states that records must be made available to a person seeking access to records pertaining to him or her, unless one or more grounds for denial may properly be asserted.

Your letter also makes reference to proceedings before the Greene County Legislature. In this regard, I direct your attention to the Open Meetings Law (see attached).

First, the Open Meetings Law provides that a public body must conduct its deliberations during open meetings, unless there are grounds for entry into executive session. If the matter of the resignation was considered by a public body, such as the County Legislature, I believe that the discussion of the resignation could have been conducted during an executive session.

Specifically, §100(1)(f) of the Law 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 the issue dealt with a matter leading to the removal of a particular person, the subject could in my view have justifiably been discussed behind closed doors.

Section 101 of the Open Meetings Law provides guidance regarding the contents of minutes and the amount of time in which they must be made available. With respect to open meetings, §101(1) states that minutes of such meetings are required to consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Section 101(2) requires that minutes of executive sessions must be created only when action is taken behind closed doors. In such cases, the minutes must consist of "a record or summary of the final determination of such action, and the date and vote thereon."

Further, 101(3) requires that minutes of open meetings be compiled and made available within two weeks of such meetings and that minutes of executive sessions be compiled and made available within one week of the executive sessions.

I hope that 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: Fred Flack

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1731

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

October 14, 1980

Mr. Scott Martelle
The Post Journal
P.O. Box 190
Jamestown, NY 14701

Dear Mr. Martelle:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a denial of access to the City of Jamestown's "departmental budget requests". Although a total has been provided, the department breakdowns have been withheld based upon the Mayor's refusal to release the information "before he has the opportunity to look at the numbers himself". Richard Sotir, Corporation Counsel, has contended that the records are deniable based upon the holding in Delaney v. DelBello,(405 NYS 2d 276, 62 AD 2d 281).

As you are aware, the Freedom of Information Law as amended is based upon a presumption of access. The Law provides that all records in possession of government in New York are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h). 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..." Therefore, the documents sought are "records" subject to the Freedom of Information Law, whether or not the Mayor or other city officials have had an opportunity to digest their contents.

In my opinion, the only ground for denial that may be offered with respect to the records sought is §87(2)(g). The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The quoted provision contains what in effect is a double negative. Although an agency may deny access to inter-agency or intra-agency materials, statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations found within such materials must be made available. Therefore, to the extent that the records sought, which may be characterized as "internal memos", consist of statistical or factual tabulations or data, or are reflective of agency policy or determinations, they are in my opinion accessible. At this juncture, none of the records could likely be characterized as final determinations. Portions of the records, however, might contain agency policy adopted in the past, and substantial portions of the records likely contain "statistical or factual tabulations or data."

I am cognizant of the fact that two decisions rendered to date have dealt with budget information that may be somewhat analogous to the information that you are seeking. In Dunlea v. Goldmark, [54 Ad 2d 446, aff'd without opinion, 43 NY 2d 754 (1977)], the Appellate Division, Third Department, held that budget worksheets containing advice in the form of numbers were accessible. The Court noted that although the figures contained in the worksheets may not have been reflective of "objective reality," they were nonetheless accessible. The worksheets were sought after the adoption of the executive budget.

The second determination that dealt with similar subject matter was rendered by the Appellate Division, Second Department. In Delaney v. DelBello, supra, it was held that budget estimates submitted by agency heads to the County Executive were deniable. In Delaney, the court found that only "supporting" statistical or factual tabulations relative to a budget are accessible. In order to discern

whether such tabulations are "supporting", the budget obviously must pass to make such a determination. Consequently, Delaney was distinguished from Dunlea on the basis that the information was sought in Delaney prior to the adoption of the budget, while it was sought after the adoption of the budget in Dunlea. Both decisions were handed down under the Freedom of Information Law as originally enacted.

I disagree with the holding in Delaney for several reasons. As noted earlier, the amended Freedom of Information Law is based upon a presumption of access and defines "record" to include any information in possession of an agency "in any physical form whatsoever" [§86(4)]. Therefore, the nature of the contents of records determines the extent to which records or portions thereof may be withheld. A distinction in terms of time cannot in my view justifiably be made under the Law. For example, if a statistical tabulation appears in a record, it is accessible, whether or not it relates to a proposed or an adopted budget. Its nature alone determines rights of access under §87(2)(g). Therefore, I believe that the distinction made in Delaney based upon the time of submission of the records sought would be irrelevant under the amended Freedom of Information Law.

Second, Delaney relied heavily upon 9 NYCRR 145.1(2). Reliance upon that section of the New York Code of Rules and Regulations was in my view misplaced. The cited provision constituted a portion of the regulations adopted under the original Freedom of Information Law by the State Division of the Budget, which exempted "opinions, policy options and recommendations" from the coverage of the Law. It may have been relevant to the Dunlea case, but it had no connection whatsoever to the controversy in Delaney. The Freedom of Information Law requires this Committee to promulgate regulations regarding the procedural aspects of the Law, and all agencies in the state must in turn adopt regulations no more restrictive than those promulgated by the Committee. The regulations adopted by the Division of the Budget, however, pertained not only to procedures, but to rights of access as well. In this regard, it is my contention that an agency cannot adopt regulations more restrictive in terms of rights of access than a statute [see Zuckerman v. Board of Parole, 53 AD 2d 405]. If an agency could adopt regulations more restrictive than the statute, the statute would be of no effect. In short, 9 NYCRR 145.1(2) should in my opinion have had no relevant to the Delaney determination.

Third, the phrase "statistical or factual tabulations or data" is subject to conflicting interpretations. The phrases "factual tabulations" or "factual data" in my view do not result in substantial questions regarding their interpretation. But what constitutes "statistical tabulations" or "statistical data"? In my opinion, there must be a difference between "factual" tabulations or data" and "statistical" tabulations or data, or the Legislature would not have included the word "statistical" within the Law. In this regard, if the phrase "statistical tabulations or data" does not include items such as proposed budget estimates, the word "statistical" appearing in §87(2)(g)(i) would have no apparent meaning.

Fourth, the legislative declaration contained in §84 of the Freedom of Information Law states that the people must have the right to "review the documents and statistics leading to determinations..." The statement of legislative intent makes clear that statistical or factual findings that precede the making of determinations are intended to be available. The Delaney decision appears to have passed over a relevant portion of the Freedom of Information Law, its statement of intent. Although the phrase "statistical or factual tabulations" may be subject to conflicting interpretations, the courts have long held that in cases in which the specific language of a statute is unclear but the statute's legislative intent is clear, the statement of intent should be used as a guide to approporiate interpretation. Further, the rules of construction have long held that remedial legislation, such as the Freedom of Information Law, should be construed liberally. This contention was in my view confirmed and strengthened by the Court of Appeals, the state's highest court, which in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)] emphasized the portion of the legislative declaration of the Freedom of Information Law stating that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible" (emphasis added by the court).

In sum, I believe that the phrase "statistical or factual tabulations or data" should be construed broadly to include within its scope statistical or factual data, even if the figures are not final and are subject to review and modification. Therefore, to the extent that the records in question consist of statistical or factual data or contain statements of policy, they are in my opinion available.

It is emphasized that descriptive explanations of accessible information, such as statistical tabulations, would in my opinion be deniable under §87(2)(g). For example, while a chart consisting of statistical projections should be made available, descriptive or deliberative explanations or rationales reflective of the thought process used in the compilation of the chart would in my view be 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

cc: Mayor Steven B. Carlson
Richard Sotir, Corporation Counsel
City Council

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1732

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

October 14, 1980

Mr. Arnold B. Johnson
[redacted]

Dear Mr. Johnson:

I have recently received your letter of September 29 and the materials attached to it.

Your inquiry concerns a claim made against Nassau County and your request for copies of reports "used in the investigation, evaluation and rejection" of the claim. In response to your request, the Deputy County Attorney wrote that, in the opinion of his office, the Freedom of Information Law does not apply.

I disagree with the contention of the Deputy County Attorney and would like to offer the following comments.

First, I am unaware of the contents of the records that you are seeking. Consequently, I do not feel that I can provide specific direction.

Second, I believe that the Freedom of Information Law of New York is applicable to the records sought. The Freedom of Information Law is based upon a presumption of access. All records of an agency, such as Nassau County, are available, except to the extent that records or portions of records fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law. Further, §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..." Consequently, any records that may have been prepared in conjunction with your claim would fall within the scope of the Freedom of Information Law. This is not to say that all records are available, but rather that access to all records is determined by the Freedom of Information Law.

Third, it is possible that the documents that you are seeking could be characterized taken as a whole as a motor vehicle accident report. It is unclear whether the documents in question were prepared by a police department. If that was the case, I believe that §66-a of the Public Officers Law is applicable. The cited provision states in relevant part that:

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

Based upon the provision quoted above, if the documents constitute an accident report, I believe that they would be available to you under §66-a of the Public Officers Law. It is noted that the cited provision is applicable even though a municipal corporation, such as the County, may have been involved in an accident.

Fourth, it is also possible that the records may be confidential. Section 87(2)(a) of the Freedom of Information Law states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". In this regard, §3101(d) of the Civil Practice Law and Rules provides that "material prepared for litigation" generally need not be disclosed. If the documentation falls within the scope of the provision, I believe that it is deniable. However, if the reports were routinely compiled in the ordinary course of business, §3101(d) would not in my view be applicable.

Fifth, another basis for withholding is §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold 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 provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. Under the circumstances, it appears that the records could likely be characterized as "intra-agency" materials. However, it is also likely that they contain "statistical or factual tabulations or data" that should be made available.

Lastly, the response of the Deputy County Attorney of September 26 is in my view inappropriate. His response to your request merely advised you that the Freedom of Information Law "does not apply in this situation". In this regard, it is emphasized that the regulations promulgated by the Committee (see attached), which have the force and effect of law, require that a denial of access to records provide the reasons for the denial and inform the applicant of his or her right to appeal. The response by the Deputy County Attorney does not provide reasons based upon any of the grounds for denial listed in the Freedom of Information Law, nor does it inform you of your right to appeal as required by §89(4)(a) of the Freedom of Information Law and §1401.7(b) of the regultions.

It is suggested that you contact the Deputy County Attorney in order to determine the identity of the person to whom an appeal should be directed. It is also noted that a denial of access must be appealed within thirty days. Consequently, you should attempt to appeal prior to October 26.

I hope that I have been 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: Gerard F.X. Nolan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1733

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

October 15, 1980

Ms. Susan Marie Tatro
Town Attorney
Town of Colonie
Memorial Town Hall
Newtonville, NY 12128

Dear Ms. Tatro:

Thank you for sending a copy of the determination rendered on appeal under the Freedom of Information Law regarding a request by Hubert D. Miles, Esq.

The determination is reflective of a denial of access to records that indicate the results of a chemical test to determine the blood alcohol content of a particular individual charged with driving while intoxicated. It is noted, too, that Mr. Miles represents an insurance company that has been sued by the subject of the chemical test, presumably an insured, for breach of contract.

You wrote that the records in question are not found within the records in possession of the Town Justice and, therefore, are not subject to rights of access granted by the Uniform Justice Court Act, §§2019 and 2019-a. You also wrote that the Freedom of Information Law specifically excludes the courts and court records from its scope. The conclusion of your letter suggested that Mr. Miles should subpoena the records from the police department whose officers administered the test.

In all honesty, I do not understand the reasoning behind your determination. On the one hand, you have indicated that the records are not in possession of a court and, therefore, are not subject to the provisions of the Uniform Justice Court Act. On the other hand, however, you intimated that the records are in possession of a police department. If that is the case, the records could not be considered "court records" outside the scope of the Freedom of Information Law, but rather "agency records" subject to the Freedom of Information Law in all respects. Stated differently, a police department of a town is an "agency" as defined by §86(3) of the Law. Further, in my view, resort to a subpoena should be unnecessary for the records in question are in my opinion available.

As you are aware, the Freedom of Information Law is based upon a presumption of access. All records 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). Although there are three grounds for denial that might be applicable with respect to the records in question, I do not believe that any of the three could justifiably be asserted to withhold the test results.

The first ground for denial that might be applicable is §87(2)(b), which states that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy". Under the circumstances, it is my contention that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. It is clear that the applicant for the records is aware of the identity of the person to whom the records relate, for there is a contractual relationship between the subject of the records and an insurance company, which is represented by the applicant. The charges against the subject of the records could have been known to any member of the public, and presumably any member of the public could have been present during any judicial proceedings related to the charge that may have been conducted. In addition, it appears that a "medical authorization" was signed by the subject of the records. Unless I have misunderstood the correspondence and the nature of the medical authorization, I believe that the authorization is intended to constitute a waiver of any "rights" of privacy with respect to records sought by the insurance company. Moreover, as indicated in the letter from Mr. Hamlin to you, it has been held that any claims of invasion of privacy are essentially waived when the subject of the records places his physical condition into controversy in a suit. In view of the foregoing, it does not appear that §87(2)(b) could be asserted to withhold the test results.

A second ground for denial that may be applicable is §87(2)(g), which provides that an agency may withhold 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..."

It is important to note that the quoted provision contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In this instance, I believe that the records reflective of the chemical test results could be considered "intra-agency" materials. However, the test results would constitute "statistical or factual tabulations or data" that must be made available. Consequently, I do not believe that §87(2)(g) could be cited as a basis for withholding.

The last ground for denial that might be applicable 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."

Since the investigation and judicial proceedings have been terminated, none of the first three bases for withholding listed in §87(2)(e) are in my view applicable. Further, the last basis for withholding in §87(2)(e) in my view indicates an intent on the part of the Legislature to make the chemical tests that have been requested accessible. To reiterate the language of that provision, §87(2)(e)(iv) states that records compiled for law enforcement purposes may be withheld when disclosure would reveal "criminal investigative techniques or procedures, except routine techniques and procedures" (emphasis added). The blood alcohol or "breathalyzer" test, as it is commonly known, is clearly a routine criminal investigative technique or procedure. As such, I do not feel that §87(2)(e) could be cited to withhold the records in question.

In sum, if the records sought are in possession of a police department, they are records of an "agency" subject to the Freedom of Information Law in all respects. Further, I do not believe that any of the grounds for denial could appropriately be asserted to withhold the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hubert D. Miles, Esq.

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

October 16, 1980

Sergeant William Calcutti
Commander Staff Services
Town of Yorktown
Police Department
Yorktown Heights, NY 10598

Dear Sergeant Calcutti:

I have received your letter of October 1 and thank you for your interest in complying with the Freedom of Information Law.

You have indicated that the Yorktown Police Department would like to reestablish a "realistic" fee for copying reports maintained by the Department. Consequently, you have raised two questions regarding the capacity of the Department or the Town to establish fees.

It is noted at the outset that §87(1)(b)(iii) of the Freedom of Information Law provides that an agency, such as a town, may assess a fee for copies not in excess of twenty-five cents per photocopy up to 9 x 14 inches, "except when a different fee is otherwise prescribed by law". Consequently, if there is no provision of law that is applicable other than the Freedom of Information Law, the maximum fee that may be assessed is twenty-five cents per photocopy.

In addition, I would like to point out that numerous questions have arisen regarding the fees assessed by police departments for motor vehicle accident reports. In all likelihood, the questions have been raised due to §202 of the Vehicle and Traffic Law. That provision enables the State Department of Motor Vehicles to assess specific fees for copying and for searching records that exceed those permitted by the Freedom of Information Law. However, it is stressed that the fees permitted to be charged under the Vehicle and Traffic Law are applicable only to the State Department of Motor Vehicles. Many municipalities have viewed §202 of the Vehicle and Traffic Law as a basis for assessing fees analogous to those assessed by the Department. Often, the higher fees have been established by means of policy. Nevertheless, from my perspective, a fee established by means of policy, for example, would not be reflective of "law". Therefore, if a unit of local government and its police department have established fees consistent with those envisioned by §202 of the Vehicle and Traffic Law by means of policy, those fees would in my view be inconsistent with the direction provided by the Freedom of Information Law.

With respect to your first question, you indicated that, in 1972, the Town Board passed a resolution setting the fee for accident reports at three dollars. In my opinion, a resolution is reflective of policy and not "law". As such, based upon the facts that you have provided, I believe that the police department is currently restricted from assessing a fee in excess of twenty-five cents per photocopy.

Your second question is whether the Town of Yorktown has the capacity to enact a local law that sets a higher fee for the reports. In this regard, I believe that the town may by means of a local law establish fees in excess of twenty-five cents per photocopy. Nevertheless, I question the need to do so.

When the fee of twenty-five cents was established by the Committee by means of regulations in 1974 and by the Legislature when it amended the Freedom of Information Law in 1977, a great deal of consideration was given to the amount that should properly be charged for photocopying. Unlike most kinds of services, the cost of photocopying has decreased in the past decade. Further, in setting a fee of twenty-five cents per photocopy, while precluding a fee for searching for records, it was recognized that personnel time and, therefore, money would be expended in locating and copying records. However, it was also recognized that the actual cost of photocopying ranges from approximately one cent per photocopy up to approximately six cents per photocopy, depending upon the type of machine used or the contractual relationship between a unit of government and a lessor. In my view, in the majority of circumstances, a fee of twenty-five cents per photocopy is sufficient to cover the actual cost of duplicating records and the time required to locate the records.

Lastly, legislation has been introduced which, if enacted, would preclude agencies from establishing fees for photocopying in excess of twenty-five cents per photocopy by means of a local law or regulation, for example. Specifically, while the Freedom of Information Law now states that fees permitted to be charged under other provisions of "law" may remain in effect, the legislation would permit higher fees to be charged only when a provision of a "statute" so states. The effect of passage of the legislation would remove the authority of agencies to enact local laws or regulations establishing fees in excess of twenty-five cents per photocopy; the only circumstances in which higher fees could be assessed would involve instances in which the State Legislature has enacted a statute authorizing a higher fee. Further, in all honesty, I believe that the Committee will be recommending such legislation in its upcoming report to the Governor and the Legislature. Should the legislation be enacted, any local laws or regulations that permit a higher fee would be rendered void.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1735

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

October 16, 1980

Mr. Richard Behrens
[redacted]

Dear Mr. Behrens:

I have recently received your letter of October 5 in which you described difficulties in gaining access to records under the Freedom of Information Law from the New York City Board of Education as well as various school districts in the New York City area. In conjunction with those difficulties, you have asked that the Committee conduct an "investigation and review".

Please be advised that the Committee does not have the authority to "investigate". As a matter of fact, the staff of the Committee consists of myself and two secretarial assistants. Consequently, neither the resources of the Committee nor the scope of its authority under the Freedom of Information Law permit the initiation of what might be characterized as an investigation.

I am familiar with the problems that you have encountered regarding the New York City Board of Education and have discussed the matter on several occasions with representatives of its Office of Counsel and Harold Siegel, Secretary and Counsel to the Board. For a variety of reasons, it appears that the Board of Education receives more requests than any agency in the state. Further, based upon conversations with Board officials, I do not believe that there is any "deliberate attempt" to circumvent the Freedom of Information Law; on the contrary, I believe that the Board has increased its efforts to comply with the Law.

You stated your belief that the Freedom of Information Law requires that records sought must be supplied within five business days. In this regard, I direct your attention to §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee, which govern the procedural implementation of the Freedom of Information Law.

Section 89(3) of the Law requires that an agency respond to a request within five business days of its receipt of a request. However, the cited provision also states that one of the responses to a request can consist of "a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied". Further, §1401.5(d) of the regulations states that:

> "If the agency does not provide or deny access to the record sought within five business days of receipt of a request, the agency shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied. If access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed."

In view of the foregoing, the response to a request, which must be given within five business days of the receipt of a request, can take one of three forms. The response can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review of locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated

to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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-1736

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

October 17, 1980

Mr. Frank G. Colone, President
Newburgh Teachers' Association
196 Rte. 9W
Newburgh, New York 12550

Dear Mr. Colone:

I have received your letter of October 6 in which you requested an advisory opinion regarding a denial of access to records in possession of the City School District of the City of Newburgh.

In terms of background, in December of 1977, the Board of Education voted to spend $14,200 on a research project conducted by Magi Educational Services, Inc., an "independent evaluator". After making numerous requests for the report submitted by Magi, access to the report was finally denied on September 8 by Donald W. Saltmarsh, the appeals officer of the District. The denial is based upon the contention that the report was compiled by a firm "which would qualify as 'legal expert', as that term is used in litigation, under the specific direction and request of trial counsel..." for the District, and is being used in litigation. The determination stated further that the sole purpose for the preparation of the report was litigation, and on that basis, the appeals officer found that the report constitutes material prepared for litigation that is confidential under §3101(d) of the CPLR and, therefore, deniable under §87(2)(a) of the Freedom of Information Law.

Based upon the minutes of the meeting in which the expenditure for the research project was approved by the Board of Education, it does not appear that the report in question could be characterized as "material prepared for litigation". As such, the report is in my view available.

Specifically, the minutes of the meeting of December 20, 1977, state that:

> "[D]r. Cohen asked approval of the Research Project proposed to conduct study of student disciplinary records and procedures followed in the junior and senior high schools. Magi Education Services, Inc. (independent evaluator) proposal was included with agenda material, previously reviewed in committee and is now recommended.
>
> "Mr. Disare said he felt that the personnel within the organization understands the objectives of the Board in making the study and he is hopeful it will prove 'positive' for the school district. After interviews, Mr. Disare believe the representatives highly competent and able to accomplish the findings the Board is interested in. In their proposal, the total cost outlined is $14,200 (this cost does not, however, include expert testimony)."

The minutes make no mention of pending or upcoming litigation. On the contrary, the report was apparently intended to be considered a "research project". Moreover, at the end of the portion of the minutes dealing with the report, a statement appearing in parentheses indicates that "this cost does not, however, include expert testimony".

In my opinion, which is based upon the minutes, the report was compiled in the ordinary course of business and not for litigation. I believe that this contention is bolstered by the statement in the in the minutes that additional services to be provided by Magi might be in the nature of expert testimony, but that the cost of obtaining such testimony would not be included within the cost of the report itself. Further, although the report may be relevant to litigation, again, the minutes indicate that it does not constitute material prepared for litigation. Consequently, I believe that the basis for withholding offered by the appeals officer is inappropriate.

I would like to point out that there is case law reflective of analogous situations in which it was held that similar reports are accessible. For example, in Winston v. Mangan, 338 NYS 2d 654, the court found that the report in Winston:

> "...was ordered by the Board...as spread on the minutes, at a maximum cost of $400 paid out of public monies...The Board minutes do not indicate what use was to be made of the study, nor that it was for any reason deemed secret or confidential.
>
> "[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."

The court also wrote that:

> "[T]he Board argues that even if the roofing study is public record, it is material prepared for litigation and therefore privileged from disclosure pursuant to CPLR 3101(d). In so contending, the Board has the burden of proving that the data is exempt from inspection...
>
> "[T]he Court finds this argument interesting, but unpersuasive. First, there was no mention of any ongoing or contemplated litigation in the Board minutes when the study was authorized, nor any mention thereof...

> "[S]econd, material collected in the 'ordinary course of business' in governmental operatings, 'including perhaps eventual use in any litigation which may ensue', as well might be a follow-up quality study of a major project about which adverse reports had been received, is not shielded from disclosure..."

In view of the similarity of the facts in the situation that you have described and those described in Winston v. Mangan, supra, I do not believe that the report in question can be shielded from disclosure on the ground that it constitutes material prepared for litigation.

Assuming that my contention is accurate and that the report cannot be withheld under §87(2)(a) of the Freedom of Information Law, I do not believe that there are any other grounds for denial in the Freedom of Information Law that may properly be asserted to withhold the records. Therefore, I believe that the report in which you are interested is available.

You have also raised questions regarding the District's procedural implementation of the Freedom of Information Law.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, §87(1) of the Freedom of Information Law requires that each agency, including a school district, promulgate procedural regulations consistent with and no more restrictive than those promulgated by the Committee. The regulations are required to identify one or more records access officers and an appeals officer by name, title and business address.

Further, as you indicated, each agency is required to maintain a "subject matter list" pursuant to §87(3)(c) of the Freedom of Information Law. The list is not intended to be an index that identifies every record of the agency; however, it is required to identify the categories of records of an agency, whether or not records falling within the categories 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

cc: Board of Education
Kenneth DeWitt
Donald W. Saltmarsh

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-546
FOIL-AO-1737

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

October 17, 1980

Mr. and Mrs. Thomas Geer
[redacted]

Dear Mr. and Mrs. Geer:

As you are aware, I have received your letter of October 3 in which you raised several questions regarding access to records as well as meetings.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law and with which each agency must comply, the Open Meetings Law, an explanatory pamphlet dealing with both subjects and a pocket guide to the Freedom of Information Law.

Your first question concerns your contention that minutes of the meetings of the Town Board of the Town of Hopewell are "grossly inadequate" and that the minutes do not reflect statements made during meetings by either Board members or the public pertaining to individual questions or issues.

In this regard, I direct your attention to §101 of the Open Meetings Law concerning minutes. That provision gives direction regarding the minimum requirements of the contents of the minutes. With respect to minutes of open meetings, §101(1) states that "minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon". In view of the foregoing, it is clear that minutes need not be reflective of a verbatim transcript of statements made during open meetings. Further, they need not identify every speaker or every issue raised. However, the minutes are required to make reference to all "motions, proposals, resolutions and any other matter formally voted upon and the vote thereon".

In addition, having reviewed the minutes of the Hopewell Town Board regarding its meeting of September 17, in every instance in which a motion was passed, the minutes merely indicate that the motions were "carried". In my view, the term "carried" may not be sufficiently specific, for the vote of the Board is in each instance required to be recorded. Specifically, §87(3)(a) of the Freedom of Information Law provides that each agency shall maintain "a record of the final vote of each member in every agency proceeding in which the member votes". Stated differently, in every instance the Town Board votes, a record must be compiled indicating the manner in which each member voted. Although a vote of three to two may be "carried", it would not indicate which members voted in favor or against, which is required under §87(3)(a) of the Freedom of Information Law.

You also indicated that members of the Town Board and other Town officials refused to answer questions directed to them by Town residents. In my opinion, although representatives of government are designated to serve the public, there is no legal requirement of which I am aware that compels town officials to respond to individual inquiries at Board meetings. While responses might be expected, they are not in my view required by any provision of law.

Your secondary area of inquiry concerns a situation in which a member of the Town Board questioned the practice of approving the payment of bills without being aware of the specific nature of payments authorized. You wrote that the Supervisor "criticized" the Board member and informed the member that he could inspect the bills prior to the meetings. In this regard, I have two comments to offer. First, it is true that a Board member could inspect the bills in advance of a meeting, particularly if the bills are identified in an agenda provided in advance of a meeting. Second and in the alternative, if a member of a Board is not satisfied that he is sufficiently familiar with the bills at the time of the meeting, he or she could vote to oppose payment of the bills until he or she becomes familiar with them.

Your third question concers a situation in which a Town official resides outside the town and "routinely operates public vehicles outside the town with private citizens in the vehicle during non-business hours". You also indicated that the qualifications of the official and the manner in which he was appointed are in your view questionable. With respect to the use of town vehicles outside the town, I must admit that I have no legal expertise. It is suggested that you contact the Division of Municipal Affairs at the Department of Audit and Control in order to obtain direction.

With regard to job qualifications and an appointment, I would need additional information to provide you with a specific response. However, if, for example, the official fills a "Civil Service" position, there may have been an "eligible list" that identifies those candidates for the position who passed an examination and their scores. The eligible list is available to the public.

Your fourth area of inquiry indicates that the Town Board approved the issuance of a permit by the Department of Environmental Conservation regarding dumping. However, you wrote that the Town Board had in the past stated its opposition to any dumping in the Town and indicated that no permits for dumping were pending. From my perspective, the question is whether the Town Board or any other public bodies of the Town had considered the issuance of the permit in question prior to the meeting of September 17. If one or more of the Boards had met to consider the issuance of the permit, meetings of such bodies would have been required to be open.

Fifth, you wrote that a report issued by the Department of Audit and Control was critical of several aspects of the Town's financial record keeping. In response to questions regarding the report, the Supervisor informed a resident of the Town that he could read the report. You also stated that copies of the report would not be available to Town residents, but that a radio station had obtained a copy. In my opinion, the report is available for inspection and copying by any person. Specifically, §89(3) of the Freedom of Information Law requires that an agency produce a copy of an available record upon payment of the requisite fees for photocopying. Moreover, the Freedom of Information Law does not distinguish among categories of individuals in terms of rights to access. Consequently, representatives of the news media have no greater or lesser rights of access to records than any member of the public.

Lastly, you wrote that the Town Board passed a resolution banning the use of tape recorders at meetings. As I informed you yesterday, I have discussed the matter with Mr. Monaghan, the Town Attorney, and have transmitted to him a copy of a recent opinion of the Attorney General. Enclosed for your consideration is a copy of the same opinion, in which it was advised that the Town Board cannot totally preclude the use of tape recorders at meetings. I concur with the opinion expressed by the Attorney General.

In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt reasonable rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process (see attached, Special Report: Electronic Reproduction of Public Proceedings).

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the wisespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not

> 'to prevent the possibility of star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Town Board

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

October 20, 1980

Mr. Charles C. David Jr. #77A0916/3-S-9
Queensboro Correctional Facility
47-04 Van Dam Street
Long Island City, New York 11101

Dear Mr. David:

I have received your letter of October 9, in which you requested "transcripts" of an advisory opinion, as well as any updated information that I might have pertaining to the subject of the opinion.

In addition, you indicated that you had been denied access to records by the New York City Department of Probation.

As requested, I have enclosed a copy of the advisory opinion to which you made reference, as well as an updated index to advisory opinions rendered by this office under the Freedom of Information Law. If you are interested in gaining copies of opinions of particular interest that are identified in the index, you may request them by identifying the opinions in writing by key phrase or number.

With respect to the denial of access that you reported, I have contacted the State Division of Probation on your behalf in order to obtain additional information regarding your request. Based upon the information given to me, the only record concerning you in possession of the New York State Department of Probation is a presentence report. In this regard, even though a probation department or a correctional facility may have copies of a presentence report, neither in my view has the capacity to release such a report. I direct your attention to §390.50(2) of the Criminal Procedure Law, which in relevant part 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 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, only a court can determine to disclose the contents of a presentence report. Consequently, it is suggested that you seek the report from the court that maintains 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-548
FOIL-AO-1739

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

October 20, 1980

Peter Pirnie, PhD.
[redacted]

Dear Dr. Pirnie:

Secretary of State Paterson has transmitted your letter of September 18 to this office, for it raises questions under both the Freedom of Information and Open Meetings Laws. As you are aware, Secretary Paterson is a member of the Committee.

It is noted initially that the information in which you are interested is not in possession of the Department of State. To the extent that the information exists, it would likely be in possession of the Department of Labor. Therefore, it is suggested that you transmit your ensuing requests to that Department in conjunction with the following comments.

First, you requested "the 1980 - 1981 meeting times, dates, and places scheduled for the New York State Balance of State Planning Council" (BSPC). In this regard, I direct your attention to §99 of the Open Meetings Law. Subdivision(1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice of such meetings be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision(2) of §99 concerns notice of meetings scheduled less than a week in advance and requires that notice also be given to the news media and posted in the same manner as described in subdivision(1) "to the extent practicable" at a reasonable time prior to such meetings. In view of the foregoing, it is clear that a public body subject to the Open Meetings Law must provide notice prior to each of its meetings, whether the meetings are regularly scheduled or otherwise.

It is possible that there is no existing schedule of the meetings of the Council as extensive as that which you have requested. For instance, although the Council may have a schedule of its meetings for the remainder of 1980, perhaps no schedule yet exists with respect to meetings to be held in 1981. If that is the case, the Board would not be required to create a schedule of its upcoming meetings on your behalf. Further, it is noted that §89(3) of the Freedom of Information Law states that an agency, such as the Department of Labor, need not generally create a record in response to a request. However, as soon as a schedule of meetings exists, it would be subject to the Freedom of Information Law and available upon request. In addition, you might be able to have your name placed upon a mailing list, for example, to receive notices of meetings.

Second, you requested "the agenda for the Balance of State Planning Council meetings to be received not less than forty-eight hours before the meetings". Please be advised that the Open Meetings Law does not require that an agenda be prepared in advance of meetings. However, if an agenda is developed, it is a record available upon request under the Freedom of Information Law. When you receive a schedule of the meetings, it is suggested that you request the agendas related to the meetings well in advance of the meetings.

Your third area of inquiry concerns minutes of the meetings of the BSPC. In this regard, §101(1) of the Open Meetings 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". Section 101(2) concerns minutes of the executive sessions and requires that minutes consisting of a record or summary of action taken during an executive session be made available. Subdivision(3) of §101 states that minutes are available in accordance with provisions of the Freedom of Information Law. In the case of open meetings, minutes must be compiled and made available within two weeks of such meetings. In the case of executive sessions, the Law requires that such minutes be compiled and made available within one week of an executive session.

The Committee has recognized that there may be instances in which a public body cannot convene to approve or make minutes official within the time limits specified in §101(3). However, it has consistently been advised that the minutes must be made available within the requisite time periods, but that they may be marked "draft", "unofficial", "non final", for example. By so doing, the public has the ability to learn generally what transpired at a meeting, and concurrently, the members of a public body are given a measure of protection.

The same general direction would be applicable to the records and meetings of the New York State Employment and Training Council.

Your last area of inquiry concerns a request for a copy of "the Federal Assessment of the State of New York as the prime sponsor of the Balance of State for Fiscal Year 1980". In all honesty, I am not familiar with the contents of the federal assessment that you are seeking. However, it is likely that such a record would be available under the Freedom of Information Law.

The Freedom of Information Law is based upon a presumption of access. All records of agency, such as the Department of Labor or its components, are accessible, 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. From my perspective, none of the grounds for denial would be applicable with respect to the document in question.

It is noted that §86(3) of the New York Freedom of Information Law defines "agency" to include entities of government, both state and local, in New York. The definition of "agency" does not include a federal agency, for example. Therefore, a report transmitted from a federal agency to an agency of government in New York could not be characterized as "inter-agency material" deniable under §87(2)(g) of the Freedom of Information Law.

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation and with which all agencies must comply, the Open Meetings Law, and an explanatory pamphlet that deals with both subjects. The pamphlet may be particularly useful to you, for it contains sample letters of request and appeal.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO 550
FOIL-AO-1740

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

October 27, 1980

Mr. Lewis B. Oliver, Jr.
Attorney At Law
31 Barclay Street
Albany, NY 12209

Dear Mr. Oliver:

I have received your letter of October 9 in which you requested an advisory opinion regarding the Open Meetings Law.

Based upon your letter and the materials attached thereto, the Student Association of the State University of New York at Albany contends that the Board of Trustees of the State University of New York violated the Open Meetings Law by improperly discussing a proposal to increase dormitory rental charges during executive sessions.

In terms of background, your letter and the attached materials, which include the affidavit of Sharon Ward, a student member of the Board of Trustees, the proposal to increase dormitory rental charges was "extensively discussed" during executive sessions conducted at the April and May meetings of the Board. You wrote further that "[A]fter the matter was essentially resolved in executive session at the open session of the May 28, 1980, meeting the Board briefly discussed the dormitory rental increase and approved it by a vote of 10 to 1."

The minutes of the meetings held in April and May indicate that the issue in question was considered behind closed doors after the Board passed motions to enter into executive session that cited §100(1)(d) and (f) of the Open Meetings Law as the bases for convening executive sessions.

In addition, Ms. Ward's affidavit indicates that she was informed of the provisions of §74(3)(c) of the Public Officers Law, which in relevant part states that a public officer should not "disclose confidential information acquired by him in the course of his official duties". The affidavit also states that she was advised by the University Counsel "that disclosure of information which took place during executive session was a violation of Public Officers Law §74(3)(c)".

In my opinion, which is based upon the materials that you have transmitted, the executive sessions in question were convened in violation of the Open Meetings Law.

The first ground for executive session cited in the minutes is §100(1)(d) of the Open Meetings Law, which states that a public body may enter into executive session to discuss "proposed, pending or current litigation". However, there is no indication in any of the materials that litigation was pending, threatened or imminent. It has been contended in the past that "possible" litigation constitutes an appropriate basis for entry into executive session. However, it has consistently been advised that virtually any topic discussed by a public body could be the subject of "possible" litigation and that §100(1) can properly be cited only when ongoing litigation is being discussed, or when litigation is imminent. The materials indicated that litigation was not proposed, pending or current. Consequently, I do not believe that §100(1)(d) of the Open Meetings Law could justifiably have been cited to enter into executive session to discuss the proposal to increase dormitory rental charges.

The second ground for executive session cited in the minutes is §100(1)(f) of the Open Meetings Law. That provision 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..."

In my opinion, a discussion of an increase in rental fees concerned neither the "medical, financial, credit or employment history of a particular person or corporation", nor "matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation". From my perspective, the issue did not deal with any of the areas identified in §100(1)(f), nor did it pertain to any "particular" person or corporation. Therefore, I do not believe that §100(1)(f) of the Open Meetings Law could justifiably have been cited to enter into executive session to discuss the proposal to raise rental fees.

Further, having reviewed the remaining grounds for executive session enumerated in §100(1) of the Open Meetings Law as well as the exemptions from the Law set forth in §103, there appears to have been no basis for closing meetings in which the proposal in question was discussed.

In view of the foregoing, it is my opinion that the discussion of the proposal to increase dormitory rental charges should have been discussed by the Board during open meetings.

Lastly, I would like to comment with respect to the provision of §74(3)(c) of the Public Officers Law, which, to reiterate, states in part that a public officer should not "disclose confidential information acquired by him in the course of his official duties". Due to the provisions of the Open Meetings Law and the Freedom of Information Law, the appropriate scope of the term "confidential" is in my view questionable.

First, with respect to the Freedom of Information Law and the confidentiality or records, I believe that there is but one ground for denial that would represent a situation requiring that records be kept confidential. In this regard, I direct your attention to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". Stated differently, §87(2)(a) is applicable only when an act passed by Congress or the State Legislature precludes an agency from disclosing particular records, (see e.g., §136 of the Social Services Law regarding records identifying applicant for and recipients of public assistance, §697 of the Tax Law regarding income tax returns, §33.13 of the Mental Hygiene Law regarding patient records, §114 of the Domestic Relations Law regarding records of adoption, 20 U.S.C. §1232g regarding student records, etc.). Statutes precluding an agency from disclosing in my view represent the only instances in which records may be deemed "confidential."

It is noted that the common law governmental privilege until recently represented another means by which an agency could characterize records as "confidential". However, in Doolan v. BOCES, 64 AD 2d 702 (1978); reversed 48 NY 2d 341, 347 (1979), the Court of Appeals appears to have abolished the privilege, stating that the only bases for withholding are those found in §87(2)(a) through (h) of the Freedom of Information Law.

In a related vein, if a public body seeks to discuss confidential information, it may do so outside the scope of the Open Meetings Law. Section 103(3) of the Open Meetings Law states that its provisions do not apply to "matters made confidential by federal or state law". Therefore, if, for example, a school board or the SUNY Board of Trustees sought to discuss the education records of a particular student, it could do so outside the scope of the Open Meetings Law, for the records would be confidential under the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In such a circumstance, a public officer would be precluded from disclosing the contents of the records due to confidentiality requirements imposed by a federal act.

Second, what is "confidential" is often unclear, for a discussion of a particular issue by a public body might be required to be held open to the public under the Open Meetings Law, while a record related to the discussion might be deniable under the Freedom of Information Law, and vice versa. For instance, a school district official might transmit recommendations to a board of education regarding the possible closing of a school in the district. Such a record might be deniable under §87(2)(g) of the Freedom of Information Law concerning intra-agency materials; however, the discussion of the recommendations would be open, for none of the grounds for executive session would be applicable. Conversely, §87(3)(b) of the Freedom of Information Law, as well as case law, require that payroll information regarding public employees as well as the features of collective bargaining agreements be made available (see Doolan, supra). While the records might be available, a discussion of the records in conjunction with collective bargaining negotiations would constitute a proper ground for executive session under §100(1)(e) of the Open Meetings Law.

In short, I question the direction given to Ms. Ward to the effect that disclosure of any aspect of an executive session would violate §74(3)(c) of the Public Officers 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: Carolyn Pasley

FOIL-AO-1741

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : James C. Aube

October 27, 1980

FROM : Bob Freeman

SUBJECT : Privacy Legislation

I have received your memorandum of October 15 and appreciate your interest in complying with the privacy legislation, Chapter 677 of the Laws of 1980.

Your inquiry concerns the application of the legislation to various records maintained by the Bureau of State Records, some of which, in terms of personally identifiable information, provide only a name and address or a name and an agency to which the person named has been appointed. Further, the records have generally been accessible to the public and are maintained by the Department, not for any particular use by the Department, but merely because the Department is the designated repository for the records.

First, in my view, whether or not the records are accessible is irrelevant in terms of the requirements of the legislation.

Second, as you are aware, the legislation defines "record" broadly to include "any information kept, held, filed, produced or reproduced by, with or for an agency, in any physical form whatsoever..." [see §2(d)]. Therefore, if you have it, whatever "it" might be, it is a "record".

Third, "personal information" is also broadly defined to include "any information concerning a person which...can be particularly associated with that person [§2(c)].

Fourth, and perhaps most importantly, "system of records" is defined to mean:

> "...any group of records pertaining to one or more persons from which personal information may be retrieved by use of the name or other identifying particular or combination of particulars of a person" [§2(d)].

In view of the definition of "system of records", the question is whether a "name or other identifying particular" could be used to retrieve other personal information concerning individuals, such as an address or even the initial date of employment. If the question can be answered in the affirmative, the legislation applies and a notice must be completed.

I realize that the burdens imposed by the legislation may be onerous; nevertheless, it is all-encompassing, reasonably clear and it does not give either of us a great deal of leeway with respect to its interpretation. I hope, too, that after an initial notice is completed, the rest can be completed quickly and easily.

If you have any further questions, please do not hesitate to call.

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1742

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

October 29, 1980

Ms. Nancy M. Lederman
Board of Education of the
City of New York
Office of Legal Services
Education Division
110 Livingston Street
Brooklyn, NY 11201

Dear Ms. Lederman:

As you are aware, I have received your letter of October 9. Your interest in complying with the Freedom of Information Law is much appreciated.

According to your letter, questions have arisen regarding the policy of the New York City Board of Education regarding evaluations of teachers, complaints, reprimands and similar materials found within individual personnel files. In addition, you have raised questions concerning rights of access to records indicating the ages of particular teachers.

I would like to offer several comments with respect to your inquiry.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Board of Education, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in the Freedom of Information Law.

From my perspective, there are two relevant grounds for denial regarding the records in question. To the extent that those grounds for denial may appropriately be cited, the records or portions of the records may be withheld.

The first relevant ground for denial is §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". It is important to point out at this juncture that the courts have generally held that public employees enjoy a lesser protection of privacy than members of the public generally, because public employees have a greater duty to be accountable than any other identifiable group. As a consequence, in interpreting §87(2)(b) of the Freedom of Information Law, the courts have held in essence that records which are relevant to the performance of a public employee's 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 2d 664 (Court of Claims, 1978)].

The second relevant ground for denial is §87(2)(g), which states that an agency may withhold 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..."

It is noted that the provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available. Conversely, §87(2)(g) permits an agency to withhold inter-agency and intra-agency communications to the extent that they are reflective of advice, recommendation, suggestion, impression, etc.

I would like to review the status of each of the types of records that you have identified in conjunction with the two exceptions in the following paragraphs.

First, with respect to evaluations, which, according to your letter, are generally written by principals who oversee teachers and are used by supervisory staff in making various determinations.

In my view, the privacy provisions discussed earlier could not likely be cited as a basis for withholding evaluations, for the evaluations are clearly relevant to the performance of a teacher's official duties. However, they might justifiably be withheld under §87(2)(g) if they are essentially advisory in nature and used to assist a supervisor in reaching a decision. In such circumstances, evaluations would not constitute final determinations, for their contents could be accepted or rejected by a decision-maker. Therefore, they could in my view be withheld under such conditions [see McAuley v. Board of Education, City of New York, 60 AD 2d 1048 (1978), ___ NY 2d ___ (aff'd with no opinion)].

To reiterate, if an evaluation is advisory in nature and contains no statistical or factual information, instructions to staff that affect the public or could not be considered a statement of policy or determination, it is in my opinion deniable.

Second, with respect to reprimands, I believe that the conclusion must be different from that given regarding an evaluation. In my view, as well as that of at least one court, a reprimand is reflective of a final determination and therefore is available under §87(2)(g)(iii) of the Freedom of Information Law. In addition, a reprimand would have a bearing upon how a particular public employee has performed his or her official duties. Consequently, disclosure of a reprimand would in my view result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell, supra].

Third, with regard to complaints, rights of access depend in part upon the identity of the person who made a complaint. For instance, if a member of the public complained relative to a particular teacher, the letter of complaint would constitute neither inter-agency nor intra-agency material. Therefore, §87(2)(g) could not

be cited as a basis for withholding. Further, it has been consistently advised that the substance of a complaint is available but that the identity of the complainant may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy [see also, Montes, supra].

There is an additional possible ground for withholding a complaint. As you are aware, the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) states in brief that "education records" identifiable to a particular student are confidential to all but the parents of the the student. If, for example, a complaint could identify a particular student, I believe that it would be confidential under the provisions of the Family Educational Rights and Privacy Act. In that situation, the complaint would be 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".

If a complaint is made by an official of the agency, it could be characterized as "intra-agency" material. The degree to which the privacy of the author might be invaded by disclosing his or her identity in my view could be determined only on a case by case basis. For instance, in some situations it is the duty or responsibility of a public employee to report on the activities of another. In that situation, the public employee would be acting within the scope of his or her official duties. However, if an unsolicited complaint is made by a public employee, I believe that disclosure of that person's identity would result in a more serious invasion of personal privacy.

Fourth, with regard to records indicating the ages of public employees, it is my opinion that such information could be deleted from a record on the ground that disclosure would result in an unwarranted invasion of personal privacy. Again, if an item of personal information is relevant to the performance of one's official duties, it would likely be available based upon the judicial determinations cited earlier. However, it is unlikely that the age of the public employee would in most instances be relevant to the performance of one's official duties. Therefore, I believe that an indication of the age of a public employee found within the records may generally be deleted.

Lastly, you wrote that questions regarding extant policy have arisen with respect to libel. In this regard, it is my view doubtful for two reasons that disclosure of records regarding public employees could result in a successful libel suit.

First, the Freedom of Information Law is permissive. Stated differently, although an agency may withhold records that fall within one or more of the grounds for denial, there is nothing in the Law that requires that such records be withheld.

Second, the courts have generally held that a public official who discloses in the performance of his or her official duties is absolutely immune from liability. Although I know of no judicial determination that deals with a school board concerning disclosure relative to the issues of libel and defamation, in other contexts, the principle stated above has been applicable [see e.g., Ward Telecommunication and Computer Services, Inc. v. State, 42 NY 2d 289 (1977); Sheridan v. Crisona, 14 NY 2d 108, 112, 249 NYS 2d 161, 164, 198 NE 2d 359, 162; Cheatum v. Wehle, 5 NY 2d 585, 593, 186 NYS 2d 606, 611, 159 NE 2d 166, 170; and Follendorf v. Brei, 50 Misc. 2d 363 (1966)]. Based upon the decisions cited above, I believe that a public official is generally absolutely immune from liability when he or she discloses information in the performance of his or her official duties, even if the information is defamatory.

I hope that 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-551
FOIL-AO-1743

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

October 29, 1980

Mr. Richard A. Ferriolo
Board of Education
Greenville Central School District
R.D. 1, Box 82
Greenville, New York 12083

Dear Mr. Ferriolo:

As you are aware, I have received your letter of October 9. Please accept my apologies for the delay in response.

Your correspondence raises several questions regarding the implementation of the Open Meetings Law by the Board of Education of the Greenville Central School District.

To be more specific, based upon a letter dated July 10 sent to Commissioner Ambach, you indicated that in June, as president of the Greenville Central School Board, you requested that a special meeting of the Board be called in order to "bring peace and reconciliation" to the school district. However, the Board apparently "pressured" you to cancel the meeting, and, in fact, adopted a by-law stating that "special meetings of the Board of Education should be held only with majority Board approval".

In my opinion, the by-law adopted by the Board is of no effect, for it conflicts with the direction provided by the Education Law. Specifically, §1606(3) states that "[A] meeting of the board may be ordered by any member thereof, by giving not less than twenty-four hours' notice of the same." In view of the provision quoted above, consent by a majority of the Board is not necessary to convene a special meeting, for any member of the board could convene such a meeting by giving at least twenty-four hours notice to the other members.

You have questioned the capacity of the Board to take action behind closed doors with respect to four resolutions. In this regard, I would like to review particular provisions of the Open Meetings Law and the Education Law.

First, it is emphasized that the Open Meetings Law permits a public body, such as a school board, to enter into executive session only to discuss matters deemed appropriate for executive session that are enumerated in §100(1)(a) through (h) of the Law. Unless a discussion concerns one or more of the eight enumerated subjects, the deliberations of the Board must be conducted in public. Further, the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean that portion of an open meeting during which the public may be excluded. Moreover, §100(1) of the Law requires that a public body follow a procedure prior to entry into an executive session. Specifically, 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..."

In view of the foregoing, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. It is also clear that a motion to enter into executive session must be made during an open meeting, that the motion must identify in general terms the subject matter to be considered during an executive session, and that a motion to enter into executive session must be carried by a majority of the total membership of a public body.

The minutes of the executive session held on June 16 indicate that four resolutions were adopted during the executive session. In brief, the resolutions dealt with, first, a cancellation of a proposed meeting, second, the holding of special meetings of the Board only with "majority Board approval", third, that the Board of Education will pursue disciplinary action if a Board member does not comply with a determination made by a majority of the Board, and fourth, that the chief school officer and the business manager would be directed not to assist "in the planning or implementation or attendance of the proposed...meeting".

In my opinion, none of the four resolutions fell within the scope of any of the grounds for executive session appearing in §100(1)(a) through (h) of the Open Meetings Law. Consequently, it is my view that the subject matter of each of the resolutions should have been discussed during an open meeting in full view of the public and that the Open Meetings Law was violated due to the lack of authority of the Board to consider those topics during an executive session.

In a related vein, you asked whether the School Board could take action during executive session. As a general rule, a public body may take action or vote during a properly convened executive session, unless the vote is to appropriate 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 (see attached) requires to 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 minutes of meetings, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) concerns minutes of open meetings and requires that they consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the date and vote. Subdivision (2) concerns minutes of executive sessions and states that such minutes must consist of a record indicating the nature of a determination made behind closed doors. Again, however, a school board may not generally vote during an executive session due to the provisions of §1708(3) of the Education Law. Consequently, minutes of executive sessions generally need not be compiled by a board of education, for its actions must be taken during open meetings.

I hope that I have been 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: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1744

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

October 30, 1980

Mr. Joseph G. Rose
Clerk-Treasurer
Village of Great Neck
61 Baker Hill Road
P.O. Box "A"
Great Neck, NY 11023

Dear Mr. Rose:

Thanks for your letter of October 17.

Enclosed as requested are copies of the advisory opinions in which you are interested.

I assume that your comments regarding disclosure of the identity of complainants arose in conjunction with the MacHacek decision. From my perspective, it is unclear why the court stopped short of permitting the deletion of that portion of a complaint indicating the identity of a complainant. This office has consistently advised that the substance of a complaint is available, but that any identifying details regarding a complainant may be deleted on the ground that disclosure would result in "an unwarranted invasion of personal privacy". I believe that in some instances, the disclosure of the identity of a complainant could indeed result in "economic or personal hardship". Further, I do not believe that the identity of a complainant is necessary or relevant to the work of the agency that receives a complaint. In brief, the agency is concerned with whether or not the complaint has merit; who makes the complaint is in my view largely irrelevant.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1745

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

October 31, 1980

Ms. Debbie Frank
New York Public Interest
Research Group, Inc.
University Union
SUNY at Binghamton
Binghamton, NY 13901

Dear Ms. Frank:

I have received your letter of October 9 in which you requested assistance regarding your capacity to request or identify records of the State Education Department regarding the Truth-in-Testing Law.

According to the correspondence attached to your letter, which does not specifically indicate the nature of the information that you are seeking, the Education Department does not maintain "a detailed list of documents submitted" relative to the Truth-in-Testing Law. You have asked whether the response given by the Education Department is reflective of compliance with the Freedom of Information Law, particularly §87(3)(c).

As you are aware, the cited provision of the Freedom of Information Law states that each agency shall maintain:

> "a reasonably detailed current list by subject matter, of all records in possession of the agency, whether or not available under this article."

In this regard, I have not seen the Education Department's subject matter list. Consequently, I could not conjecture as to its sufficiency. Nevertheless, it is clear that the subject matter list envisioned by the Freedom of Information Law is not required to identify particular records. From my perspective, such a list should identify the categories of records in possession of an agency. Further, §1401.6(b) of the regulations promulgated by the Committee (see attached),which have the force and effect of law, states that:

> "[T]he subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

In view of the foregoing, I believe that the Education Department is required to include in its list sufficient detail to permit you to identify "the category" of a record sought.

In the third paragraph of Mr. Bower's letter, a breakdown of the types of materials maintained regarding the Truth-in-Testing Law was described. Based upon his response, it might be possible to identify the categories of information in which you are interested.

It is also noted that, in making a request, §89 (3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. Consequently, when a request is made, an applicant need not identify specific records in which he or she is interested. It is also noted that §1401.2(b)(ii) of the Committee's regulations requires that the designated agency records access officer "assist the requester in identifying the requested records, if 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

Enc.

cc: David R. Bower
Gene Snay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1746

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

October 31, 1980

Mr. John Kaufmann
Executive Director
Saratoga County Economic
Opportunity Council
510 North Broadway
Saratoga Springs, NY 12866

Dear Mr. Kaufmann:

I have received your letter of October 2 and apologize for the delay in response.

Your inquiry raises several questions regarding a denial of access to records by the Department of Social Services. Specifically, the Department has withheld a draft relative of the "results and determinations" of an investigation that you precipitated. Although the draft was withheld, a final report, a copy of which was sent to me, has been made available. You have contended that the draft that was used as the basis for the final report, but which is apparently different in content in many respects, should be available in toto or at least in part.

Based upon the information that you have provided, particularly as it relates to a conference held with Department officials to review the draft, I must concur with your contention.

First, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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.

Second, even though the information sought may exist in the form of a "draft" or used solely for purposes internal to an agency, it constitutes a "record" subject to rights of access granted by the Law. It is

noted that §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..."

Third, it appears that there are two relevant grounds for denial with respect to the records that you are seeking.

The initial ground for denial, which is the focal point of your inquiry, is §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold 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 language quoted above contains what in effect is a double negative. Although inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations are available.

Under the circumstances, the document in question could clearly be characterized as "intra-agency" material. However, to the extent that it contains "statistical or factual tabulations or data" (emphasis supplied), it is in my view available. It appears doubtful that a draft would contain instructions to staff that affect the public or final agency statements of policy or determinations, for the document in draft form was not final.

In my view, §87(2)(g) is intended to enable an agency to withhold those portions of inter-agency or intra-agency materials that are reflective of advice, recommendations, suggestions, or impressions, for example. Therefore, if the draft contains recommendations analogous to those appearing in the final report, those portions of the draft could justifiably be withheld.

Further, it is important to emphasize that I have neither reviewed nor do I have the authority to review the draft in question. Consequently, my remarks regarding the contents of the draft report in conjunction with §87(2)(g) should be considered conjectural in nature. Again, however, I believe that those portions of the draft report consisting of statistical or factual information are available.

A second ground for denial with which you have taken issue concerning §136 of the Social Services Law. In brief, that provision precludes the Department of Social Services from disclosing any records that identify either an applicant for or a recipient of public assistance. You have contended that, since you are "acting as the representative" of some sixty-one individuals who have lodged complaints against the Saratoga County Department of Social Services, you cannot understand how disclosing information pertaining to those who you represent would violate the provisions of §136 of the Social Services Law. I would agree with your contention if an applicant for or a recipient of public assistance had the legal authority to waive confidentiality with respect to records pertaining to him or her. However, I do not believe that §136 of the Social Services Law permits the subject of a record to waive confidentiality. Unless I am mistaken, an applicant or a recipient has no "right" to gain access to records pertaining to him or her from either the State or County Department of Social Services. Section 357.3 of the regulations promulgated by the Department of Social Services indicates that a social services agency may, but need not disclose portions of a case record to an applicant or a recipient. Consequently, applicants and recipients have no "right" to records pertaining to them. Therefore, it does not appear that they could confer any "right" of access to you acting as their representative.

Assuming that §136 of the Social Services Law is applicable in part due to the inclusion of the identities of applicants for or recipients of public assistance in the draft report, I believe that any identifying details concerning those individuals could be deleted. The rationale for the deletions is based upon §87(2)(a) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof that "are specifically exempted from disclosure by state or federal statute." In this case, the state statute requiring non-disclosure is §136 of the Social Services Law.

You have also asked for my opinion regarding positions which in your opinion have been taken by the Department of Social Services.

First, you wrote that you feel that Mr. Wynn "appears to believe" that the burden of proof rests upon you to demonstrate that the information requested is available. If that is the case, I disagree with Mr. Wynn. The structure of the Freedom of Information Law places the burden of reviewing records and determining rights of access upon an agency. The introductory language of §87(2), as indicated earlier, states that all records are available, except those records or portions thereof falling within one or more grounds for denial. Therefore, when an agency receives a request for a record, it is obliged to review the records sought in their entirety to determine which portions, if any, fall within the grounds for denial.

Second, you also wrote that the Department has "apparently" required you to "specifically identify" the documents that you are seeking. The original Freedom of Information Law enacted in 1974 required that an applicant request "identifiable" records. However, in many instances, if an applicant was not sure of the particular record that he or she was seeking, that person could not identify the records. In order to assist the public in asserting its rights under the Freedom of Information Law, the Law was amended in 1977. Among the amendments that became effective on January 1, 1978, included a reversal of the burden of identifying records. Section 89(3) of the Law now states that an applicant is required to request "a record reasonably described". Therefore, it is clear that an applicant need not identify a record sought with particularity; he or she now must merely reasonably describe the records sought. In addition, as you indicated in your letter, the regulations promulgated by the Committee, require that a designated records access officer assist the requester in identifying the records sought, if necessary [see regulations, §1401.2(b)(ii)].

Lastly, you wrote that the Department of Social Services "has consistently ignored the time constraints imposed by the statute".

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Wynn

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1747

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

November 3, 1980

Mr. Robert F. Reninger
[redacted]

Dear Mr. Reninger:

I have received your letter of October 12, which again concerns your request directed to the Greenburgh Central School District.

According to your letter, you initially requested information concerning whether a particular individual provided services to the School District as a substitute or student teacher. You have contended that your question was clear, despite the responses given by Ms. Myrna Freyman, the District's Records Access Officer.

In all honesty, I do not feel that I could appropriately state that the actions of the School District have in your words constituted "a clear violation of not only the intent and spirit but also the mandates of the 1974 Freedom of Information Law." Very simply, each time I receive a communication from you or the District, new facts are provided which had previously been unknown to me. For instance, until receiving your letter of October 12, I had no idea of what type of information you requested; all I had were copies of correspondence exchanged between you and the District concerning the means by which the request was made. Unfortunately, without the total background, I can only respond to the facts presented to me, which are often incomplete, as in this case.

Having reviewed your letter of August 15, I would like to offer the following comment. As stated in previous letters addressed to you and Ms. Freyman, it is reiterated that, as a general rule, an agency need not create a record in response to a request. In this regard,

in the future, it is recommended that your requests for records be phrased differently. Your letter of August 15 raises a question; it does not seek records or portions of records as written. It is suggested that the form of the request found in the Committee's pamphlet, a copy of which is enclosed, might avoid such situations in the future. Rather than seeking "information" by raising questions, an applicant should in my view request records or portions of records concerning whatever the subject matter might be. If, for example, you requested records or portions thereof reflective of payment to a particular individual between particular time periods, perhaps such a request would have "reasonably described" the records sought and would have met the requirements of the Law. Further, I believe that such a request would not be considered unclear by District officials.

Lastly, although you may have had difficulty in dealing with the District in conjunction with your request, it is suggested that you contact Ms. Freyman and explain the problem in full. I am sure that she and other District officials will do their best to assist you and to comply with the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Ms. Myrna Freyman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 1748

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

November 3, 1980

Mr. Gerald A. Lennon
Jacobowitz and Gubits
158 Orange Avenue
P.O. Box 367
Walden, New York 12586

Dear Mr. Lennon:

I have received your letter of October 13 which, in brief, concerns rights of access to records reflective of the fee arrangements between a school district and its attorney.

You have asked whether such records are available under the Freedom of Information Law and whether a request would, under the circumstances, violate the Code of Ethics, DR7-104.

It is noted that I have neither the expertise nor the authority to render an opinion pertaining to questions concerning ethics. Consequently, the ensuing remarks will deal only with the interpretation of the Freedom of Information Law.

With respect to access to records regarding the payment of attorneys by government, it has been consistently advised that such records are available. Although a municipal board may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies paid 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 a municipal 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, records reflective of fee arrangements as well bills sent to and paid by a municipal board with respect to its attorney are in my view accessible under the Freedom of Information Law.

Lastly, it is noted that the Freedom of Information Law does not distinguish among applicants in terms of rights of access. Stated differently, it has been held 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]. Consequently, it would appear that the records in question could be requested by and made available to any person.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Warwick Valley Central School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1749

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

November 3, 1980

[redacted]

Dear [redacted]:

I have received your letter of October 13 concerning a request for records directed to the Department of Motor Vehicles.

Specifically, you have requested all records pertaining to you in possession of the Department. You indicated that the information is vital, for you have received a notice from the Department that your license might be suspended if you fail to supply certain information. In addition, you wrote that in your judgment, the notice is based upon incorrect information that may be contained in records of the Department of Motor Vehicles. Nevertheless, Department officials informed you that the records that you are seeking do not exist, and that the only record of your driving history was the computerized information provided to you.

In my opinion, any existing records pertaining to you concerning your driving record should likely be made available under the Freedom of Information Law. However, in view of the responses given by the Department, it is questionable whether those records exist. In many instances, individual records upon which computer information might be based are destroyed after specific periods of time. Ofter records are destroyed in order to prevent future disclosures of information that may no longer be relevant to an individual. For example, if I were involved in a violation of the Vehicle and Traffic Law some fifteen years ago, but had had an unblemished driving record since that time, the original record of the violation if made available now might in some fashion be used against me. Nevertheless, since the violation would have occurred so long ago, it may be expunged from the records in order to prevent exactly that type of eventuality.

From my perspective, if the Department continues to assert that the records that you are seeking do not exist, the only tool that you can use under the Freedom of Information Law is that found in §89(3). In relevant part, the cited provision states that an agency shall, upon request "certify that it does not have possession of such record that that such record cannot be found after diligent search". It is suggested that you request such a certification, for it may result in an additional search by the Department and offer you a degree of protection in the future.

Although I would be pleased to meet with Department representatives on your behalf, I am not sure that there is anything that I could do. However, a copy of your letter will be sent to Joyce Wrenn, an attorney for the Department with whom I have had many dealings and who is familiar with the Freedom of Information Law. Perhaps, based upon review of your letter and my correspondence, she can assist 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Joyce Wrenn

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1750

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

November 5, 1980

Mr. Robert E. Mills
[redacted]

Dear Mr. Mills:

I have received your letter of October 14 concerning your unsuccessful efforts to gain access to contracts into which the William Floyd School District has entered, as well as related materials. You wrote further that Mr. James Wright has been "more than helpful" in responding to your requests for records, but that Mr. Poulos "has been stalling on all matters". Your question is whether Mr. Poulos has "the right to ignore the public" when requests are made under the Freedom of Information Law.

In my opinion, any contracts entered into by the William Floyd School District, as well as records reflective of the status of accounts, are available under the Law.

The Freedom of Information Law is based upon a presumption of access. All records of an agency, such as a school district, are available, except to the extent that records or portions thereof fall within one or more grounds of denial appearing in §87(2)(a) through (h) of the Law. Based upon the information that you have provided, none of the grounds for denial would be applicable with respect to the records that you have identified.

With regard to contracts, very simply, there is no basis for withholding such records among the eight grounds for denial listed in the Law. Further, a contract is reflective of a final determination made by the District and would clearly be available on that basis.

The other records that you are seeking concerning the status of accounts are in my view also available. In this regard, I direct your attention to §87(2)(g) of the Freedom of Information Law, which in my view effectively requires that the information that you are seeking be made available. The cited provision states that an agency may withhold 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 language quoted above contains what in effect is a double negative. While an agency may withhold inter-agency and intra-agency materials, it must grant access to statistical or factual data, instructions to staff that affect the public, or final agency policies or determinations found within such materials.

Under the circumstances, books of account could be considered "intra-agency" materials. Nevertheless, the information that you are seeking consists of "statistical or factual tabulations or data" that must be made available under §87(2)(g)(i). Consequently, I believe that the information in which you are interested must be made available.

Further, it is emphasized that agency officials cannot "ignore" requests for records made under the Freedom of Information Law.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and 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
Executive Director

RJF:ss

Enclosures

cc: Mr. J. Wright
Mr. Poulos

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1751

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

November 6, 1980

Mr. Alfred O. Carlsen
[redacted]

Dear Mr. Carlsen:

I have received your letter of October 15 and apologize for the delay in response. In addition, Secretary Paterson has also received your letter and transmitted it to this office.

Your correspondence indicates that you have requested records from John Magoolaghan, the Freedom of Information Officer of the Pilgrim Psychiatric Center, which indicate whether or not you attended an "investigative meeting" that dealt with the Pilgrim Psychiatric Center Youth Hope Program. You have stated that, although your request was directed to Mr. Magoolaghan on October 2, no response has been provided to you as yet.

First, with regard to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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 Freedom of Information Law. Under the circumstances, if a record exists that would indicate your presence or absence from the meeting that you described, I believe that it would be available to you at least in part, if not in toto.

Perhaps the most relevant ground for denial under the circumstances could also be cited as a basis for disclosure. Specifically, I direct your attention to §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold 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 language quoted above contains what in effect is a double negative. While inter-agency and intra-agency material may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Under the circumstances, minutes or similar records of the meeting could be characterized as "intra-agency" materials. However, a listing or indication of those who attended would constitute factual data that is available. Consequently, if there is a record that indicates that you attended the meeting in question, that portion of the record, at the very least, should be made available to you if it exists.

It is noted that there may be other grounds for denial that might appropriately be asserted with respect to other portions of the minutes or the records of the meeting. For instance, §87(2)(b) states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy. Since I am unaware of the contents of its records, I do not know what the effects of disclosure might be in terms of privacy. However, it is possible that identifying details might justifiably be deleted. In addition, §87(2)(a) of the Freedom of Information Law states that an agency may deny access to records that are "specifically exempted from disclosure by state or federal statute". In this regard, §33.13 of the Mental Hygiene Law provides in brief that records that identify patients in mental hygiene facilities are confidential. Therefore, portions of records concerning the meeting which identify patients could be deleted.

It is noted further that, as a general rule, an agency is not required to create a record in response to a request [See Freedom of Information Law, §89(3)]. The cited provision, however, also enables you to request and obtain a certification made in writing to the effect that records sought are not maintained by the agency if such an assertion is made.

Lastly, with regard to Mr. Magoolaghan's apparent failure to respond to your request, it is noted that the Freedom of Information Law requires that responses to requests be given within particular time limits. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt or a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

The same information will be sent to Mr. Magoolaghan.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Mr. Magoolaghan

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

November 7, 1980

Mr. Robert J. Puryear
80-A-29
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

Dear Mr. Puryear:

I have received a copy of your application for a motion requesting a sentence and pleading transcript.

I am not sure why you sent the information to the Committee on Public Access to Records. As you may be aware, the Committee is responsible for giving advice with respect to the Freedom of Information Law. It does not have possession of records generally, nor does it have the authority to compel an agency to disclose records. Moreover, the Freedom of Information Law specifically exempts the courts and court records from its coverage [see attached Freedom of Information Law, §§86 (1) and (3), which respectively define "judiciary" and "agency"].

If I can be of assistance to you, 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-1753

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

November 7, 1980

Samuel William Tucker
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

Dear Mr. Tucker:

I have received a copy of your Affidavit of Service, which concerns an inability to gain access to records of your trial and sentencing.

I am not sure why you sent the information to the Committee on Public Access to Records. As you may be aware, the Committee is responsible for giving advice with respect to the Freedom of Information Law. It does not have possession of records generally, nor does it have the authority to compel an agency to disclose records. Moreover, the Freedom of Information Law specifically exempts the courts and court records from its coverage [see attached Freedom of Information Law, §§86 (1) and (3), which respectively define "judiciary" and "agency"].

If I can be of assistance to you, 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-1754

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

November 7, 1980

Willie James Smith
78-C-551
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

Dear Mr. Smith:

I have received a copy of your Affidavit of Service, which concerns an inability to gain access to records of your trial and sentencing.

I am not sure why you sent the information to the Committee on Public Access to Records. As you may be aware, the Committee is responsible for giving advice with respect to the Freedom of Information Law. It does not have possession of records generally, nor does it have the authority to compel and agency to disclose records. Moreover, the Freedom of Information Law specifically exempts the courts and court records from its coverage [see attached Freedom of Information Law, §§86 (1) and (3), which respectively define "judiciary" and "agency"].

If I can be of assistance to you, 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- 1255

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

November 7, 1980

Richard L. Sotir, Jr.
Corporation Counsel
City of Jamestown
Municipal Building
Jamestown, NY 14701

Dear Mr. Sotir:

I have received your letter of October 16 and thank you for your thoughtful comments.

In brief, the controversy in which we were involved dealt with access to budget proposals submitted by department heads to the Mayor of the City of Jamestown.

I agree that there is room for disagreement from our respective perspectives, which are based upon reasonable interpretations of the Law. However, I would like to offer two comments.

First, nowhere in your letter did you cite the holding in Dunlea v. Goldmark [380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)]. It is true that in Dunlea, the court dealt with a situation in which records were sought after a budget had been adopted. Nevertheless, in its current form, I do not believe that the Freedom of Information Law distinguishes the status of "statistical or factual tabulations or data" sought before or after a budget might be adopted. Stated differently, if projections constitute statistical tabulations now, they forever remain statistical tabulations, whether or not they are adopted or used in a final statement of policy.

Second, as noted in my earlier letter to Mr. Martelle, I believe that the Appellate Division in Delaney v. DelBello inappropriately relied upon regulations adopted by the State Division of the Budget, which had no bearing on and no relationship to records in possession of Westchester County. Further, I believe

that the court failed to recognize that the regulations upon which it relied were implictly invalidated in Dunlea, which, as you are aware, was affirmed by the Court of Appeals.

Finally, I agree with your contention that additional case law is necessary to clarify the situation. Unfortunately, I feel that it is unlikely that such case law will be rendered, for the public often loses interest in background projections or proposals after a final budget has been adopted.

Once again, I thank you for your letter. If I can be of assistance, 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-555
FOIL-AO-1756

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

November 7, 1980

Mr. Roger French
Longvale Homeowners' Association
P.O. Box 177
Centuck Station
Yonkers, New York 10710

Dear Mr. French:

I have received your letter of October 16 concerning requests for copies of minutes of a meeting held on September 4 by the Yonkers Municipal Housing Authority. As of the date of your letter, you have had no reply.

Although the Freedom of Information Law governs rights of access to records, the Open Meetings Law specifies the time limits for the compilation of minutes of meetings of public bodies.

In terms of rights of access, minutes of meetings are generally available under the Freedom of Information Law, for they are reflective of final determinations made by an agency [See Freedom of Information Law, §86(3)], and as such are available under §87(2)(g)(iii).

With regard to the time limits for the preparation of minutes, I direct your attention to §101 of the Open Meetings Law. It is noted that the requirements concerning the contents of minutes differ between minutes of open meetings and minutes of executive sessions. In the case of the former, §101(1) of the Open Meetings Law requires that minutes consist of a record or summary of "all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon". Section 101(2) concerning minutes of the executive sessions states that those minutes shall consist of a record or summary of the final determination of such action, and the date and vote thereon. Subdivision (3) of §101 states that minutes are available in accordance with the Freedom of Information Law, and requires that minutes of open meetings be compiled and made available within two weeks of the date of such meetings, and that minutes of executive sessions be compiled and made available within one week of the executive sessions.

The committee has recognized that in some instances a public body might not meet to approve or make official minutes within the periods of time specified in §101(3). However, it has consistently been advised that the minutes be made available within the prescribed time periods, but that they may be marked as "draft", "unofficial", or "non-final", for example. By so doing, the public has the capacity to learn generally what transpired at a meeting and, concurrently, the members of the public body 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:ss

cc: Mr. Emmett Burke

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1757

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

November 7, 1980

Ms. Lea Zauderer
[redacted]

Dear Ms. Zauderer:

I have recently received your letter of October 17. You wrote that you are an owner and tenant at 749 West End Avenue in New York City and that two "squatters" have recently moved into your building. You wrote further that you are concerned that the "squatters" are involved in "illegal business".

You have requested information from the Police Department concerning a visit by the police on September 18 and have written to this office in order to gain access to criminal records that may exist with respect to the two individuals that you named as "squatters".

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. The Committee does not have possession of records generally, such as the records in which you are interested, nor does it have the authority to require an agency to disclose records.

In addition, I believe that the regulations of the Division of Criminal Justice Services, which maintains criminal history records, prohibit the disclosure of such information to all but other law enforcement agencies.

Nevertheless, if, as you indicated, police officers were at the apartment of the "squatters" on September 18, a record of their visit might be found in a police blotter or an incident report, for example. In my opinion, such records would be available under the Freedom of Informa-

tion Law. It has been held that a police blotter consists of a log or diary in which any event reported by or to a police department is recorded and that such logs or diaries are available [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

In addition, I have contacted the Legal Division of the New York City Police Department on your behalf in order to attempt to provide you with direction. I was informed that if indeed the two individuals named in your letter are "squatters", the best course of action would involve calling your local precinct and asking that the appropriate steps be taken to remove the two individuals from the building.

I regret that I cannot be of greater assistance. Should anyffurther 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-1258

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

November 12, 1980

Nancy Bruns
United States Dept.
of Justice
5259 Main Justice Building
Washington, D.C. 20535

Dear Ms. Bruns:

Thank you for your assistance regarding my inquiry relative to the use of the Freedom of Information Act.

As promised, enclosed are materials for your consideration regarding the New York Law and our experience with the Law. The materials include:

-the Freedom of Information Law;

-regulations that govern the procedural aspects of the Law;

-an explanatory pamphlet concerning both the Freedom of Information and Open Meetings Laws;

-a "common sense" article that I wrote concerning the Freedom of Information and Open Meetings Laws; and

-the first three pages of the Committee's 1979 annual report to the Governor and the Legislature, which contain a discussion of the use of the Law and the role of the Committee.

It is possible that the portion of the annual report may be sufficient for your purposes. However, I have prepared the following text that may be used for an article if the other materials are too lengthy or difficult to edit.

The New York Freedom of Information Law was enacted in 1974 as part of a nationwide trend toward ensuring governmental accountability. In its initial version, the Law granted access to records falling within specified categories of available records, to the exclusion of all others. Based upon that deficiency, a new statute became effective in 1978 that essentially reversed the logic of the original law. In brief, as in the case of the federal Act, the New York Law states that all records are available, except those records or portions thereof that fall within one or more grounds for denial. As a general rule, the Law states that records are accessible unless disclosure would in some way "hurt" somebody or some governmental process.

It has been contended by many that the New York Freedom of Information Law as amended removes problems that had arisen under the federal Act. For example, the New York Law contains a definition of "record"; the exception regarding trade secrets contains standard upon which government and commercial enterprise can rely in terms of guidance; to allay the fears of law enforcement officials, an exception was placed on the Law enabling an agency to withhold any records, not only those compiled for law enforcement purposes, which if disclosed would "endanger the life or safety of any person". In short, New York attempted to remedy the apparent deficiencies in the federal Act.

Perhaps the most unique aspect of the New York Law is creation of a Committee on Public Access to Records. The Committee consists of ten members, four of whom are ex officio state agency heads, and six of whom are representatives of the public. The Law also specifies that at least two of the public members must be representatives of the news media.

The Committee has taken on the role of what might be described as ombudsman. The Committee provides advice either orally or in writing to anyone having a question regarding rights of access to records. In 1980, it is estimated that the Committee will respond to approximately 6,000 oral inquiries. In addition, some 600 written advisory opinions will have been prepared by the end of the year. Although the Committee's advice is not legally binding, the courts have cited the opinions as the basis for their own with increasing frequency. Consequently,

the role of the Committee as mediator and educator has been enhanced.

Further, it is clear that the news media has come to rely upon the Committee for advice and direction. In many instances, a reporter "uses" the Committee in order to ensure that records are made available. Reporters often call knowing what the response will be in order to print the opinion in a local newspaper. Often the publication of an opinion has the effect of encouraging government officials to comply with the Law. The Committee's experience also indicates that the greatest users of the Law are those intended to use it--the public and the media.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

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

November 12, 1980

Thomas P. O'Connor
[redacted]

Dear Mr. O'Connor:

I have received your letter of October 19 and apologize for the delay in response.

In brief, you are interested in obtaining records pertaining to you that may be in possession of the State Police. You mentioned in your letter that you would send copies of the rejections of your requests made by the State Police. If you could send copies of that background information, I could respond more appropriately to your inquiry.

Nevertheless, I would like to offer the following comments. First, in order to make a request under the Freedom of Information Law, an agency may require that an applicant request records in writing. The Law does not require that an applicant identify the records sought in detail; on the contrary, §89(3) of the Law states that an applicant must merely "reasonably describe" the records sought. In addition, the regulations promulgated by the Committee, which govern the procedural aspects of the Law, require that the designated records access officer of an agency "assist the requester in identifying requested records, if necessary" [see attached regulations, §1401.2(b)(2)].

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except those records or portions thereof that fall within one or more enumerated grounds for denial. As a general rule, the grounds for denial are based upon potentially harmful effects of disclosure.

Based upon our telephone conversation, it would appear that two of the grounds for denial might be cited for withholding by the State Police. However, I am not sure that either ground for denial could properly be asserted.

Specifically, §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".

Under the circumstances, it does not appear that the grounds for denial quoted above would be applicable, for any investigation that there may have been has likely been terminated. Further, there is no indication that there will be any trial or other type of proceeding.

A second ground for denial is §87(2)(g), which states that an agency may withhold 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..."

It is noted that the provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policies or determinations must be made available. In this instance, it appears that records compiled by the State Police pertaining to you could be characterized as "intra-agency" materials. However, to the extent that they contain statistical or factual data, for example, they must be made available to you.

Again, if you can provide me with more specific direction regarding the types of records sought and nature of the responses by the State Police, I would be in a better position to provide advice.

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:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1760

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

November 14, 1980

Mr. Milton Levine
[redacted]

Dear Mr. Levine:

As you are aware, I have received materials related to your unsuccessful efforts in gaining access to records of the New York City Department of Environmental Protection.

In brief, you have been involved in a situation in which you submitted several complaints to the Department regarding the noise made by a roof air exhaust duct used by a restaurant located just outside your apartment. The materials indicate that your complaints resulted in investigations by City air resources inspectors, who concurred that violations had been committed and apparently imposed fines upon the owner of the restaurant. However, the noise has continued and you have attempted to gain access to records concerning the steps taken by the Department of Environmental Protection in relation to your complaints and the violations.

I would like to offer the following comments with respect to the controversy.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Department of Environmental Protection, are available, except to the extent that records or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

From my perspective, the records pertaining to the controversy are likely available in great measure, if not in toto.

Second, the only ground for denial that I can envision with respect to the records that you are seeking is §87(2)(g) of the Freedom of Information Law. However, that provision in my view also may be cited as a basis for advising that the records must be made available. Specifically, §87(2)(g) states that an agency may withhold 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..."

It is important to note that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, it appears that the records that you are seeking could be characterized as "intra-agency" materials. Nevertheless, I would conjecture that the majority of the records in which you are interested consist of "statistical or factual tabulations or data" or determinations made by the agency.

For instance, tests that may have been taken regarding the noise produced by the duct would constitute "factual data" and would be available. Assuming that investigators completed inspection reports, their reports would likely consist of factual data that would be available. Findings that violations had been committed or that fines should be assessed would also be available, for such records would be reflective of final determinations. Consequently, based upon the facts as you have described them, it appears that virtually all of the information that you are seeking, to the extent that it exists, is available under the Freedom of Information Law.

Third, it is noted that, as a general rule, the Freedom of Information Law does not require an agency to create or compile records on behalf of an applicant [see attached Freedom of Information Law, §89(3)]. Therefore, if information sought does not exist in the form of record or records, an agency is not obligated to create a record on behalf of an applicant.

Fourth, an applicant may seek a written certification from an agency to the effect that records sought are not maintained by the agency or that records sought do exist but cannot be found after having made a diligent search [see §89(3)]. It is suggested that you seek such a certification from the Department.

Fifth, the process of using the Freedom of Information Law should not be what one might characterize as a "hit and miss" proposition. 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, require that the head or governing body of an agency must designate one or more records access officers and an appeals officer by name or title. Consequently, when a request is made under the Freedom of Information Law, an applicant should have the capacity to know and identify the person or persons to whom the request should be directed. Further, in the event of a denial, the reasons for a denial should be stated in writing and the applicant must be apprised of his or her right to appeal.

Lastly, the Freedom of Information Law and the regulations prescribe specific time limits for response to a request. Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt or a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and 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
Executive Director

RJF:ss

Enclosures

cc: Mr. Allen Zetterberg

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1761

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

November 17, 1980

Mr. Charles Derderian
[redacted]

Dear Mr. Derderian:

I have recently received your letter of October 17. You wrote that you are interested in obtaining information from the New York City Employees' Retirement Systems regarding accidental disability and from the Law Department concerning workmen's compensation.

Without more specific information regarding the nature of the information that you are seeking, I can only provide you with general direction.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the New York City Employees' Retirement Systems or the City or State Law Department, are available, except to the extent that records or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation with which all agencies must comply, and an explanatory pamphlet on the subject that may be useful to you.

It is noted also that each agency is required to designate one or more persons as "records access officer". The records access officer has the duty of responding to requests made under the Freedom of Information Law. It is suggested that you contact the agencies in question in order to determine the identity of the records access officers. In addition, the enclosed pamphlet contains model letters of request and appeal that may be useful to you.

Lastly, your letter made reference to a privacy act. Please be advised that there is no "privacy act" that has yet been enacted in New York. There is, however, a federal Privacy Act which concerns records in possession of federal agencies.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1762

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

November 19, 1980

Mr. Peter Michael Lovi
Staff Assistant
Town of Ithaca
126 East Seneca Street
Ithaca, New York 14850

Dear Mr. Lovi:

I have recently received your letter concerning the implementation by the Town of Ithaca of a records management inventory. You have asked for materials relative to the requirements of the Freedom of Information Law (see attached) regarding the implementation of the State's retention and disposition schedule.

Please be advised that the Freedom of Information Law concerns only access to records. It does not deal in any way with the retention and disposal of records.

The only provision of the Freedom of Information Law that would have a bearing upon records management is §87(3)(c), which states that each agency shall maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

In view of the foregoing, the Freedom of Information Law requires that an agency develop a list by category of the records in its possession, whether or not they are available. Having seen several schedules for the retention and disposal of records, I believe that such schedules are generally far more detailed than a subject matter list must be.

Perhaps it would be appropriate to contact the State Education Department, which devises schedules regarding the retention and disposal of records. I suggest that you contact Kenneth Brock at the State Education Department, Archives, Cultural Education Center, Albany, New York 12230. Mr. Brock can be reached at (518) 474-6928.

I regret that I cannot be of greater assistance. Should any questions arise regarding access to records, 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-1763
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 20, 1980

Mr. David J. Mack
Records Access Officer
Department of Social Services
40 North Pearl Street
Albany, NY 12243

Dear Mr. Mack:

As you are aware, I have received your letter of October 20. Please accept my apologies for the delay in response.

You have requested an advisory opinion regarding a request for records made by the Electronic Data Systems Corporation. In pertinent part, the applicant wrote that:

> "[I] am formally requesting a copy of the proposals submitted by Bradford National Corporation to administer the Medicaid program in New York City and upstate New York. I am also requesting a copy of the contracts entered into by the State of New York with Bradford for the program's administration".

You have indicated that, in response to the request, the Department has granted access to the contract instrument. However, you have requested advice with respect to rights of access to related documentation, specifically, the proposals submitted by the Bradford National Corporation that pertain to the contract.

Without having seen the records in question, and without having personal technical expertise , I feel that only general direction can be provided. Nevertheless, it is hoped that the ensuing comments will be helpful to you.

First, the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the Department of Social Services, 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 Freedom of Information Law.

Second, §86(4) of the Law defines "record" broadly 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..." Consequently, the documents in possession of the Department reflective of the records sought constitute "records" as defined by the Law that are subject to rights of access.

Third, 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. Therefore, an agency is obligated to review records sought in their entirety to determine the extent to which any of the grounds for denial might be properly asserted.

Fourth, under the circumstances described in your letter and a conversation with Thomas Murray of the Office of Counsel, it appears that three grounds for denial might be applicable to the records or portions of the records in question.

Section 87(2)(d) of the Freedom of Information Law 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..."

From my perspective, the rationale for the exception quoted above, as well as the majority of the other exceptions to rights of access in the Freedom of Information Law, is obvious. In my view, the Freedom of Information Law essentially provides that all records are available, unless disclosure would in some way damage a person, a governmental process, or, as in this instance, a corporation.

Moreover, as you may be aware, the New York Freedom of Information Law as amended was enacted after the revised federal Freedom of Information Act had been in effect for

for approximately three years. Efforts of both the Committee on Public Access to Records and the State Legislature to improve the original Freedom of Information Law enacted in 1974 were based in part upon the experience of the federal Freedom of Information Act. In several areas, attempts were made in New York to improve p n the federal Act or to correct apparent errors or deficiencies within that Act.

In my opinion, one of the areas of deficiency in the federal Act involves the language of its "trade secret" exception.

The federal Freedom of Information Act permits the withholding of trade secrets under a standard which is vague and has been the subject of hundreds of lawsuits. Section 552(b)(4) of the federal Act provides that a federal agency may withhold:

> "trade secrets and commercial or . financial information obtained from a person and privileged or confidential".

The New York Freedom of Information Law, however, contains a standard based upon harmful effects of disclosure, i.e. "substantial injury to the competitive position of the subject enterprise". Further, while the provisions of the federal Act have resulted in a great deal of controversy and litigation, §87(2)(d) of the New York Law has resulted in but a single lawsuit in New York.

The standard found within the New York Law was based upon the thrust of federal court decisions under the federal Act.

In the only reported decision in New York of which I am aware that construes §87(2)(d) of the New York Freedom of Information Law, records that may be considered somewhat analagous to those sought in the instant case were found to be deniable as trade secrets (see Belth v. Insurance Department, 406 NYS 2d 649). Notwithstanding the factual situation presented in Belth, I believe that the exception regarding trade secrets is not restricted to technical or scientific data, for example; on the contrary, I believe that it is applicable to any records submitted to government by a commercial entity the disclosure of which would "cause substantial injury" to its competitive position. In this regard, certainly Department officials and representatives of the Bradford National Corporation are more familiar with the potential effects of disclosure than I. Nevertheless, to reiterate, it is my view that the Department may cite

§87(2)(d) as the basis for withholding the documents in question to the extent that disclosure would cause substantial injury to the competitive position of Bradford.

Another ground for denial that might be applicable to portions of the records 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". Assuming that the records name particular individuals employed by or having a relationship with the corporation, it is possible that the names, identifying details, or other related information may justifiably be withheld under the cited provision.

A third ground for denial that might be applicable is §87(2)(c), which states that an agency may withhold records or portions thereof that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations..."

Although a contractual agreement has been consummated, if I recall correctly, some aspects of the contract might be subject to renegotiation. If that is so, it is possible that disclosure of certain aspects of the records might "impair" imminent contract awards. To that extent, I believe that §87(2)(c) could be cited as a basis 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
Executive Director

RJF:ss

cc: Thomas Murray

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

November 21, 1980

Mr. Dean G. Burt
[redacted]

Dear Mr. Burt:

I have received your letter of October 21 and apologize for the delay in response.

Once again, you are seeking advice with respect to your capacity to review the contents of a personnel file pertaining to you in possession of the Herkimer County Community College.

An earlier letter was written to James G. Hill, Dean of Administration of the Herkimer County Community College in response to a determination to deny access to records. That denial was based upon a contention that "college policy" forbids former employees from gaining access to their personnel records.

It is reiterated that the classification of records as "personnel records" does not automatically remove them from rights of access granted by the Freedom of Information Law. Again, certain records or portions of records found within personnel files are in my view likely accessible.

Your most recent question concerns a denial of access by Robert McLaughlin, President of the College, who wrote that "you are asking for access to correspondence, such as confidential letters of recommendation, which was [sic] generated after you were no longer an employee of the college." If indeed you have requested letters of recommendation, I agree with President McLaughlin's denial for two reasons.

First, as stated in my earlier letter of September 30, inter-agency and intra-agency materials are available to the extent that they contain statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations. A letter of recommendation would not fall within any of the three categories of accessible information found within inter-agency and intra-agency materials.

Second, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. The first example makes reference to:

> "...disclosure of employment, medical or credit histories of personal references of applicants for employment..."

It is possible that the documents in question may be considered references relative to your efforts in gaining employment. Due to the direction given by that provision, it appears that confidential letters of recommendation may justifiably be 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

cc: President Robert McLaughlin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-557
FOIL-AO-1265

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

November 21, 1980

Mr. Craig E. Smith
Auburn Bureau
Syracuse, Newspapers
Box 203
Auburn, NY 13021

Dear Mr. Smith:

I have received your letter of October 12 and apologize for the delay in response. You have described by means of your letter as well as an article appended to it problems that have been encountered with respect to the Cayuga County Legislature under the Open Meetings Law and the Freedom of Information Law.

With regard to the Open Meetings Law, you have asked whether the "annual session" held to create the budget must be open to the public.

In this regard, I would like to offer several comments relative to the annual session, as well as the points made in your article.

First, as you are aware, the cornerstone of the Open Meetings Law is its definition of "meeting" [see attached, Open Meetings Law, §97(1)]. The state's highest court, the Court of Appeals, more than two years ago considered the definition and provided an expansive interpretation [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In essence, the Court held that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Further, in a series of amendments to the Open Meetings Law that went into effect on October 1, 1979, the definition of "meeting" was amended to conform to the direction given by the Court of Appeals.

In view of the Court of Appeals' decision as well as the amendment to the definition of "meeting", it is in my view clear that the "annual session" to which you made reference is a "meeting" subject to the Open Meetings Law in all respects.

Second, a public body may enter into a closed or executive session only to discuss matters specified in the Law as appropriate for executive session [see §100(1)(a) through (h)]. Under the circumstances described, I do not believe that any of the grounds for executive session could properly be asserted to close the gathering in question.

Third, it is important to note that an executive session is not separate and distinct from an open meeting. The phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [see §97(3)]. Moreover, §100(1) sets forth a procedure that must be followed by a public body prior to entry into executive session. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Again, the language quoted above clearly indicates that an executive session can be called only after a public body has convened an open meeting, and only to discuss those matters deemed appropriate for executive session that are described in the ensuing paragraphs.

Fourth, your article indicates that a controversy has arisen with respect to the application of the Open Meetings Law to meetings held by committees. Although the status of committees under the original Open Meetings Law was unclear, the amended definition of "public body" [see §97(2)] now makes specific reference to committees, subcommittees and similar bodies, whether or not such entities have the capacity to take final action. Consequently, the Open Meetings Law is in my view applicable to committees identified in your article, even if they have only the capacity to recommend or advise.

Fifth, it is important to point out that the County Law contains provisions regarding the process by which a county budget is adopted. There is specific direction that a tentative budget must be available for public inspection prior to a public hearing on the budget [see County Law, §359]. It is also noted that §357 of the County Law concerning the review of a tentative budget and the report of a county budget committee:

> "...shall remain on file in the office of the clerk of the board of supervisors and shall be open to public inspection during business hours."

In view of the provisions of the County Law cited above, there is a clear intent to enable the public to become familiar with budget proposals in order that the public may offer comments at a public hearing prior to the adoption of a budget.

You have also asked for an opinion regarding rights of access to budget documents. In this regard, §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, nothing in the Freedom of Information Law can be cited to abridge rights of access granted either by means of judicial determinations or by other provisions of law. In this instance, the County Law, as indicated previously, provides specific direction that a tentative budget must be made available for public review. In addition, §87(2)(g) of the Freedom of Information Law states that an agency may withhold 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..."

It is important to note that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the documents generated in the budget process could be considered inter-agency or intra-agency materials". However, budget projections, work sheets, and similar documentation likely constitute "statistical or factual tabulations or data" that must be made available [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)]. In my view, the fact that budget proposals or projections may be tentative and subject to change is of no relevance. If the information consist of "statistical or factual tabulations or data" or is directed to be made available under the County Law, the public has the right to inspect and copy such materials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Cayuga County Legislature

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1766

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

November 21, 1980

Mr. Norman J. Parry
School District Clerk
North Syracuse Central School
District
5355 West Taft Road
North Syracuse, New York 13212

Dear Mr. Parry:

I have received your letter of October 22 regarding the absence report used by the North Syracuse Central School District. Please accept my apologies for the delay in response.

Having reviewed the form currently used for the absence report, I believe that it is available in great measure, if not in toto, under the Freedom of Information Law.

It is noted that the Law states that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy". However, it is emphasized that the courts have consistently found that public employees enjoy a lesser right to privacy than the public generally, for public employees have a greater duty to be accountable than any other identifiable group. Further, the courts have generally found that records that are relevant to the performance of the official duties of public employees are available, 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, if a record or portion of a record has no bearing on the performance of the official duties of a public employee, disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty. NYLJ, Nov. 22, 1977].

Having reviewed the absence report form, it appears that it is relevant to the performance of one's official duties. Since a public employee can be absent with pay for only a certain number of days for illness, or vacation, for example, I believe that the report has a bearing upon the manner in which a public employee performs his or her duties.

The only aspect of the report which in my view raises questions concerning privacy deals with the possible identification of a member of the immediate family who may have been ill. In my view, what is relevant is that a "family day" or days were charged. Which family member may have been ill is in my opinion largely irrelevant. Consequently, if one of the spaces indicating the family member whose illness precipitated the taking of a day off is marked, I believe that that aspect of the report could justifiably be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Again, the remainder of the report is in my view likely available. If the report contained additional information regarding the medical history of an employee, for example, I believe such information could justifiably be withheld. However, information of that nature does not appear.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

FOIL-AO-1267

November 24, 1980

Mr. David R. Patterson
Attorney at Law
44 Maple Avenue
Shrewsbury, MA 01545

Dear Mr. Patterson:

As you are aware, your correspondence addressed to the Attorney General has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

Your inquiry concerns a request for "information, records, and other materials..." relating to a particular individual that are maintained by the Suffolk County Department of Social Services. The information in which you are interested apparently was generated in 1959.

Please be advised that §136 of the State Social Services Law provides in brief that records identifiable to an applicant for or a recipient of public assistance are confidential. Further, the confidentiality provisions are applicable even in the case of a request made by the subject of the records. The exemption from disclosure carries over to the Freedom of Information Law (see attached), which in §87(2)(a) states that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute".

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 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:ss

Enclosure

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

November 24, 1980

Mr. Stuart Balberg
[redacted]

Dear Mr. Balberg:

I have received your letter of October 23 and apologize for the delay in response. Your question concerns access to records in possession of the Internal Affairs Section of tne New York City Police Department. Apparently an investigation was made with respect to the possibility of bribery and disciplinary action that may have been brought against "corrupt officers".

If I understand your inquiry correctly, it appears that much of the information in which you are interested may properly be withheld under the Freedom of Information Law.

The Law is based upon a presumption of access. Stated differently, 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) (see attached, Freedom of Information Law). Under the circumstances, several grounds for denial might properly be asserted.

For instance, the first ground for denial is §87(2)(a), which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". One such statute that exempts particular records from disclosure is §50-a of the Civil Rights Law. In brief, the cited provision states that police officers' personnel records that are used to evaluate performance toward continued employment or promotion are confidential.

A second ground for denial that might be applicable 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". In this instance, portions of records that identify witnesses might result in such an invasion of personal privacy.

A third possible ground for denial is §87(2)(e), which states that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> 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 extent to which the provision quoted above might be applicable as a basis for denial is questionable. However, it is possible that informants' identities may justifiably be deleted. Additional information may also be withheld if the investigation is ongoing.

The last ground for denial that might be applicable is §87(2)(g), which states that an agency may withhold 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. While statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records are accessible, portions of such materials consisting of advice, recommendations, suggestions, impression, or the like, are deniable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-558
FOIL-AO-1769

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

November 24, 1980

Mr. Norman J. Parry
School District Clerk
North Syracuse Central School District
5355 West Taft Road
North Syracuse, NY 13212

Dear Mr. Parry:

I have received your letter of October 23 and apologize for the delay in response. Your letter raises several questions regarding the Open Meetings Law, as well as the Freedom of Information Law.

I will attempt to respond to each of your questions in the order in which they appear in your letter.

First, you asked:

> "[W]hen a school board is in public work session, may the board move to go to executive session without reconvening the 'regular' meeting?"

In my view, due to judicial interpretations of the Open Meetings Law and amendments to the Law, there is no distinction between a "work session" and a "meeting". Consequently, the Board may in my view enter into an executive session, when appropriate, during a so-called "work session".

It is noted that the definition of "meeting" in the Open Meetings Law as originally enacted was unclear with respect to the status of work sessions, agenda sessions, briefing sessions, and similar gatherings during which a public body merely discussed, but had no intent to take action. Nevertheless, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the state's highest court, the Court of Appeals, held that the definition of "meeting" is applicable to any

situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Moreover, one among a series of amendments to the Open Meetings Law that became effective on October 1, 1979, redefined "meeting" in a manner consistent with the direction provided by the Court of Appeals.

As such, a "work session" is a meeting that must be preceded by notice and during which a proper executive session may be convened.

Your second question concerns the contents of minutes. In this regard, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) of the cited provision 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."

In view of the foregoing, it is clear that minutes need not consist of a verbatim transcript of a meeting and that reference need not be made to each and every comment made during a meeting. Section 101(1) provides minimum requirements for the contents of minutes. If a public body seeks to provide more information than that required, it may do so. However, to reiterate, minutes of an open meeting must at a minimum contain the information described in §101(1).

Third, you wrote that the Board tape records its meetings. In this regard, you have asked whether the tape recordings must be accessible to all persons who request them.

Since your question deals with access to records, the Freedom of Information Law is the applicable statute.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records are available, except those records or portions thereof that fall within one or more grounds for denial listed in §87 (2)(a) through (h) of the Law. Further, it is emphasized that the term "record" is broadly defined 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..."

Therefore, a tape recording is clearly a "record" as defined by §86(4) of the Law. Further, since the tape recording concerns an open meeting, I do not believe that there are any grounds for denial that may appropriately be asserted.

In my view, an agency must provide access to a tape recording by either permitting an individual to listen to a tape recording, or by reproducing the tape recording upon payment of a fee. Any fee that might be assessed must be based upon the actual cost of reproduction, excluding items such as overhead or personnel salaries [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty, NYLJ, December 27, 1978]. Further, it has been held that accessible records must be made equally available to any person under the Freedom of Information Law [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Therefore, any person has the right to gain access to tape recordings.

Fourth, you asked whether a meeting and the action taken at a meeting may be judged "illegal" or "void" if there is a "procedural error in calling the meeting to order, failing to follow Robert's Rules, or through a failure to follow the agenda". Here I direct your attention to §102 of the Open Meetings Law. In brief, §102 states that any "aggrieved" person may initiate a suit under the Open Meetings Law. The cited provision also provides, in brief, that if action is taken illegally during a closed meeting, a court may "upon good cause shown" declare the action taken in violation of the Open Meetings Law null and void, in whole or in part. From my perspective, a "procedural error" would not likely result in the nullification of action taken under the Open Meetings Law, for it would be difficult to demonstrate good cause for invalidating such action. However, it is difficult to conjecture, for the courts have invalidated action taken in violation of the Open Meetings Law in several instances.

It is also noted that the first sentence of the second paragraph of §102 states that:

> "[A]n unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

Fifth, you wrote that it is often difficult to transcribe "every comment" during a lengthy discussion. Again, I refer you to the provision of §101 of the Open Meetings Law. Clearly the minutes are not required to make reference to every comment made during a discussion. Although reference may be made to each comment, such steps need not be taken.

Sixth, you have asked whether the "background information" sent to Board members prior to meetings must be made available to the public. All that can be advised in this regard is that the contents of records and the effects of disclosure determine rights of access. Again, all records are available under the Freedom of Information Law, except those records or portions thereof that fall within one or more of the grounds for denial. Some of the records transmitted to Board members prior to meetings may be available; others may properly be denied in whole or in part, depending upon their contents.

Seventh, you have indicated that the School Board has a "comments from the floor" period at the beginning of Board meetings. You have asked for advice regarding the conduct of such a period in a fair and orderly manner. It is noted that the Open Meetings Law is silent with respect to public participation. Consequently, although a board may permit public participation, there is no requirement that public participation be permitted. However, if a public body choses to permit public participation, it must in my view do so based upon reasonable rules that treat all members of the public equally. For instance, one person should not be permitted a longer period of time to speak than another.

Lastly, you asked for direction regarding the form of a record of public announcement of a meeting. As you are aware, §99 of the Open Meetings Law requires that notice of every meeting be given to the public by means of posting and to the news media (at least two). There

is no specific requirement that a record of notice of meetings be kept. However, in this office, the person designated to give notice under the Open Meetings Law prepares and signs a certification to be kept in this office. The certification indicates that notice was transmitted on a certain date for posting and to particular news media outlets on a specific date with respect to a meeting to be held at a particular time and place.

I hope that 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-559
FOIL-AO-1220

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

November 24, 1980

Mr. Michael Rabasca
[redacted]

Dear Mr. Rabasca:

As you are aware, your letter addressed to the Attorney General has been transmitted to the Committee on Public Access to Records, which advises with respect to the Freedom of Information and Open Meetings Laws.

You have requested information regarding the rights of public employees to gain access to records and entry into meetings of public employee unions.

Enclosed, as requested, are copies of the Freedom of Information Law, regulations that govern its procedural implementation, the Open Meetings Law, which is appended to a memorandum explaining changes in the Law that went into effect on October 1, 1979, and an explanatory pamphlet dealing with both laws.

In my view, public employee unions are not covered by either the Freedom of Information Law or the Open Meetings Law.

Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

Since a public employee union, although related to government, is not itself a governmental entity, it is not in my view an "agency" subject to the provisions of the Freedom of Information Law.

Similarly, §97(2) of the Open Meetings Law 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 sub-committee or other similar body of such public body."

From my perspective, since a public employee union neither conducts public business nor performs a governmental function, it is not subject to the Open Meetings Law.

However, I would like to offer the following suggestions.

First, although a public employee union is not governmental in nature, it has a relationship with government. Consequently, to the extent that government maintains records regarding a public employee union, such records would be subject to rights of access granted by the Freedom of Information Law.

Second, it is suggested that you review the by-laws of your public employee union. It is possible that the by-laws may contain specific direction regarding the disclosure of an annual report, for example, or perhaps the capacity of members to attend meetings of an executive board.

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-1221
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 24, 1980

Mr. Jeff Sinclair
[redacted]

Dear Mr. Sinclair:

I have received your letter of October 27. Please note that the address to which you sent your letter is no longer accurate. The new address appears on the letterhead.

You wrote that you requested various records, directives, and memoranda which authorize members of the Westchester County Department of Public Safety to fingerprint pre-trial detainees after arraignment on an indictment. However, the request was denied initially by Inspector D'Iorio and on appeal by the County Attorney, Samuel Yasgur. In both instances, it appears that the denial was based upon a contention that the Department does not have possession of the records in question.

Please be advised in this regard that the Freedom of Information Law grants access to certain existing records. Further, §89(3) of the Law specifically states that an agency generally need not create a record in response to a request. In short, if the Department of Public Safety maintains no records reflective of the information that you are seeking, the response was likely proper.

Nevertheless, I have reviewed the Criminal Procedure Law on your behalf and have enclosed various provisions of that chapter which may be useful to you. For instance, enclosed is a copy of §160.10, which describes the duties of the police with respect to fingerprinting. In addition, enclosed are copies of §§160.30 and 160.40, which detail respectively the duties of the Division of Criminal Justice Services regarding fingerprinting and the transmission of fingerprints to a court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1772
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 25, 1980

Mr. R. Nelson
[redacted]

Dear Mr. Nelson:

I have received your letter of October 27 and apologize for the delay in response.

You have requested an advisory opinion concerning the application of the Freedom of Information Law to the Public Administrator of Kings County.

As you are aware, the question is whether the Public Administrator and his office fall within the scope of the definition of "judiciary" appearing in §86(1) of the Law, or whether the Office of the Public Administrator is considered an "agency" as defined by §86(3) of the Law. If the Public Administrator is considered part of the judiciary, records of that office fall outside the Freedom of Information Law. Conversely, if the office is considered an agency, it is subject to the Freedom of Information Law in all respects.

I have reviewed the Surrogate's Court Procedure Act on your behalf in order to attempt to render appropriate advice. In my view, based upon various provisions within Article 11 of the Surrogate's Court Procedure Act, which has been enclosed for your consideration, it appears that the Public Administrator is part of the judiciary and therefore is outside the scope of the Freedom of Information Law.

The public administrators in New York City are appointed by the judges of the courts of their respective counties. Further, the public administrators have the capacity to issue subpoenas in the name of the court "with the same effect" as if the subpoena were issued by the court [see §1114]. Consequently, it appears that the Public Administrator is a court officer that falls within the definition of "judiciary".

Nevertheless, many of the records of the Office of Public Administrator are in my view likely available. For instance, §1109 of the Surrogate's Court Procedure Act requires that:

> "[E]ach public administrator shall file monthly with the mayor and the comptroller of the city of New York a statement of such of his accounts as have been closed or finally settled in such form as the comptroller may prescribe".

In my view, since the Mayor and the Comptroller of the City of New York represent agencies that fall within the scope of the Freedom of Information Law, the monthly reports, once in their possession, are subject to rights of access granted by the Freedom of Information Law. Further, since the reports are reflective of accounts, I believe that they would be accessible under §87(2)(g)(i) of the Freedom of Information Law. In addition, §1107 requires that Public Administrators pay into the treasury of the City of New York all commissions and costs received by them, with one exception. Such payments are made monthly. Again, those records, once in possession of an agency, would be available under the Freedom of Information Law.

Lastly, I have contacted the Office of Court Administration in order to gain additional information regarding your inquiry. If you would like a formal opinion from the Office of Court Administration on the subject, you may seek such an opinion by writing to Paul A. Feigenbaum, Counsel to the Office of Court Administration, 270 Broadway, New York, NY 10007.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-562
FOIL-AO-1273

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

November 25, 1980

Morris Marshall Cohn
Attorney at Law
230 State Street
Schenectady, NY 12305

Dear Mr. Cohn:

As you are aware, I have received your letter of October 20, as well as the correspondence appended to it. Please accept my apologies for the delay in response.

You have requested an opinion regarding the propriety of a request for and rights of access to information sought pursuant to a request directed to Robert D. McEvoy, Schenectady County Manager. The information sought concerns the Glenridge Hospital.

Specifically, you have requested:

"1) an itemized statement of all expenditures incurred for Glenridge Hospital from 1/1/79 to date, including, but not limited to, purchases, repairs, maintenance, taxes and assessments, utilities, labor, legal fees and architectural services;

2) an itemized list of all monies spent and bills paid from funds of any and every sort, including the Expendable Trust, the John G. Smith Estate Fund and other sources for and on behalf of the so-called Diagnostic Clinic since 1/1/79;

3) an itemized list of all expenditures charged to the Expendable Trust Fund and the John G. Smith Estate Fund for the year 1978;

4) a copy of each request from the Glenridge Hospital Board of Managers to the County Board of Representatives for the making of the expenditures referred to in item #3 above and the date or dates of confirmation or authorization by the Board of Representatives for the making of such expenditures."

From my perspective, to the extent that the information sought exists in the form of a record or records, it is available in great measure, if not in toto.

However, it is important to point out that the Freedom of Information Law grants access to existing records. As a general rule, an agency need not create a record in response to a request. Therefore, if, for example, there are no "itemized lists" of the information in which you are interested, the County has no obligation to create such lists on your behalf. Nevertheless, I believe that the items, if requested individually or if your request is presented in a different manner, should be made available.

The Freedom of Information Law is based upon a presumption of access. All records of an agency, such as Schenectady County, are available, except those records or portions thereof that fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law.

Under the circumstances, there is but one ground for denial that is relevant. However, that ground for denial provides direction to the effect that much of the information that you are seeking must be made available.

I direct your attention to §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold 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..."

It is important to point out that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, virtually all of the records sought could be considered "inter or intra-agency materials". However, those portions of the materials consisting of "statistical or factual tabulations or data" are accessible.

The only instance in which the materials in question might not be statistical or factual in nature would involve the requests from the Glenridge Hospital Board of Managers to the County Board of Representatives regarding the possibility of making expenditures. The requests might contain advice or recommendations, for instance, which could justifiably be withheld. However, records reflective of the date or dates of confirmation or authorization by the Board of Representatives for the making of such expenditures would in my view be available.

It is noted also that confirmation or authorization by the Board of Representatives for such expenditures should be contained within minutes. In this instance, I direct your attention to the provisions of the Open Meetings Law. The Open Meetings Law is applicable to all public bodies, including the County Board of Representatives. Further, §101 of the Law, which concerns minutes, requires that each public body must keep minutes of open meetings consisting of:

> "...a record or summary of all motions, proposals, resolutions and any other matter formally voted upon ahd the vote thereon."

Consequently, the acts of confirming or authorizing expenditues should be reflected in minutes of meetings.

Lastly, questions arose by telephone relative to your request regarding the time limits within which the County is required to respond to requests made under the Freedom of Information Law.

In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7 (b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert D. McEvoy

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

November 25, 1980

Mr. Frank J. Agosta
[redacted]

Dear Mr. Agosta:

As you are aware, 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. I apologize for the delay in response.

According to your letter, you have requested without success the "evaluation property card" regarding your property, which is located in the town of Ashland. Although you were permitted to inspect the record, the Chairman of the Board of Assessors stated that "she does not have to make copies for [you] nor for anyone else in town". Further, having contacted the Town Attorney, Mr. Charles Brown, you were informed that since the Town is involved in litigation, you could not have copies of the record in question.

I disagree with the contentions of both Ms. Simmons and Mr. Brown.

First, the Freedom of Information Law is based upon a presumption of access. All records of an agency such as the Town, are available, except those records or portions thereof that fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law.

Under the circumstances, none of the grounds for denial could in my view be appropriately asserted to withhold the record in which you are interested. In fact, §87(2)(g)(i) directs that statistical or factual information found within intra-agency materials must be made available. Since the record that you are seeking consists of factual information, it is available for inspection and copying.

Second, even before the enactment of the Freedom of Information Law, the courts held under §51 of the General Municipal Law that virtually all records developed in the assessment process are available [see e.g., Sears Roebuck & Co., v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1929)]. In Sanchez, supra, the Appellate Division found that pencil-marked data cards used by municipal assessors to reappraise real property are available to the public, even though the cards were prepared by a third party, a private contractor.

Third, §89(3) of the Freedom of Information Law requires that, upon payment of or offer to pay the requisite fees, an agency must provide copies of accessible records upon request. In addition, it is noted that case law has for decades found that the right to copy is concomitant with the right to inspect [see In Re Becker, 200 AD 178 (1922)]. In view of the foregoing, I believe that the Town is obliged to provide a copy of the record sought upon payment of the appropriate fee.

Fourth, although the records requested may be relevant to litigation, they were prepared in the ordinary course of business and not for litigation. Consequently, it cannot in my view be withheld on the ground that it constitutes material prepared for litigation [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234].

Lastly, your letter indicates that the Town failed to respond to your request promptly. With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgement of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Ms. P. Simmons

Mr. Charles Brown

Mr. Joseph Cooper

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

November 25, 1980

Mrs. Josephine Thompson
[redacted]

Dear Ms. Thompson:

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.

You wrote that your husband was in 1979 a councilman in the City of Gloversville. According to your letter, he "was threatened by an individual because he cast a no vote on a certain matter before the common council." After filing a police report, your husband indicated that he did not want the person who made the threat to be arrested; he merely wanted the threat to be recorded in the event of unforeseen occurrences. Recently, your husband went to the Police Department and requested a copy of the report. Although he offered to pay the appropriate fees for copying, "he was told that it was against the law to give a copy of the report to anyone and that even if the case came to court it would have to be subpoenaed by the courts." You have indicated that no litigation is pending with respect to the situation.

In my opinion, the record in which you are interested is likely available in great measure, if not in its entirety.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Police Department, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in the Law.

There are in my view three grounds for denial that might be applicable to the situation. While it is possible that portions of the records might justifiably be withheld, none of the grounds for denial could in my opinion be cited to withhold the record in its entirety.

The first ground for denial of relevance is §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". Since the record pertains to your husband and since he is aware of the identity of the person who made the threat, I do not believe that the privacy provisions cited above could justifiably be cited as a basis for withholding.

A 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."

Under the circumstances, it does not appear that any of the harmful effects of disclosure described in §87(2)(e)(i) through (iv) would arise as a result of disclosure. Apparently there is no ongoing investigation, there is no trial or hearing in the offing, there is no confidential source involved and it does not appear that disclosure of any non-routine criminal investigative techniques or procedures would be involved. As such, I do not believe that §87(2)(e) of the Freedom of Information Law could be cited as a basis for withholding.

The last ground for denial that might be relevant is §87(2)(g), which states that an agency may withhold 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..."

It is important to point out that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the report in which you are interested might justifiably be characterized as "inter-agency material." However, to the extent that it contains statistical or factual information, such as a factual rendition of the event, i.e. the threat, for instance, I believe that it is available to your husband, the subject of the record. To the extent that the report contains statements of recommendation, advice or impression, for example, made by a police officer, it would be deniable.

In short, based upon the facts that you have provided, I believe that the record in which you are interested must be made available in great measure, if not in its entirety to you or your husband by the Police Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gloversville Police Department

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

November 25, 1980

Mr. John Pucci
79-A-1478
Box 149
Attica, NY 14011

Dear Mr. Pucci:

I have received your letter of November 3.

According to your letter, you have unsuccessfully attempted to gain access to your probation report, which was denied by the Putnam County Police Deparment and by Judge Bowers of the sentencing court on the ground that the Freedom of Information Law does not apply to the courts.

I agree with the contention of Judge Bowers that the Freedom of Information Law does not apply to the courts and court records. Section 86(1) of the Freedom of Information Law defines "judiciary", §86(3) of the Law defines "agency" and specifically excludes the "judiciary". Since the Freedom of Information Law is applicable only to records of agencies, court records fall outside the scope of the Law.

Nevertheless, §390.50 of the Criminal Procedure Law provides that a presentence report shall be made available to a defendant with certain exceptions. Specifically, subdivision (2) of §390.50 of the Criminal Procedure Law states that:

> "The presentence report or memoranda 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 diag-

> nostic 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 reapply to the court, citing §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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1277

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

November 25, 1980

Mr. Mitchell J. Goroski, Jr.
Assistant Counsel
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12233

Dear Mr. Goroski:

I have received your letter of October 31 and apologize for the delay in response.

You have asked for assistance regarding record retention requirements with respect to one of the units within the Department of Environmental Conservation. That unit has been requested to assist in the development of guidelines concerning the retention of its files, as well as the destruction of its files.

I direct your attention to §186 of the State Finance Law, which in subdivision (1) states that Commissioner of General Services shall have the power:

> "[T]o authorize or require the disposal or destruction of state records including books, papers, maps, photographs, microphotographs, or other documentary material made, acquired or received by any state department, division, board, bureau, commission or other agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of general services shall deliver a list of the records to be disposed or destroyed to the director of the division of the budget, the commissioner of education, the attorney general and the comptroller. No state records listed therein shall be destroyed if within thirty days after receipt of such list the

> commissioner of education, the attorney general, the director of the budget or the comptroller shall notify the commissioner of general services that in his opinion such state records should not be destroyed.

In addition, subdivision (4) of §186 states that the Commissioner shall have the power: "[T]o promulgate rules and regulations to carry out..." the purposes of Article 13 of the State Finance Law, which concerns the preservation and disposal of state records.

As I understand it, agencies generally discuss the development of schedules for the retention and disposal of records with records managers at the Office of General Services. In addition, I believe that the Office of General Services has developed some guidelines and regulations on the subject.

It is suggested that you or a representative of your office contact Willis Day of the Office of General Services at 457-3171. I believe that Mr. Day or his staff could provide you with additional and more specific direction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1778

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

November 26, 1980

Mr. Charles V. Dobrescu
Chairman
Concerned Citizens of Glen Cove
P.O. Box 366
Glen Cove, New York 11542

Dear Mr. Dobrescu:

I have received your letter and the correspondence appended to it. Please accept my applogies for the delay in response.

Your inquiry concerns allegations that an employee of the City of Glen Cove may have illegally applied for and been granted unauthorized days off in order to serve with his military reserve unit. Having requested records reflective of the days off taken by the employee, the name and address of the reserve unit to which the employee is attached and the name of the commanding officer of the unit, you were denied access by Mayor Parente.

The request was denied on the ground that disclosure would result in an unwarranted invasion of personal privacy. Further, city officials explained that the records sought constitute an employment history which is deniable.

I disagree with the contentions expressed by city officials and believe that the records in which you are interested are available in great measure, if not in toto.

It is important to note at the outset that there is a significant amount of case law concerning the privacy of public employees. Based upon those judicial determinations, several conclusions can be reached. First, it is clear that public employees enjoy a lesser degree of privacy than the public generally, for public employees are required to maintain a greater degree of accountability than any other identifiable group. Second, the courts have held in several instances that records that are relevant to the performance of the official duties of a public employee are accessible, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy.

[see e.g., Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk County, NYLJ, October 30, 1980].

It has been consistently advised that records concerning the attendance of public employees are available. From my perspective, records indicating the number of days charged by a public employee for vacation, sick, personal, or time taken for military leave are clearly relevant to the performance of one's official duties, and are therefore availible on the ground that disclosure would result in a permissable rather than an unwarranted invasion of personal privacy. For instance, often, a public employee is permitted to be absent with pay for only a specific number of personal or vacation days. If more than the requisite number of days are taken, the public should in my view have a right to know whether whatever rules or contracts concerning absences have been followed appropriately. Such information would in my view be relevant not only to the official duties of a particular public employee, but also to the agency itself. Further, that type of information would not alone disclose any intimate details of an individual's life. If attendance records include a description of an illness or other medical problems, those portions of an attendance record could in my view be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy. However, portions of an attendance record indicating only the number of days taken for sick, vacation or military leave should in my view be available, for any invasion of privacy would be minimal and not "unwarranted".

With respect to the name of the reserve unit to which the employee is attached and the identity of the commanding officer of the unit, I believe that such information is available under two provisions of law. First, having reviewed the provisions of the federal Freedom of Information Act [5 USC §552], it appears that such records would be accessible under the federal Act if requested from a federal agency. Second, I believe that those records are available under the New York Freedom of Information Law. It is noted that §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..."

Consequently, if the City of Glen Cove maintains possession of the records in question, they are subject to rights of access granted by the Freedom of Information Law, even if the City was not the originator of the records. In addition, since the granting of leave based upon the military orders is relevant to the performance of the official duties of the public employee involved, I do not believe that disclosure would result in an unwarranted invasion of personal privacy.

With regard to the name of the reserve unit to which the employee is attached and the identity of the commanding officer, I cannot envision how such information could be withheld on the basis of privacy. Often military reserve units advertise and seek enlistments. Certainly the name and location of the reserve unit is known to hundreds if not thousands of people and may be identified in any number of sources. In short, there are in my view no grounds for denial with respect to such information. Similarly, a record indicating the name of the commanding officer of the unit would in my opinion clearly be available under the federal Freedom of Information Act. Consequently, if such a record is maintained by the City of Glen Cove, I believe that it is also available under the New York Freedom of Information Law.

Lastly, with respect to rights of access to military orders, it is possible that portions of such a record might be deniable. For instance, the military identification number, which is likely the same as a social security number, would in my view be deniable on the ground that disclosure would result in an unwarranted invasion of personal privacy. A social security number or military identification number has no relevance to the manner in which a public employee of the City of Glen Cove or a reserve unit performs his or her official duties. Consequently, I believe it could be deleted. Similarly, if the orders contain the home address of a particular individual, that, too, in my opinion may justifiably be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. Further, barring an exceptional case, I believe that the direction provided in the orders would likely be available. If the orders are essentially routine in nature, as in the case of an annual two week leave or a monthly meeting, it would be difficult to justify a denial based either upon privacy or anything akin to national security.

In sum, subject to the conditions described earlier, it is my contention that the denial was improper, for disclosure would under the circumstances result in a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Mr. Alan M. Parente,Mayor

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

November 26, 1980

Mr. Leo Chancer
[redacted]

Dear Mr. Chancer:

I have received your letter of November 3, as well as various other items of correspondence, all of which involve your efforts in securing a copy of "the 1980 performance evaluation" under the Freedom of Information Law with respect to William McPhee, Superintendent of the Lakeland School District.

At this juncture, District officials and members of the public are aware of the fact that you have a copy of a document purported to be an evaluation of the Superintendent's performance. However, upon a request directed to the School District, it has been contended that such a document does not exist and cannot be found in the offices of the District. You have requested that I transmit a copy of the evaluation that you sent to me to the Superintendent in order that the document will be made available to the citizens by the District under the Freedom of Information Law.

I would prefer not to take such a step for one reason. Very simply, I believe your contention that the evaluation was created by members of the School Board. However, I feel compelled to accept in good faith and believe the contention of the School District that the evaluation is not and has never been in its possession. Stated differently, I do not want to give the impression that I believe or fail to believe the contention of either you or District officials.

Moreover, since you have a copy of the document, there is no law of which I am aware that would preclude you from reproducing it or disclosing it to the people of your choice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1780

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

December 1, 1980

Ms. Nancy Weinberg
[redacted]

Dear Ms. Weinberg:

I have received your letter of November 1 and apologize for the delay in response. You have requested a clarification of the Freedom of Information Law relative to requests for records concerning a fire that occurred some 23 years ago.

It is noted initially that the Freedom of Information Law provides access to existing records. Consequently, if an agency no longer maintains possession of records related to your inquiry, there is no obligation on the part of the agency to create records on your behalf [see attached, Freedom of Information Law §89(3)].

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except those records or portions thereof that fall within one or more grounds for denial that appear in §87(2)(a) through (h) of the Freedom of Information Law.

With respect to records of the fire department, recent case law indicates that fire department records are subject to the Freedom of Information Law, even if the records are maintained by a volunteer fire company [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. If the fire department is operated by the municipality itself, they would be subject to the Law, for municipality is a public corporation that falls within the definition of "agency" [see §86(3)].

Judicial interpretations of the Freedom of Information Law also indicate that police blotters are available. Although the phrase "police blotter" is nowhere specifically defined, the Appellate Division in Sheehan v. City of Binghamton [59 AD 2d 808 (1977)] held that a police blotter is a log or diary in which any event reported by or to a police department is recorded. The court also held that the police blotter is available, for it contains no investigative information; on the contrary, the blotter is merely a summary of events or occurrences.

With respect to remaining records pertaining to the fire that may be in possession of the police or fire departments, it would appear that such records are available. The most relevant exception to rights of access regarding the records would in my view be §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 and procedures".

The language quoted above is based upon potentially harmful effects of disclosure. However, since the event occurred years ago, it is in my opinion doubtful that any of the harmful effects of disclosure described in §87(2)(e) would arise. Consequently, it appears that the records are accessible.

Lastly, §89(3) of the Freedom of Information Law requires that an agency provide photocopies of accessible records "upon payment, or offer to pay" the requisite fees for photocopying. Therefore, if you wish to photocopy accessible records, you have the right 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

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

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

December 1, 1980

Mr. Joseph J. Dolan, Jr.
Chairman
Public Information Committee
County Legislature
Court House
Albany, New York 12207

Dear Mr. Dolan:

I have received your letter of November 5 and thank you for your interest in complying with the Freedom of Information Law. Please accept my apologies for the delay in response.

Your inquiry concerns a question raised by members of the County Legislature regarding the application of the Freedom of Information Law. Specifically, the question is whether members of the County Legislature are required to comply with the Freedom of Information Law and whether they are "as elected officials required to file forms and comply with the other requests for access that the legislature itself adopted for the public".

In my view, since there is virtually no case law on the subject, I believe that an answer based upon reasonableness must be given.

From my perspective, when a public officer seeks information while acting in his or her capacity as a public officer, that person should not be required to follow the procedures generally applicable to the public under the Freedom of Information Law. In such a situation, a member of a board, for example, would not be requesting information as a member of the public based upon his or her "right to know", but rather as a representative of government who has a need to know in order to carry out his or her official duties.

Of course, it should be noted that there may be reasonable limitations that may be imposed upon public officers seeking information to perform their duties. For instance, some records may be exempted from disclosure by statutes that permit disclosure only under specified circumstances. In those situations, I do not believe that it would be appropriate to provide unrestricted access to records. However, as a general rule, when a public officer seeks information in the performance of his or her duties, I do not believe that it would be necessary or appropriate to require such an individual to "file forms", for instance, or follow formalized procedures generally applicable 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:ss

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

COMMITTEE MEMBERS
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IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 1, 1980

Saul E. Feder, Esq.
30 Broad Street
Suite 2308
New York, NY 10004

Dear Mr. Feder:

I have received your letter of November 5 and apologize for the delay in response.

You have indicated that your client is interested in obtaining as much information as possible with respect to a parochial school in New York City.

In all honesty, there may little information concerning a parochial school that is accessible under the Freedom of Information Law. As you may be aware, the Freedom of Information Law is applicable to records in possession of agencies. The term "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."

From my perspective, since a parochial school is not a "governmental entity", it would not be subject to the Freedom of Information Law. As such, I do not believe that there is any statute that provides direct access to records of parochial schools.

However, it is possible that the school in question engages in programs administered by or has contractual relationships with any number of New York State or New

York City agencies. For example, it is possible that a parochial school receives aid in some form from New York State through programs administered by the State Education Department. In this regard, to the extent that a city or state agency maintains records relative to the parochial school, those records would be subject to rights of access granted by the Freedom of Information Law.

In my view, the most likely source of information in possession of an agency regarding a parochial school would be the State Education Department.

Without knowing more of the type of information that is being sought, I cannot provide you with specific direction regarding the unit within the State Education Department that might have records in which your client is interested. If you obtain more specific information regarding the nature of records sought, it is suggested that you contact Mr. James Blendell, whose address is:

The State Education Department
Education Building
Albany, New York 12234

Mr. Blendell can be reached at (518) 474-7770. My experience is that Mr. Blendell has excellent overview of the functions of the State Education Department, and if anyone can provide you with direction, he is the most likely source.

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-1283

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

December 2, 1980

Mr. R. Gardner Congdon
Supervisor, Town of Moreau
61 Hudson Street
So. Glens Falls, NY 12801

Dear Mr. Congdon:

As you are aware, I have received your letter of November 5 in which you requested an advisory opinion under the Freedom of Information Law.

You have indicated by telephone and by letter that you are a member of the Saratoga County Board of Supervisors and the County Equalization and Assessment Committee. The County is currently engaged in a contractual relationship with the Cole-Layer-Trumble Company of Dayton, Ohio, which is in the process of performing for the County a one-hundred percent assessment revaluation project. You wrote further that your responsibilities "are not only to ensure the successful compliance of the contract but to vote in committee on the payment of bills as submitted..." by Cole-Layer-Trumble.

Within recent weeks, the Company has conducted a field review to reexamine project values that have been generated to date. You wrote that your "cursory review" of some of the materials revealed what you characterized as "startling inaccuracies", which resulted in your request to evaluate the information prepared by Cole-Layer-Trumble. Although the Chairman of the Equalization and Assessment Committee contacted Cole-Layer-Trumble and arranged a meeting to review the materials, the records that you requested have to date been withheld.

The question is whether the materials developed by Cole-Layer-Trumble are subject to the Freedom of Information Law.

It is noted that I have discussed the matter with Richard E. Serano, Secretary in General Counsel to Cole-Layer-Trumble, who wrote that, in his view, the Freedom of Information Law is inapplicable to the records in question. In addition, he transmitted a copy of an opinion drafted by Robert L. Beebe, Counsel to the Division of Equalization and Assessment, in which it was advised that similar records in possession of a town that had been developed by Finnegan Associates and Cole-Layer-Trumble could justifiably be withheld.

Although there is no case law of which I am aware that deals with the specific subject matter at issue, it appears that the records in question are accessible under the Freedom of Information Law. Further, I believe that recent case law tends to bolster such a contention.

First, it is emphasized that the Freedom of Information Law defines the term "record" broadly in §86(4) to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 information sought may not yet be in the legal custody of Saratoga County, the definition of "record" includes "any information...produced...for an agency...in any physical form whatsoever..." Saratoga County, a public corporation, is clearly an agency as defined by §86(3) of the Freedom of Information Law. As I understand the situation, the information in question has been produced for an agency, Saratoga County, by Cole-Layer-Trumble for review by the County pursuant to a contractual agreement. Although Mr. Serano has contended that "the materials...do not yet constitute records...", I disagree with his contention based upon the definition of "record" discussed above.

Although the information may be by no means final, since the definition of "record" includes any information produced for an agency "in any physical form whatsoever", the materials, in my view, constitute records subject to rights of access granted by the Freedom of Information Law.

Second, Mr. Beebe's letter, upon which Mr. Serano relies, cites §87(2)(g) of the Freedom of Information Law as the basis for withholding similar records. I disagree with that contention as well based upon the language of the Freedom of Information Law and recent case law. Section 87(2)(g) states that an agency may withhold 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..."

From my perspective, inter-agency materials constitute those documents transmitted from one agency to another. Intra-agency materials constitute those records transmitted within an agency, from one official of a particular agency to another official of the same agency. Cole-Layer-Trumble, however, is a private, profit-making corporation, which falls outside the scope of the definition of "agency". Consequently, I do not believe that the materials in question could be considered either inter-agency or intra-agency in nature.

This point has been confirmed by means of three recent judicial interpretations of the Freedom of Information Law. In Murray v. Troy Urban Renewal Agency (Sup. Ct., Rensselaer County, April 24, 1980), the Court found that:

> "[T]he appraisal report sought here was prepared for the Troy Urban Renewal Agency by an independent, private real estate appraiser who was not a public employee. The appraisal report prepared by an independent contractor did not originate from within a state or municipal government agency as is required by Public Officers Law §87 subd. 2(g).

> Because the subject appraisal report was prepared for a government agency and, not by the agency personnel it lacks the essential characteristic of being "inter-agency or intra-agency materials" and therefore exempt from disclosure under Public Officers Law §87 subd. 2(g)" (emphasis added by the court).

A similar holding was reached in Phillips v. Brier (Sup. Ct., Albany County, August 22, 1980) which held that correspondence between a city manager and a private appraiser engaged in a contractual agreement with the city fell outside the scope of the exception of inter-agency and intra-agency materials.

Further, in a situation concerning access to reports and correspondence between a town and private firm of consulting engineers, it was held that:

> "[S]ubdivision (g) under certain circumstances permits nondisclosure of inter and intra agency materials. However, the Intervenor, Leonard S. Wegman Co., Inc. does not fall within the definition of "agency" as it is set forth in section 86 subd. 3 of the Public Officers Law (Freedom of Information Law)" [Sea Crest Construction v. Stubing (Sup. Ct., Nassau County, January 7, 1980)].

Based upon the foregoing, it is reiterated that although a contractual relationship exists between Saratoga County and Cole-Layer-Trumble, the latter is not "agency" as defined by the Freedom of Information Law. Therefore, §87(2)(g) of the Freedom of Information Law could not in my view be cited appropriately as a basis for withholding.

Third, I would also like to direct your attention to Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], in which the Court of Appeals rendered an expansive interpretation of the Freedom of Information Law. In that decision, which dealt with access to records in possession of a not-for-profit corporation engaged in a contractual

relationship with a village, the Court granted access and, as one of the bases for disclosure, cited the statement of legislative intent appearing in §84 of the Freedom of Information Law:

> "[K]ey is the Legislature's own unmistakably broad declaration that, '[a]s 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' (emphasis added; Public Officers Law, §84)". (id. at 576).

The Court stated further that:

> "[F]or the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit".

It is also noted that the records sought in Kimball were apparently outside of the physical custody of the village when the request was made. Nevertheless, the Court of Appeals found that:

> "temporary possession in another does not necessarily oust a permanent possessor of the control which would make it subject to the responsibilities imposed by the Freedom of Information Law" (id. at 578).

As I understand it, there is no question but that the materials developed by Cole-Layer-Trumble will be in the legal custody of Saratoga County. As the Court of Appeals stated, however, the fact that the records may not now be in the physical possession of an agency might not alter rights of access to the records or the County's responsibilities under the Freedom of Information Law.

Lastly, assuming that §87(2)(g) of the Freedom of Information Law could not be cited as a basis for withholding, I do not believe that any of the remaining grounds for denial could justifiably be cited. While there is a contractual relationship between the County and Cole-Layer-Trumble, it does not appear that disclosure would, in the words of §87(2)(c) of the Freedom of Information Law, "impair present or iminent contract awards", for the contract was awarded to Cole-Layer-Trumble some time ago. Consequently, there appears to be no possibility that disclosure would "impair" the process by which a contract is awarded.

In sum, it appears that the materials in question constitute "records" subject to rights of access granted by the Freedom of Information Law, that §87(2)(g) concerning inter-agency and intra-agency materials could not be cited as a basis for withholding, that the direction given by the courts indicates that the Freedom of Information Law is being construed expansively, and that no other remaining grounds for denial listed in §87(2) of the Freedom of Information Law could be cited to withhold 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:ss

cc: Mr. Robert Beebe
Saratoga County Board of Supervisors
Saratoga County Equalization and Assessment Committee
Mr. Richard Serano

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

December 3, 1980

Barbara Lombardo
THE SARATOGIAN
Gannett Newspaper
Saratoga Springs, NY 12866

Dear Ms. Lombardo:

As you are aware, I have received your letter of November 10 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, your question is whether the public has the right to gain access to records created by Cole-Layer-Trumble, which is under contract with Saratoga County to carry out the County's real property revaluation program. You have indicated that the Company contends that the records are reflective of "new values" that are preliminary and that the records have not "officially" been turned over to the County. Nevertheless, you also wrote that the Company is "making the files available to at least one supervisor and probably any supervisor that demands to see them for his town".

In my view, even though the records in question may be preliminary in nature, I believe that they are subject to rights of access granted by the Freedom of Information Law.

I would like to point out in good faith that a similar inquiry has been made by R. Gardner Congdon, a member of the Saratoga County Board of Supervisors and the County Equalization and Assessment Committee. Essentially the same opinion has been drafted in response to a request for advice made by Mr. Congdon.

It is noted that I have discussed the matter with Richard E. Serano, Secretary in General Counsel to Cole-Layer-Trumble, who wrote that, in his view, the Freedom of Information Law is inapplicable to the records in question. In addition, he transmitted a copy of an opinion drafted by Robert L. Beebe, Counsel to the Division of Equalization and Assessment, in which it was advised that similar records in possession of a town that had been developed by Finnegan Associates and Cole-Layer-Trumble could justifiably be withheld.

Although there is no case law of which I am aware that deals with the specific subject matter at issue, it appears that the records in question are accessible under the Freedom of Information Law. Further, I believe that recent case law tends to bolster such a contention.

First, it is emphasized that the Freedom of Information Law defines the term "record" broadly in §86(4) to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 information sought may not yet be in the legal custody of Saratoga County, the definition of "record" includes "any information...produced...for an agency...in any physical form whatsoever..." Saratoga County, a public corporation, is clearly an agency as defined by §86(3) of the Freedom of Information Law. As I understand the situation, the information in question has been produced for an agency, Saratoga County, by Cole-Layer-Trumble for review by the County pursuant to a contractual agreement. Although Mr. Serano has contended that "the materials...do not yet constitute records...", I disagree with his contention based upon the definition of "record" discussed above.

Although the information may be by no means final, since the definition of "record" includes any information produced for an agency "in any physical form whatsoever", the materials, in my view, constitute records subject to rights of access granted by the Freedom of Information Law.

Second, Mr. Beebe's letter, upon which Mr. Serano relies, cites §87(2)(g) of the Freedom of Information Law as the basis for withholding similar records. I disagree with that contention as well based upon the language of the Freedom of Information Law and recent case law. Section 87(2)(g) states that an agency may withhold 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..."

From my perspective, inter-agency materials constitute those documents transmitted from one agency to another. Intra-agency materials constitute those records transmitted within an agency, from one official of a particular agency to another official of the same agency. Cole-Layer-Trumble, however, is a private, profit-making corporation, which falls outside the scope of the definition of "agency". Consequently, I do not believe that the materials in question could be considered either inter-agency or intra-agency in nature.

This point has been confirmed by means of three recent judicial interpretations of the Freedom of Information Law. In Murray v. Troy Urban Renewal Agency (Sup. Ct., Rensselaer County, April 24, 1980), the Court found that:

> "[T]he appraisal report sought here was prepared for the Troy Urban Renewal Agency by an independent, private real estate appraiser who was not a public employee. The appraisal report prepared by an independent contractor did not originate from within a state or municipal government agency as is required by Public Officers Law §87 subd. 2(g).

> Because the subject appraisal report was prepared for a government agency and, not by the agency personnel it lacks the essential characteristic of being "inter-agency or intra-agency materials" and therefore exempt from disclosure under Public Officers Law §87 subd. 2(g)" (emphasis added by the court).

A similar holding was reached in Phillips v. Brier (Sup. Ct., Albany County, August 22, 1980) which held that correspondence between a city manager and a private appraiser engaged in a contractual agreement with the city fell outside the scope of the exception of inter-agency and intra-agency materials.

Further, in a situation concerning access to reports and correspondence between a town and private firm of consulting engineers, it was held that:

> "[S]ubdivision (g) under certain circumstances permits nondisclosure of inter and intra agency materials. However, the Intervenor, Leonard S. Wegman Co., Inc. does not fall within the definition of "agency" as it is set forth in section 86 subd. 3 of the Public Officers Law (Freedom of Information Law)" [Sea Crest Construction v. Stubing (Sup. Ct., Nassau County, January 7, 1980)].

Based upon the foregoing, it is reiterated that although a contractual relationship exists between Saratoga County and Cole-Layer-Trumble, the latter is not "agency" as defined by the Freedom of Information Law. Therefore, §87(2)(g) of the Freedom of Information Law could not in my view be cited appropriately as a basis for withholding.

Third, I would also like to direct your attention to Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], in which the Court of Appeals rendered an expansive interpretation of the Freedom of Information Law. In that decision, which dealt with access to records in possession of a not-for-profit corporation engaged in a contractual

relationship with a village, the Court granted access and, as one of the bases for disclosure, cited the statement of legislative intent appearing in §84 of the Freedom of Information Law:

> "[K]ey is the Legislature's own unmistakably broad declaration that, '[a]s 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' (emphasis added; Public Officers Law, §84)". (id. at 576).

The Court stated further that:

> "[F]or the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit".

It is also noted that the records sought in Kimball were apparently outside of the physical custody of the village when the request was made. Nevertheless, the Court of Appeals found that:

> "temporary possession in another does not necessarily oust a permanent possessor of the control which would make it subject to the responsibilities imposed by the Freedom of Information Law" (id. at 578).

As I understand it, there is no question but that the materials developed by Cole-Layer-Trumble will be in the legal custody of Saratoga County. As the Court of Appeals stated, however, the fact that the records may not now be in the physical possession of an agency might not alter rights of access to the records or the County's responsibilities under the Freedom of Information Law.

Lastly, assuming that §87(2)(g) of the Freedom of Information Law could not be cited as a basis for withholding, I do not believe that any of the remaining grounds for denial could justifiably be cited. While there is a contractual relationship between the County and Cole-Layer-Trumble, it does not appear that disclosure would, in the words of §87(2)(c) of the Freedom of Information Law, "impair present or iminent contract awards", for the contract was awarded to Cole-Layer-Trumble some time ago. Consequently, there appears to be no possibility that disclosure would "impair" the process by which a contract is awarded.

In sum, it appears that the materials in question constitute "records" subject to rights of access granted by the Freedom of Information Law, that §87(2)(g) concerning inter-agency and intra-agency materials could not be cited as a basis for withholding, that the direction given by the courts indicates that the Freedom of Information Law is being construed expansively, and that no other remaining grounds for denial listed in §87(2) of the Freedom of Information Law could be cited to withhold 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:ss

cc: Mr. Robert Beebe
Saratoga County Board of Supervisors
Saratoga County Equalization and Assessment Committee
Mr. Richard Serano

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1785

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

December 8, 1980

Mr. M.A. Lang
[redacted]

Dear Mr. Lang:

I have received your letter of November 6 and apologize for the delay in response.

You have requested "access lists for various agencies", as well as information regarding the historical background of the Freedom of Information Law, an indication of the "pitfalls the government sees in the law", and distinctions between the New York Law and its federal counterpart.

First, I do not understand the substance of your request for "access lists" of various agencies. It is possible that you are referring to the subject matter lists required to be compiled by agencies under §87(3)(c) of the Freedom of Information Law. If that is so, it is suggested that you request such lists directly from the agencies of your choice. The Law does not require agencies to submit subject matter lists to the Committee. Consequently, the Committee does not maintain them. Further, the list required to be compiled should make reference by category to all records of an agency, whether or not they are available.

Second, with regard to the background leading to the passage of the Freedom of Information Law in 1974, I do not believe that any specific event precipitated enactment of the Law. From my perspective, the passage of the federal Freedom of Information Act in 1966 began a trend that was followed by many states, one of which was New York. Certainly, events such as Watergate and Pentagon Papers case had an effect in pointing out the need for greater accountability in government.

Third, in terms of "pitfalls", I like to think that the New York Freedom of Information Law as amended provides both a useful tool for the public and the necessary protection for government. In my view, the Freedom of Information Law is a "common sense" law, for it states essentially that all records are availalbe, except to the extent that disclosure would "hurt" some governmental process or individual. Most of the exceptions to rights of access listed in §87 (2)(a) through (h) of the Law contain an operative verb that describes the potential harm that could arise if records were to be disclosed. Further, the standards in the exceptions are flexible. For instance, if collective bargaining negotiations are occurring today, perhaps disclosure of records would "impair" the bargaining process and place government at a disadvantage [see §87(2)(c)]. However, if an agreement is signed tomorrow, the "impairment" disappears, and the records that were deniable yesterday likely become available (see attached article on Freedom of Information Law and Open Meetings Law that I prepared).

Lastly, although the structure of the New York Freedom of Information Law and the federal Freedom of Information Act is similar, there are distinctions between the two statutes that should be noted. I would like to point out, too, that the amendments to the New York Freedom of Information Law, effective January, 1978, were drafted in part based upon the experience under the federal Act and with an ey toward preventing problems that had arisen under the federal Act.

The New York Law defines "record" broadly in §86(4) to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..."

No such definition appears in the federal Act. As a consequence, there have been federal judicial determinations denying access that would in my opinion have been decided in favor of access under the New York Law.

In addition, I feel that the language in the New York Law regarding the exceptions for trade secrets, records compiled for law enforcement purposes and inter-agency and intra-agency materials improves upon and removes many of the problems that have arisen under the analogous

exceptions in the federal Act. I have enclosed the Committee's first and second annual reports on the Freedom of Information Law, which discuss in greater detail comparisons between the two statutes.

Further, the New York Freedom of Information Law created the Committee on Public Access to Records, the only body of its kind in the nation. I believe that the Committee, as indicated in the second annual report, has been helpful in implementing the Law from the perspective of the public and government agencies. There is no similar office at the federal level.

I hope that 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-1786

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

December 8, 1980

The Honorable Thomas J. Schwarz
Mayor
Incorporated Village of Ocean Beach
Box 457
Ocean Beach, New York 11770

Dear Mayor Schwarz:

I have received your request for a "ruling" under the Freedom of Information Law. Please accept my apologies for the delay in response to your inquiry.

It is noted at the outset that the Committee does not have the authority to issue "rulings" binding upon agencies. On the contrary, the Committee renders advisory opinions which, although they are not binding upon agencies, have been given substantial weight by the courts [see e.g., Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979); and Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

According to your letter, the Village of Ocean Beach "requested a copy of the tentative assessment list prepared by the Town of Islip with respect to that property which was within both the Town and the Village". The Town has sought to charge a fee of $572.16, which is based upon the "going fair market rate for one hour on IBM 3031, and the operator's time and paper costs."

However, you wrote that it is your understanding "that the Town merely had to make a copy of an already printed assessment roll..." Consequently, you have contended that "the Town is attempting to charge the Village the going fair market rate for a computer owned by the Town for a roll which had already been run on the computer."

If I understand the situation correctly, I would agree with your contention that the fee sought to be assessed by the Village is both excessive and inappropriate. Very simply, assuming that the initial computer printouts had been made by the Town prior to your request, it appears that the fee should be based upon the cost of photocopying existing records.

While it may have been costly to the Town to develop and program the information contained within the computer, once those steps have been taken and records have been created, I do not feel that the Town may seek to pass on its costs. Unless I am mistaken, the records that you requested would have been created, and indeed were created, whether or not your request had been made. In a somewhat similar situation, a BOCES with its computer developed salary and fringe benefit data in a program in which the districts contributed thousands of dollars. However, once the information was developed, it was subject to the Freedom of Information Law and made available upon payment of the fees for photocopies envisioned by the Freedom of Information Law.

Stated differently, although it may have cost the districts thousands of dollars to compile the records, once they were created, the agency was restricted to charging a fee of twenty-five cents per photocopy. As stated by the Court of Appeals:

> "[M]eeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds." [Doolan v. BOCES, 48 NY 2d 341, at 347 (1979)].

With respect to fees generally, §87(1)(b)(iii) of the Freedom of Information Law states that:

> "the fees for copies of records 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."

Therefore, if, for example the printed information could be photocopied on a page not in excess of nine by fourteen inches, the Town could charge no more than twenty-five cents per photocopy, unless a different fee has been established by law. If the sheets to be copies are larger than nine by fourteen inches, the Town could assess a fee based upon the actual cost of reproduction (i.e., two photocopies per page).

Moreover, §1401.8(c)(3) of the regulations promulgated by the Committee, which have the force and effect of law, provide that the actual reproduction cost is "the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries." As such, the Town could not in my view charge for personnel costs of its operator. This point has been confirmed in Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School (Sup. Ct., Nassau Cty., NYLJ, December 27, 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

cc: Michael LoGrande
Gregory Munson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1787

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 8, 1980

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

Dear Mr. Mooney:

Thank you for transmitting a copy of your determination rendered pursuant to an appeal made by Sol Herskowitz, Esq., who requested:

> "records or portions thereof pertaining to the names and organizational affiliations of the individuals who examined candidates for the Associate Medical Care Administrator promotional examination administered during the March 1980 period".

The determination denied access on the grounds that the information sought falls within the scope of §87(2)(g) and 87(2)(b) of the Freedom of Information Law, and that the Law does not require that an agency create a record in response to a request.

From my perspective, your determination contains conflicting statements. Consequently, I disagree with your response to the appeal.

Please note that the following comments are intended merely to resolve a dispute and attempt to obviate the necessity of the initiation of litigation.

First, you indicated that the Department of Civil Service does not maintain "a record of the names of those persons who served as examiners for the examination..." In this regard,

as I understand the request, no "listing" was sought; contrarily, Mr. Herskowitz requested "records or portions thereof" reflective of the information in question, which is consistent with the introductory language of §87(2) of the Freedom of Information Law. Moreover, the last paragraph on the first page of your determination indicates that the Department records "do contain the names...of persons constituting a pool or panel..." of those who served as examiners. In view of your statement, it appears that although there may be no "list" of names, the Department does maintain records containing the names of the examiners. If that is the case, records indicating the names requested exist in the form of a record or records and such records would be subject to rights of access granted by the Freedom of Information Law.

To the extent that other areas of requested information are not maintained by the Department, such as information regarding the "organizational affiliations" of the examiners, I concur with your response. As you wrote, §89(3) of the Freedom of Information Law states that, as a general rule, an agency need not create a record in response to a request.

Second, the denial is based in part upon §87(2)(g) of the Freedom of Information Law, which provides that an agency may withhold 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..."

You wrote that the "records or portions thereof" sought by Mr. Herskowitz "do not constitute final agency determinations or otherwise fall within any of the above categories". I disagree, for one of the categories of accessible information within §87(2)(g) is "statistical or factual tabulations or data". I believe that records reflective of the names of the

examiners in question clearly constitute "factual...data" that must be made available. I cannot envision any way in which an indication of names of pool or panel members could be anything but factual information.

The remaining ground for denial cited in your letter is based upon §87(2)(b) of the Freedom of Information Law, which states in relevant part that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". I agree with your contention that the listing of such invasions of privacy appearing in §89(2)(b) constitutes merely five examples among many more possible unwarranted invasions of privacy. Nevertheless, having discussed the request with Mr. Herskowitz's client, I do not believe that §87(2)(b) could appropriately be cited.

I was informed by the client that at the time of the examination, the names of the examiners were made known to the examinee. If that is so, I believe that it would be difficult, if not impossible, to justify a denial of access to information appearing in records that was provided orally. Further, as you indicated in your letter, "the fact that certain persons serve as examiners for our examinations is relevant to the work of our agency". Once again, if that is so, based upon various judicial interpretations of the Freedom of Information Law, it appears that records containing the names 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:SS

cc: Mr. Herskowitz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1788

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

December 8, 1980

Mr. Thomas J. Kelly
[redacted]

Dear Mr. Kelly:

I have recently received your letter of November 8 in which you requested information regarding the means by which you may file a request under the Freedom of Information Law with the New York City Police Department. You wrote that you are particularly interested in gaining access to records concerning the Lindbergh kidnapping case of 1932.

As a general rule, in making a request under the Freedom of Information Law, an applicant is merely required to state his or her request in writing reasonably describing the records sought. In addition, you might want to offer to pay the requisite fees for photocopying if photocopies are sought. I have enclosed an explanatory pamphlet regarding the Freedom of Information Law that contains a sample letter of request that may be useful to you.

It is also noted that the Freedom of Information Law provides access to existing records. Consequently, if information that is requested no longer exists in the form of a record or records, an agency, such as the New York City Police Department, is not obliged to create new records on your behalf.

In directing your request to the Police Department, it is suggested that you address it to the Records Access Officer, New York City Police Department, 1 Police Plaza, New York, NY 10038. In addition, it is suggested that you simply write "Freedom of Information Request" on the outside of the envelope.

Lastly, it is possible that there may be other sources of the information in which you are interested. Specifically, I would imagine that there are numerous court records that would be available from the court in which the kidnapping trial was held. In addition, the Department of Records and Information Services performs archival services for New York City government. If you would like to contact that office, your inquiry should be addressed to Robert P. Gerometta, Deputy Commissioner, Department of Records and Information Services, 31 Chambers Street, New York, NY 10007.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

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

December 31, 1980

Mrs. Muriel Shuman
[redacted]

Dear Ms. Shuman:

I have recently received your letter in which you requested assistance in your efforts to obtain all of your school records, including information concerning your I.Q., achievement test scores and similar information.

Attached to your inquiry is a response to a request for records that you transmitted to the Clara Barton High School for Health Professions, in which it was stated that the school was "not permitted to send copies of records directly to former students." I disagree with the contention expressed in the response to you.

I would like to point out initially that the Committee on Public Access to Records is responsibile for providing advice with respect to the New York Freedom of Information and Open Meetings Laws. However, the provision of law governing access to student records is the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g).

The federal Act is applicable to any educational agency or institution that receives funding through a program administered by the United States Department of Education. Consequently, virtually all public schools and many private colleges that receive funding are subject to the provisions of the Act.

Second, in brief, the Act states that "education records" identifiable to a particular student are confidential to all but the parents of a student, and that the student acquires the rights of his or her parents when he or she reaches the age of eighteen.

Consequently, assuming that the High School in question is subject to the Act, I believe that many education records pertaining to you are likely available to you.

Enclosed are copies of both the Family Educational Rights and Privacy Act and the regulations governing its procedural implementation adopted by the then United States Department of Health, Education and Welfare. I believe that the regulations will be most useful to you, for they provide guidance regarding the definitions of terms, the means by which requests should be made, and requirements regarding the responses to be given by educational agencies or institutions.

I hope that 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-1790

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

December 9, 1980

Mr. Donald Schatz
General Counsel
New York City
Housing Authority
250 Broadway
New York, NY 10007

Dear Mr. Schatz:

I have received your letter of November 24 in which you questioned the application of Chapter 677 of the Laws of 1980 to the New York City Housing Authority.

I concur with your contention that the Housing Authority is likely outside the scope of the Act in question. The definition of "agency" appearing in §2(a) of the Act makes reference to state agencies and excludes entities of local government. Further, from my perspective, the Act is intended to survey the practices of agencies that generally have statewide authority with respect to the maintenance of systems of records that identify individuals. It is also noted that the lists used by the Committee to contact state agencies do not make reference to the New York City Housing Authority.

In view of the foregoing, it is my opinion that the Housing Authority falls outside the scope of Chapter 677.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1791

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

OMMITTEE MEMBERS
THOMAS H. COLLINS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 9, 1980

Mr. James F. Gleason, Jr.
Assistant Business Manager
International Brotherhood
Electrical Workers
Union Local #41
3564 California Road
Orchard Park, NY 14127

Dear Mr. Gleason:

As you are aware, I have received your letter of November 5. Please accept my apologies for the delay in response.

According to the correspondence appended to your letter, you have unsuccessfully requested information from the City of Buffalo. Specifically, you have raised questions as to whether the owners of a particular parcel of real property have applied for assistance from the City in their renovation project, and if so, whether assistance has been approved and granted in the form of a loan, loan guarantee or grant; whether the project is funded in any way by the state or federal government; and whether "wage and hour labor standards" are applicable to the project.

It is emphasized at the outset that the Freedom of Information Law is an access to records law. Stated differently, the Law grants access to existing records, and an agency, such as the City of Buffalo, is not obligated to create records in response to a request. Consequently, if the information that you requested does not exist in the form of a record or records, the City has no obligation to create a new record on your behalf. On the other hand, if records do exist that are reflective of the information sought, those records are 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. Specifically, all records 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.

During our recent telephone conversation, I raised questions with you concerning the possibility of an invasion of privacy with regard to the applicant. I explained that in situations in which the award of a grant or loan is based upon a particular level of personal income, records might justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law. For instance, if loans or grants are awarded only to those individuals having a personal income of less than ten thousand dollars, disclosure of the identity of the person in receipt of a grant or a loan would indicate that such a person earns less than ten thousand dollars per year. In that type of situation, it would be advised that disclosure would result in an unwarranted invasion of personal privacy and that, therefore, an agency could withhold the records.

However, in this situation, the correspondence and our telephone conversation indicate that the applicant is a commercial enterprise, "Laube's Old Spain", a restaurant. Consequently, if I understand the situation correctly, there would appear to be no issue with respect to the personal privacy of the applicant.

Assuming that the conclusions reached in the preceding paragraphs are accurate, I do not believe that any of the grounds for denial listed in the Freedom of Information Law could be cited to withhold the records.

In terms of the questions raised in your request, first, a record of whether the owners of the real property had applied for renovation would, in my view, be accessible, for no ground for denial could in my view appropriately be cited.

The three remaining areas of information sought appear to be available under §87(2)(g) of the Law, which provides that an agency may withhold 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..."

It is important to point out that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Under the circumstances, it appears that the records in question would be found within inter-agency or intra-agency materials. However, a decision to approve a loan, loan guarantee, or a grant would be reflective of a "final determination" available under §87(2)(g)(iii). Records reflective of the manner in which the project is funded, as well as the wage and hour labor standards applicable to the project, would in my view constitute statistical or factual information that would also be available.

Lastly, the correspondence attached to your letter indicates that the City of Buffalo apparently did not respond to your request in a timely fashion.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged

within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgement of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Mr. Bruce Baird, Commissioner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1792

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

December 10, 1980

Mr. H. Davis
Davis & Davis
116 John Street
New York, NY 10038

Dear Mr. Davis:

I have recently received your communication of November 25, and it appears that your client has obtained virtually all of the information in which she was interested.

You wrote, however, that you have had no success in gaining access to records in possession of federal agencies, such as the FBI. As you intimated, the Committee has no jurisdiction with respect to access to federal agency records. The New York Freedom of Information Law is applicable to records of government in New York. Its counterpart, the federal Freedom of Information Act (5 USC §552) is applicable to records of federal agencies. The two statutes are similar in structure, for both essentially provide access to all records except those falling within one or more grounds for denial. Further, the exceptions to rights of access are somewhat similar. Based upon what I have read concerning the implementation of the federal Act by federal agencies, and particularly the FBI, unfortunately, it often takes an inordinate amount of time to gain access to records at the federal level. All that I can suggest is that you and your client seek to prod the federal agencies to act speedily.

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-1793

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

December 10, 1980

Ms. Rhoda Keller
Editor
THE LEADER
45 Church Street
Freeport, NY 11520

Dear Ms. Keller:

As you are aware, I have received your letter in which you described difficulties in gaining access to records of the Police Department of the Village of Freeport.

According to your letter, you have had dealings with the Police Department for several years. However, your capacity to gain access to its records had steadily deteriorated. Some of the problems that you have encountered involve an inability to inspect police blotters and complaint reports, a contention by the Police Chief who has stated that "it is his responsibility to the village to withhold the names of persons from prominent families if they are involved in burglaries" and statements to the effect that members of the police force do not want their names in print, which you have characterized as a "sheer untruth". Most recently, you were told by clerks at the Police Department that the Chief said that you had no right to "see the blotter or anything else". It is noted that you wrote that your publisher feels that the newspaper has an obligation to the public, and at the same time, you expressed your sensitivity to infringements upon personal privacy.

I would like to offer several comments with respect to the situation that you have described.

First, there are judicial interpretations concerning both the content and access to police blotters. Specifically, in Sheehan v. City of Binghamton [59 AD 2d 808 (1977)] it was held that a police blotter constitutes a log or diary in which any event reported by or to a police department is recorded. The court stressed that a police blotter contains no investigative information, and that it is merely a summary of events or occurrences. The court also concluded that a police blotter is accessible.

The Sheehan decision was rendered under the original Freedom of Information Law, which differed in structure from the existing Freedom of Information Law, which went into effect on January 1, 1978. The original Law granted access to specified categories of records to the exclusion of all others. One of the categories of accessible records included "police blotters and booking records" [see original Freedom of Information Law, §88(1)(f)]. The new Law reverses the scheme of the original Law. Instead of providing access to specified categories of records to the exclusion of all others, the Law now 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.

From my perspective, the fact that the Freedom of of Information Law no longer specifically directs that police blotters and booking records be made available does not constitute a basis for withholding those records under the amended statute. Section 89(5) of the amended 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, nothing in the Freedom of Information Law may be cited to limit or abridge rights of access granted either by other provisions of law or by means of judicial determinations. In this instance, there is a judicial determination, the Sheehan case cited earlier, which directs that police blotters are available. The effect of the decision in my view is to preserve rights of access to police blotters. Consequently, even if a police blotter or a booking record makes reference to a member of a "prominent family", for instance, the record in my view remains available. I do not believe that the Law distinguishes or discriminates in terms of rights of access to records based upon the economic status of persons named in records.

With regard to the amended Law generally, there are several provisions that relate to your inquiry. It is noted that most of the grounds for denial appearing in the amended Freedom of Information Law are based upon potentially harmful effects of disclosure. Unless disclosure of records would result in significant harm either to an individual or a governmental process, it is likely that records must be made available.

Perhaps the most relevant 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 language quoted above permits an agency, such as a police department, to withhold records compiled for law enforcement purposes only under specified conditions. For instance, disclosure of a police blotter or booking record would not in my view likely interfere with an investigation or deprive a person of a right to a fair trial, for it is merely a summary of events. If such a record contains reference to a confidential informant, that portion of the record could be deleted. The remainder, however, would be required to be made available.

Another ground for denial that could arise in rare instances is §87(2)(f), which states that an agency may withhold records or portions of record when disclosure would "endanger the life or safety of any person."

Again, that provision likely would arise most often if a record identifies a confidential informant, for if the identity of such an individual is disclosed, it is conceivable that his or her life or safety could be placed in jeopardy.

The last ground for denial that could be relevant may also be cited as a basis for disclosing. Section 87 (2)(g) of the Law states that an agency may withhold 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..."

It is emphasized that the language quoted above contains what in effect is a double negative. Although the Law states that inter-agency and intra-agency materials may be withheld, it also provides that portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. It is likely that the information in which you are interested is found within "intra-agency" materials developed by the Police Department. However, the information in question consists of factual information which is available under §87(2)(g)(i).

In short, it is reiterated that the Freedom of Information Law is based upon a presumption of access and that records must be made available, except to the extent that one or more of the grounds for denial may appropriately be cited to withhold.

Lastly, it is important to point out that the Freedom of Information Law places the burden of proof in a judicial challenge to a denial of access upon government. If a judicial challenge to a denial of access is initiated, the agency has the burden of proving that the records withheld fall within one or more of the grounds for denial appearing in the Law. Further, the Court of Appeals, the state's highest court, has held that an agency cannot merely assert a ground for denial and pre-

vail; on the contrary, the agency must demonstrate that the harmful effects of disclosure described in the grounds for denial would indeed arise [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 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:jm

cc: Mayor William H. White
Anthony P. Elar, Police Chief

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1794

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

December 11, 1980

Jean Walters
[redacted]

Dear Ms. Walters:

Thank you for your thoughtful letter of November 12. Please accept my apologies for the delay in response.

Your letter concerns a series of event regarding the financial condition of the Town of Charleston. Although you have not raised questions concerning access to particular records, you have asked for "anything" that might be offered regarding the Freedom of Information Law and your ability to gain access to records.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern the procedural aspects of the Law with which each agency, such as a town, must comply, and a copy of a pamphlet that outlines rights of access granted under the Freedom of Information Law and the Open Meetings Law.

As a general rule, the Freedom of Information Law is based upon a presumption of access. Stated differently, the Law provides that all records of an agency 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.

With respect to the records in which you are interested concerning the financial condition of the Town, such as books of account, such records have long been available. It is noted that §89(5) of the Freedom of Information Law preserves rights of access granted by other provisions of law. For instance, §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 orfiled 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..."

Moreover, §87(2)(g)(i) of the Freedom of Information Law grants access to "statistical or factual tabulations or data" found within inter-agency or intra-agency materials. The records in which you are interested could likely be characterized as "intra-agency" materials for they are developed by the Town. However, their contents would consist of statistical or factual information that is available.

With respect to the identity of the bank that bonded the Town, in my view, any record that indicates the bonding relationship would be available, for it would be reflective of both factual information as well as 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:ss

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-568
FOIL-AO-1795

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

December 11, 1980

Kay Thomas
[redacted]

Dear Ms. Thomas:

I have received your letter of November 6. Please accept my apologies for the delay in response.

Your letter concerns the accountability of hospitals that are non-profit, private corporations which in some cases received eighty-five percent of their funding from government. You have asked whether meetings of the boards of those hospitals must be open to the public.

While I agree with your contention that private hospitals in receipt of substantial public funding should be accountible, I do not believe that such hospitals fall within the scope of either the Freedom of Information or the Open Meetings Laws.

In the case of the Open Meetings Law, its scope is determined by the definition of "public body" appearing in §97(2) of the Law (see attached). The cited provision states that "public body" means:

> "any entity, for which a quorum is required in order tc 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".

In my view, it is doubtful that a court would find that the board of directors of a private hospital conducts public business or performs a governmental function. Further, the fact that a private corporation, such as a hospital, receives public funding does not alone in my

view bring it within the scope of the Freedom of Information or Open Meetings Laws.

A similar conclusion must be reached in terms of rights of access to the records of a private hospital. The Freedom of Information Law (see attached) 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" [see §86(3)].

Again, although a private hospital may have a significant relationship with government, it would not be an entity of state or local government, nor would it perform a "governmental" function. Consequently, I do not believe that a private hospital would be considered an "agency" subject to the Freedom of Information Law.

Although a private hospital might not be covered by either of the two laws, both might nonetheless be useful to you. For instance, if a county legislative body provides funding to a private hospital, its deliberations on the subject would be subject to the Open Meetings Law and would have to be considered during open meetings.

Perhaps a more useful tool is the Freedom of Information Law. In order for a hospital to obtain funding from government, presumably the hospital must submit information to government prior to the receipt of funding. To the extent that government maintains records concerning a private hospital, those records would be subject to rights of access granted by the Freedom of Information Law. Further, I have had numerous conversations with representatives of the State Health Department, which maintains a great deal of information regarding hospitals and is required to make available to the public much of that information.

If you have questions concerning a particular hospital, it is suggested that you direct a request made under the Freedom of Information Law to Stephen Krill, Records Access Officer, New York State Department of Health, Tower Building, Albany, New York 12237.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1796

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

December 11, 1980

Mr. Alfred O. Kuhnle
[redacted]

Dear Mr. Kuhnle:

I have received your letter of November 17 and apologize for the delay in response.

According to your letter, you requested copies of affidavits filed by particular individuals who attested to the residence of another person. However, access to the affidavits was denied by Donald J. McCarthy, Jr., Counsel to the State Board of Elections, who wrote that:

> "[M]aterials contained in an investigative file are considered confidential by this agency and are, therefore, unavailable. Furthermore, such material is specifically exempted from the general provisions of the Freedom of Information Act."

Without greater information regarding the contents of the affidavits in which you are interested, I feel that I can provide only general direction. However, I respectfully disagree with the basis for withholding offered by Mr. McCarthy.

It is noted initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Board of Elections, are available, except to the extent that records or portions thereof fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law.

Further, the state's highest court, the Court of Appeals, has held that rights of access are fixed by the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979)]. Consequently, an agency cannot merely assert that records are confidential without more; on the contrary, the only bases for withholding are those appearing in the Freedom of Information Law.

Under the circumstances, it appears that two grounds for denial might be relevant with respect to the records sought.

The first ground for denial that might be applicable 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 view, the language quoted above could not likely be asserted to withhold the affidavits. Although the affidavits may have been compiled for law enforcement purposes, the correspondence appended to your letter indicates that they were compiled several years ago. Consequently, it appears doubtful that disclosure would interfere with an investigation, deprive a person of a right to a fair trial, identify a confidential source, or reveal non-routine criminal investigative techniques or procedures. In view of the foregoing, I do not believe that §87(2)(e) could justifiably be cited to withhold the affidavits.

The remaining ground for denial that may be applicable 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." As indicated earlier, without knowing more about the contents of the records, it would be inappropriate to conjecture with regard to possible privacy considerations. However, to the extent that portions of the affidavit might if disclosed result in an unwarranted invasion of personal privacy, the Board of Elections may delete such portions of the records and provide access to the remainder.

I hope that 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: Donald J. McCarthy, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1797

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

December 15, 1980

Mr. Dario Zorman
79-A-2693
Box B
Dannemora, NY 12929

Dear Mr. Zorman:

I have received your letter of November 16 and apologize for the delay in response.

You have indicated that you requested a copy of a medical report from the Department of Correctional Services. You wrote further that the report concerns an EEG and was used in your trial. Nevertheless, the Department denied access on the ground that the EEG fell within the exception for inter-agency and intra-agency communications.

It is noted that I have discussed the issue of medical records of inmates on several occasions with representatives of the Department of Correctional Services. I have been informed that, as a general rule, factual information such as laboratory results, are made available, but advisory materials, such as opinions rendered by physicians, are withheld.

Such a stance is in my view consistent with §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold 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..."

While an agency may withhold inter-agency or intra-agency materials, portions of such materials consisting of "statistical or factual tabulations or data" must be made available.

Unless I am mistaken, the records of an EEG would be considered test results that are factual in nature and which should be made available. If, however, the records of the EEG are advisory or evaluative in nature, they would be deniable to that extent.

I would also like to suggest an alternative. If the EEG results were submitted in evidence during your trial, they are likely found within the court records, which would be available to you under §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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1798

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

December 15, 1980

[redacted]
Box - 51
Comstock, NY 12821

Dear [redacted]:

I have received your letter of November 21 and apologize for the delay in response.

Your inquiry concerns rights of access to a "psychiatric evaluation report" apparently used by and in possession of the Department of Correctional Services and the Board of Parole.

It is noted that the issue of disclosure of medical records to inmates has been discussed with officials of the Department of Correctional Services on several occasions. In general, the Department grants access to factual materials, such as laboratory test results, and withholds advisory or evaluative materials.

In my view, that position is consistant with the Freedom of Information Law (see attached). Specifically, §87(2)(g) of the Law states that an agency may withhold 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..."

Under the circumstances, the reports developed by the Department of Correctional Services could in my opinion be characterized as "intra-agency" materials. To the extent that they contain statistical or factual information, I believe that they are available to you. However, to the extent that they contain advice, recommendations or non-factual evaluative materials, they are in my view deniable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1799

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

December 15, 1980

Kenneth S. MacAffer, Jr.
Member of Public Information
Committee
Albany County Legislator -
18th District
1 Sage Hill Lane
Menands, NY 12204

Dear Mr. MacAffer:

I have received your letter of November 17 and apologize for the delay in response.

You have questioned whether the existence of the Freedom of Information Law requires that information be divulged by Albany County "in no other way than through its (said Freedom of Information Law's) procedures". In this regard, it is your contention that members of the County Legislature, such as yourself, "should be able to obtain available information from the various County Departments and Offices in pursuance of our governmental responsibilities without Freedom of Information Law procedure, as long as such information is not specifically restricted for lawful reasons".

As you are aware, Joseph Dolan, Chairman of the County Legislature's Public Information Committee, directed a similar inquiry to this office early in November. I believe that my response to Mr. Dolan's letter is consistent in all respects with the contentions that you have made.

I have enclosed a copy of my response to Mr. Dolan, which sought to view the Freedom of Information Law and the duties of public officers from the perspective of reasonableness.

In relevant part, it was advised that:

> "...when a public officer seeks information while acting in his or her capacity as a public officer, that person should not be required to follow the procedures generally applicable to the public under the Freedom of Information Law. In such a situation, a member of a board, for example, would not be requesting information as a member of the public based upon his or her 'right to know', but rather as a representative of government who has a need to know in order to carry out his or her official duties.
>
> "Of course, it should be noted that there may be reasonable limitations that may be imposed upon public officers seeking information to perform their duties. For instance, some records may be exempted from disclosure by statutes that permit disclosure only under specified circumstances. In those situations, I do not believe that it would be appropriate to provide unrestricted access to records. However, as a general rule, when a public officer seeks information in the performance of his or her duties, I do not believe that it would be necessary or appropriate to require such an individual to 'file forms', for instance, or follow formalized procedures generally applicable 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:ss
Enclosure
cc: Mr. J. Dolan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1800

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

December 15, 1980

Mr. Charles C. David, Jr.
QCF#77A0916/3-S-9
Queensboro Correctional Facility
47-04 Van Dam Street
Long Island City, NY 11101

Dear Mr. David:

I have received your letters of November 18 and November 21 and apologize for the delay in response. In both letters you have asked for assistance regarding your capacity to obtain records from the New York City Probation Department pertaining to yourself.

It is noted at the outset that I am not sure of the nature of the records in which you are interested. If the information sought is reflective of a presentence report, a denial would be appropriate.

In relevant part, §390.50(1) of the Criminal Procedure Law states 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 is 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 a 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)].

In view of the foregoing, if you are seeking a presentence report, it is suggested that you direct your request to the appropriate court.

Assuming that you are requesting records other than the presentence report, I believe that the Freedom of Information Law is applicable. However, without knowing more of the contents of the records, I can provide only general direction. Under the circumstances, there are several grounds for denial that might be applicable.

For instance, as you intimated, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." To the extent that disclosure of names or other identifying details would result in an unwarranted invasion of personal privacy, those portions of the records could be deleted.

A second possible ground for denial is §87(2)(e), which states that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> 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."

It would appear that the only basis for withholding under the provision cited above would involve those portions of the records that might identify informants. Again, to that extent, records compiled for law enforcement purposes could be withheld.

A third ground for denial is §87(2)(f) which provides that an agency may withhold records or portions thereof which if disclosed would "endanger the life or safety of any person." For obvious reasons, the extent to which the language of §87(2)(f) is applicable is unknown to me.

The last ground for denial that could be relevant to your request is §87(2)(g), which states that an agency may withhold 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..."

It is noted that the provision quoted above contains what in effect is a double negative. Stated differently, although inter-agency and intra-agency materials may generally be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Finally, you made reference to a request for a Vaughan Index. Please be advised that a Vaughan Index may be required to be compiled by a federal agency based upon judicial interpretations of the federal Freedom of Information Act. However, the New York courts have not yet imposed a similar requirement of agencys under the New York 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: Veronica Boasi

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1801

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

December 15, 1980

T. A. Zotto
[redacted]

Dear Mr. Zotto:

I have received your letter of November 17 and apologize for the delay in response.

You have asked for assistance with respect to requests for information sought from the City of Troy's Board of Assessment Review. Although three inquiries, the earliest of which is dated August 29, were directed to John Buckley, the City Manager, no response has been provided to date.

I would like to offer several comments regarding your inquiry.

First, I believe that the designated records access officer for the City of Troy is Robert Brier. It is suggested that you renew your request and transmit it to Mr. Brier at City Hall.

Second, it is important to point out that the Freedom of Information Law grants access to existing records. Stated differently, if a request is made for information that does not exist in the form of a record or records, an agency, such as the City of Troy, is not obligated to create a record on your behalf. For instance, if there are no records that indicate the rationale for what you consider to be an excessive increase in your assessment, the City would not be required to create records in response to your request.

Third, to the extent that records exist relative to your inquiry, they are in my view available for inspection and copying upon payment of the requisite fees for photocopying. In this regard, the courts have long held that virtually all records used by a unit of local government in the development of assessments are available [see e.g., Sears Roebuck and Co. v. Hoyt, 107 NYS 2d 756 (1957); Sanchez v. Papontas, 303 NYS 2d 711 (1969); also, General Municipal Law, §51].

Fourth, the Freedom of Information Law requires that agencies respond to requests within prescribed time limits, which have long passed. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful 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:ss

Enclosures

cc: Robert Brier, Records Access Officer
John Buckley, City Manager

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1802

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

December 15, 1980

John T. Scull, 79C264
135 State Street
Auburn Correctional Facility
Auburn, New York 13021

Dear Mr. Scull:

I have recently received your letter of November 28. Your inquiry concerns a problem that you have encountered with respect to the capacity to obtain medical records.

Specifically, you wrote that you were admitted to the Niagara Falls Memorial Medical Center in 1978 due to a back injury. While at the Medical Center, a number of tests were taken and you were released. You have requested those records in order to assist you in your defense against a charge of burglary in which it is alleged that you removed color television sets.

In my opinion, although you might not have a direct right of access to the records in question, you may likely obtain them indirectly.

Assuming that the Niagara Falls Memorial Medical Center is a private hospital, it is not subject to the Freedom of Information Law, for that law applies only to records in possession of government. However, I direct your attention to §17 of the Public Health Law, which states 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. Either the physician or hospital incurring the expense of providing copies of x-rays, medical records and test records including all laboratory tests pursuant to the provisions of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expenses..."

Based upon the provision quoted above, upon the request of a physician or hospital of your designation, the Medical Center must provide copies of medical records to that physician or hospital. Consequently, although you may have no direct right of access to the medical records, they can be obtained through a physician or hospital of your choice.

If the Niagara Falls Memorial Medical Center is an entity of government, I believe that the laboratory tests and x-rays should be made available to you under the Freedom of Information Law (see attached). Section 87(2)(g) of the Law provides that an agency must make available statistical or factual information found within inter-agency or intra-agency materials. If the medical center is a government agency subject to the Freedom of Information Law, the laboratory tests and x-rays could be considered "intra-agency" materials; however, the x-rays and test results would constitute factual information that is available to you.

If the Medical Center falls within the scope of the Freedom of Information Law, it is suggested that you renew your request and cite the points that I have made in the preceding paragraphs. If it is a private hospital, perhaps you should attempt to have the doctor of your choice request the records in question on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1803

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

December 16, 1980

James H. Faux, Ed.D.
Spencerport Central Schools
71 Lyell Avenue
Spencerport, NY 14559

Dear Dr. Faux:

I have received your letter of November 20 and apologize for the delay in response.

Your inquiry concerns a request for a copy of the civil service payroll report used by the District regarding the District's clerical employees. Specifically, you have asked whether the District is required to release employees' identification, social security and retirement numbers, as well as other items included in the report, including the name, position, gross pay, fiscal gross pay and similar figures.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. All records 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 grounds for denial appearing in §87(2)(a) through (h).

Under the circumstances, I believe that only one ground for denial is relevant to the information sought. Specifically, §87(2)(b) provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

There have been several judicial determinations regarding the protection of privacy of public employees. Based upon those decisions, I believe that the following principles can be offered.

First, it is clear that public employees have a lesser right to privacy than any other identifiable group, for public employees are required to be more accountable than any other group. Second, the courts have held in brief that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than 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); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records or portions thereof that are irrelevant to the performance of a public employee's official duties are deniable, for disclosure in such circumstances would result in an unwarranted invasion of personal privacy [see Wool, Matter of, Sup. Ct., Nassau Ct., NYLJ, Nov. 22, 1977].

With respect to the information requested, it is suggested that the employees' identification, social security and retirement numbers have no bearing upon the manner in which the public employees to whom the numbers relate perform their officual duties. Consequently, based upon extant case law, it appears that those numbers could be deleted from the report on the ground that disclosure would result in an unwarranted invasion of personal privacy.

On the other hand, the name, position, gross pay, fiscal year gross pay and similar information is in my view relevant to the manner in which both the employees and the District perform their respective duties. Consequently, I believe that those items must be made available under the Freedom of Information Law.

It is also important to point out that §87(3)(b) of the Freedom of Information Law requires each agency to maintain a payroll record that identifies each employee by name, public office address, title and salary. Therefore, much of the information that I suggested to be made available in the context of the report is required to be made available under §87(3)(b) 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1804

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 16, 1980

James H. Faux, Ed.D.
Spencerport Central Schools
71 Lyell Avenue
Spencerport, NY 14559

Dear Dr. Faux:

I have received your letter of November 21 and apologize for the delay in response.

According to your letter, the Rochester Hospital Service Corporation (Blue Cross/Blue Shield of Rochester) "has consistently refused to release to [the] school district loss ratios and specific claim information". Since the District's health insurance policies are carried by Blue Cross/Blue Shield of Rochester, the information in question is needed by the District. You have asked whether under the Freedom of Information Law there is any way that you can request and gain access to the loss information from Blue Cross/Blue Shield.

In all honesty, I am not sure that I can offer assistance that will be useful to you.

From my perspective, the central question is whether Blue Cross/Blue Shield of Rochester is an "agency" that falls within the scope of the Freedom of Information Law. In this regard, §86(3) of the Freedom of Information Law defines "agency" to include:

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

Since Blue Cross/Blue Shield is not a "governmental entity", I do not believe that it is subject to the Freedom of Information Law. If that is so, its records would fall outside the scope of rights of access granted by the Law.

It is possible that there may be provisions in the contractual agreement between the District and Blue Cross/Blue Shield that require the disclosure of the information in question. It is suggested that the contract be reviewed to determine whether Blue Cross/Blue Shield is obliged to report such information to the District.

In the alternative, I believe that the State Department of Civil Service had once received the information sought on an ongoing basis from the health insurance carriers engaged in contractual relationships with units of local government, including school districts. Therefore, it is recommended that you contact the Department of Civil Service to determine whether it maintains the information in which you are interested. If the Department of Civil Service has possession of the records sought, I believe that those records must be made available [see City School District of the City of Binghamton v. Civil Service Commission, Sup. Ct., Albany Cty., Sept. 15, 1976].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1805

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

December 16, 1980

John L. Williams
79A-2348 E-2-34
Box 51
Comstock, NY 12821

Dear Mr. Williams:

I have received your letter of November 21 and apologize for the delay in response.

You have requested advice regarding the means by which you can obtain records in general and court records in particular.

Enclosed is a copy of the Freedom of Information Law, which governs rights of access to records of agencies at the state and local government levels. In brief, the Law provides access to all records, except those records or portions that fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law.

It is noted that the definition of "agency" appearing in §86(3) of the Law specifically excludes the "judiciary" and the state legislature. Therefore, the courts and court records fall outside the scope of the Freedom of Information Law.

Nevertheless, many court records are available. For instance, §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, cannot be found".

In view of the provisions of §255 of the Judiciary Law quoted above, it is suggested that you seek the records in which you are interested from the court in which your case was tried.

In addition, it may be worthwhile to contact Prisoners' Legal Services or a similar group to help you in gaining access to 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:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1806

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

December 15, 1980

Thomas E. Walsh, II
Assistant County Attorney
County of Rockland
Office of the County Attorney
County Office Building
New City, New York 10956

Dear Mr. Walsh:

I have received your letter of November 17 and apologize for the delay in response.

According to your letter and the correspondence attached to it, Rockland County has requested and in fact paid $518 for information contained in the "electronic data file" of the New York State Department of Civil Service. However, you were informed by the Department that there would be a "six-month delay" in providing the information sought due to the Department's workload.

You have contended that "[I]nformation delayed is information denied" and have requested the assistance of the Committee.

I agree with your contention that the delay on the part of the Department of Civil Service constitutes a "constructive" denial of access.

The Freedom of Information Law [§89(3)] and regulations promulgated by the Committee, which govern the procedural aspects of the Law and with which agencies must comply, prescribe specific time limits for responding to requests. Although an agency may acknowledge receipt of a request within five business days of the receipt of a request in order to locate records or evaluate their contents with respect to rights of access, the regulations

require that records be denied or made available within ten business days of the acknowledgment. In this case, there appears to be no disagreement regarding rights of access; the sole issue appears to be the length of time in which accessible records will indeed be made available. Again, based upon the Freedom of Information Law and the regulations promulgated thereunder, the appropriate time limits for response have been exceeded.

Further, recent judicial interpretations of the Freedom of Information Law in my view bolster contentions that information found within a computer should be treated in the same fashion as the traditional "record", and that a backlog of work cannot justify a denial of access, constructive or otherwise.

First, in Babigan v. Evans [427 NYS 2d 688 (1980)], it was held that the availability of information accessible as of right under the Freedom of Information Law should not be restricted merely because it does not exist in printed form. Second and more important is the decision rendered in United Federation of Teachers v. New York City Health and Hospitals Corporation [428 NYS 2d 823 (1980)]. In that determination, it was held that a shortage of manpower needed to respond to a request is indefensible, for such a stance would "thwart the very purpose of the Freedom of Information Law".

In a related area, the Court of Appeals in Doolan v. BOCES [48 NY 2d 341 (1979)] concluded that "[M]eeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" (id. at 347).

In view of the provisions of the Freedom of Information Law, the regulations promulgated by the Committee and recent judicial determinations, I do not believe that the Department of Civil Service has the legal authority to delay making available information that has already been determined to be accessible under the Law.

Lastly, as you are aware, the Committee has no authority to compel compliance with the Freedom of Information Law. However, I am hopeful that the foregoing opinions will serve to expedite the response of the Department of Civil Service.

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:ss

cc: Tony Costanzo, Director of Public Information
John Mooney, Director of Administration
Evan Richards, Public Records Access Officer
Harold Snyder, Office of Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1807

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

December 17, 1980

Jean Walters
[redacted]

Dear Ms. Walters:

I have received your letter of November 19 and apologize for the delay in response.

Once again, you have described problems regarding the conduct of the fiscal affairs of the Town of Charleston. In all honesty, I am not sure that I can recommend any steps that might be useful to you in addition to those offered in our previous correspondence.

However, I would like to offer the following points.

First, you intimated in your letter that certain records that should exist might not, or that they cannot be found. In this regard, it is noted that the Freedom of Information is an access to records law. Stated differently, it generally does not deal with the creation of records or the manner in which records are kept; what the Law states essentially is that existing records are accessible, subject to certain conditions.

Second, you indicated that you have been in touch with the Department of Audit and Control. I believe that contact with that office is likely your best course of action, particularly in view of events of recent years.

Third, I have reviewed various provisions of the Town Law on your behalf which may be of interest to you. For instance, §29(4) of the Town Law states that the supervisor of each town:

> "[S]hall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk".

In view of the foregoing, it appears that if the books that you have requested do not exist, they should. Further, it is clear that they are accessible 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1808

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

December 17, 1980

Florence and Alvin Morrison
[redacted]

Dear Mr. and Mrs. Morrison:

I have received your letter of November 24 and apologize for the delay in response.

Your inquiry concerns rights of access of taxpayers of the Fredonia School District to the "report of the Evaluation Committee of the Middle States Association of Colleges' and Schools' Commission on Secondary Schools". You have asked further whether, assuming that you are entitlted to review such a document, any conditions upon access may be imposed, such as restrictions on note taking or denials with respect to certain portions of the report.

In my opinion, based upon your description of the report, it is accessible for inspection and copying in its entirety. This contention is based upon the following rationale.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a school district, are available, unless the records fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law (see attached).

Second, although the report in question may not have been prepared by the District, it nonetheless falls within the scope of rights of access granted by the Law. It is emphasized that §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."

In view of the definition quoted above, so long as a governmental entity has possession of the document in question, it is a "record" subject to rights granted by the Freedom of Information Law.

Third, as noted earlier, all records are available unless one or more of the grounds for denial may appropriately be cited. Under the circumstances, I do not believe that any of the grounds for denial would be applicable. It is clear that the record in question would not constitute an inter-agency or intra-agency document, for the Evaluation Committee of the Middle States Association is not an "agency" as defined by the Law.

Lastly, §89(3) of the Law enables any person to inspect an accessible record. Further, the cited provision also requires that an agency make copies of available records upon payment of or offer to pay the requisite fees 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
Executive Director

RJF:ss

Enclosure

cc: School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-570
FOIL-AO-1809

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

December 18, 1980

Rosellen McFarland
Statewide Youth Advocacy, Inc.
Southern Tier Representative
4117 David Lane
Painted Post, NY 14870

Dear Ms. McFarland:

I have received your letter of November 22, as well as the news articles and minutes of a meeting attached to it. Please accept my apologies for the delay in response.

Your inquiry concerns the activities of the Corning-Painted Post Board of Education and its compliance with the Open Meetings Law. In brief, the Board of Education announced prior to a meeting that an executive session would be held to discuss the Committee on the Handicapped. However, after the discussion of the Committee on the Handicapped, an open meeting was conducted during which the Board dealt with "the regular order of business". Further, you wrote that recommendations that were accepted were not included in minutes and that the minutes failed to include reference to the manner in which the members of the Board voted. According to the Corning Leader, one member of the Board of Education asked whether you were "carping" at the Board following your statement regarding the conduct of the Board's business.

In my opinion, you were not "carping" at the Board, and I would like to offer the following comments.

First, a public body, such as a school board, cannot schedule an executive session in advance of a meeting. The phrase "executive session" is defined by §97(3) of the Open Meetings Law (see attached) to mean that portion of an open meeting during which the public may be excluded. Moreover, the Law sets forth a procedure that must be followed by a public body before it can enter into an executive session. Specifically, §100(1) of the Law states in relevant part 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 definition of "executive session" as well as the language quoted above, it is clear that a public body may conduct an executive session only after having convening an open meeting. A motion to enter into an executive session must be made during an open meeting, it must identify in general terms the subject matter to be considered, and the motion must be carried by a majority vote of the total membership of a public body. Therefore, 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 noted that in a technical sense, a public body can never schedule an executive session in advance, for it cannot be known in advance whether a motion to enter into an executive session will indeed be carried by a majority of the total membership of a public body.

Second, and in a related vein, a public body is required to provide notice to the news media and to the public prior to all meetings. It is emphasized that the courts have given an expansive interpretation of the definition of "meeting" [see Open Meetings Law, §97(1)]. Specifically, in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, held that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of discussing a public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized.

Section 99(1) of the Law concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and posted in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given to the news media and by means of posting in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is clear that notice must be given to the public and the news media prior to all meetings.

Third, a public body may enter into an executive session only to discuss those matters deemed appropriate for executive session that are described in §100(1)(a) through (h) of the Open Meetings Law.

In this regard, if I understand the situation correctly, the Board discussed a reduction of the size of its Committee on the Handicapped and the appointment of specific individuals to serve on that Committee during an executive session, and later acted with respect to those matters during the ensuing open meeting.

In my view, the discussion of the reduction in size of the Committee on the Handicapped should have been held during an open meeting. I direct your attention to §100(1)(f) of the Open Meetings Law, which states that a public body may enter into an 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..."

To the extent that the Board discussed the individuals to be appointed to the Committee on the Handicapped, an executive session was proper, for the discussion dealt with a "matter leading to the appointment" of a "particular" person or persons. However, a determination to reduce the

size of the Committee on the Handicapped was in my opinion a policy matter which did not concern any "particular" person. Therefore, based upon my understanding of the situation, the discussion of the reduction of the Committee should have been held during an open meeting.

Fourth, you indicated that a voting record reflective of the manner in which particular members of the Board of Education voted is unavailable. Here I direct your attention to the Freedom of Information Law (see attached). Specifically, §87(3)(a) of the Law states that each agency, which includes a school board, is required to maintain:

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

Consequently, any time the School Board votes, a record of votes must be compiled which indicates who voted and the manner in which each member voted.

And fifth, you asked whether the explanation of a Board member with respect to his or her vote must be included within minutes. In this regard, §101(1) of the Open Meetings 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".

Based upon the provision quoted above, minutes need not make reference to each comment made by a participant in a meeting. However, if a board seeks to include such comments in minutes, it may 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:ss
Enclosures
cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1810

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

December 22, 1980

E. M. O'Connor
Executive Director
"Friends of the Living Innocents"
29 Fisk Street
Red Hook, NY 12571

Dear Mr. O'Connor:

As you are aware, I have received your most recent correspondence as well as the materials attached to it. Please accept my apologies for the delay in response.

In brief, you are interested in obtaining records from the Division of State Police as well as a copy of a letter that you sent to the Governor some time ago. More specifically, you are interested in obtaining your letter to the Governor as well as any investigative materials that may have been compiled by the State Police as a result of your letter. You attached a copy of a denial rendered by Robert E. Sweeney, Assistant Deputy Superintendent, which is dated May 24, 1977.

It is noted at the outset that when your initial request was made, the original Freedom of Information Law was in effect. I believe that the denial at that time was likely appropriate. The original law, enacted in 1974, granted access to specified categories of records, to the exclusion of all others. Further, one of the grounds for denial enabled an agency to withhold "investigatory files compiled for law enforcement purposes".

However, on January 1, 1978, a new Freedom of Information Law went into effect. Instead of providing access to specified categories of records as in the case of the original Law, the new Law provides access

to all records, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

In view of the lapse of time between 1977 and the present, it is suggested that you renew your request. It is emphasized that in the event of the initiation of a judicial proceeding under the Freedom of Information Law, it is required that such a proceeding be initiated within four months of the date of the final denial on appeal by an agency and that all administrative remedies be exhausted.

In terms of rights of access, I cannot envision any reason why you cannot obtain a copy of your original letter to the Governor, for none of the grounds for denial would be applicable. It is suggested that you direct a request for a copy of your letter, including as much specificity as possible regarding its date, subject matter, and similar identifying information in order that the letter can be found. A request for a copy of that letter should be directed to the Executive Chamber, Records Access Officer, Robert Morgado, The Capitol, Albany, New York 12224.

With respect to the records compiled by the State Police following the receipt of your letter by the Governor, I would like to offer the following points.

First, perhaps the most relevant ground for denial is §87(2)(e), which states that an agency may withhold records or portions of records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures".

In view of the language quoted above, it appears unlikely that §87(2)(e) could justifiably be cited to withhold the records compiled by the State Police in their entirety. At this juncture, it would appear that any investigation that may have been initiated has been terminated; similarly, there appears to be no possibility that any person would be deprived of a right to a fair trial. If disclosure of the records would identify one or more confidential sources or informants, to that extent they may be withheld. In addition, if the investigation was carried out by means of unusual or non-routine criminal investigative techniques, the records may also be withheld to that extent.

A second ground for denial that may be relevant is §87(2)(g), which states that an agency may withhold 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..."

It is noted that the provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available. Contrarily, portions of such materials consisting of statements of advice, impression, recommendation, or suggestion, for example, may be withheld.

The last ground for denial that might be relevant 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".

The extent to which other persons may be identified in the records is unknown to me. However, the names and other identifying details could be deleted where appropriate.

In terms of procedure, I have enclosed a copy of regulations promulgated by the Committee which govern the procedural aspects of the Law. In addition, as you requested, enclosed is 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-572
FOIL-AO-1811

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

December 23, 1980

Michael Gauland
[redacted]

Dear Mr. Gauland:

I have received your recent letter concerning the application of the Freedom of Information and Open Meetings Laws to the Islip-East Islip Youth Development Corporation (YDC). Please accept my apologies for the delay in response.

Several inquiries regarding the YDC have been made on your behalf. However, without additional information regarding the corporation and the means by which it was created, I believe that only general direction can be provided.

First, I have learned from the Division of Corporations at the Department of State that the YDC is a type B not-for-profit corporation. Second, I have learned from the Division for Youth that the YDC is "semi-autonomous" and that it has a contractual relationship with the local youth bureau, which is an entity of town government. It is my understanding that the work of the YDC is monitored by the local youth bureau.

In my opinion, two questions must be answered in order to respond to your inquiry. The first is whether the YDC is a "public body" as defined by the Open Meetings Law. The second is whether the YDC is an "agency" that falls within the scope of the Freedom of Information Law.

The Open Meetings Law in §97(2) defines "public body" to include:

> "...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".

Without more information regarding the Youth Development Corporation, I cannot provide specific direction. In terms of the definition of "public body", although the YDC consists of at least two members and is required to carry out its duties by means of a quorum under the Not-For-Profit Corporation Law, it is unclear whether it conducts public business and performs a governmental function for a town. If indeed the YDC conducts public business and performs what may be characterized as a governmental function for or on behalf of a town, it is in my view a public body subject to the Open Meetings Law.

In addition, it is noted that a representative of the Office of Counsel for the Division of Youth informed me that similar organizations often hold their meetings on school grounds. In this regard, I direct your attention to §414 of the Education Law, which concerns the use of school grounds. The cited provision states that school grounds may be used:

> "[F]or holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainments and uses shall be non-exclusive and shall be open to the general public".

Therefore, if the Youth Development Corporation holds its meetings on school grounds, the meetings must be open to the public, whether or not it is subject to the Open Meetings Law.

In terms of rights of access to records, the coverage of the Freedom of Information Law is determined by the definition of "agency" appearing in §86(3) of the Law

(see attached). The term "agency" is defined to mean:

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

Since the Youth Development Corporation is a not-for-profit corporation, it is not likely a "governmental entity". Therefore, it would appear that it is not subject to the Freedom of Information Law.

However, in all honesty, a recent decision of the Court of Appeals, the state's highest court, raises questions concerning the scope of the definition of "agency", and, therefore, the scope of the Freedom of Information Law.

Specifically, in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], it was held that a volunteer fire company, a not-for-profit corporation, which engaged in a contractual relationship with a town, fell within the scope of the Freedom of Information Law. It is clear that a volunteer fire company, although separate from government, performs what traditionally has been considered a governmental function. Whether the YDC performs a similar function due to its relationship with government is unknown to me.

Further, whether or not the YDC falls within the scope of the Freedom of Information Law may not be determinative with respect to your capacity to gain access to records regarding the Youth Development Corporation. Here, I direct your attention to §86(4) of the 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 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 definition quoted above, if a town maintains records concerning the YDC, those records would be subject to rights of access granted by the Freedom of Information Law. Further, as noted earlier, it is my understanding that the YDC is monitored by a town. If that is so, it is possible that the YDC produces records "for an agency", for a town. If that is so, the records produced by the YDC for a town would fall within the definition of "record" and therefore within the scope of the Freedom of Information Law.

Once again, if you could provide additional information with respect to the nature of the Youth Development Corporation, I would be pleased to provide a more specific 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1812

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

December 23, 1980

Alex T. LaBrecque
Denton, Moseson & Keyser
Law Offices
200 William Street
Elmira, NY 14901

Dear Mr. LaBrecque:

Your letter addressed to Secretary of State Paterson has been transmitted to the Committee on Public Access to Records, of which the Secretary of State is a member. The Committee is responsible for providing advice with respect to the Freedom of Information and Open Meetings Laws.

You have indicated that you represent the Elmira Star Gazette, which has unsuccessfully sought to use the Freedom of Information Law to obtain financial records of the Watkins Glen Grand Prix Corporation (hereafter "the Corporation"). According to your letter, the Schuyler County Industrial Development Agency (SCIDA) leased a large tract of land to the Corporation which is a private not-for-profit corporation. The land was to be substantially improved through a project involving some 3.4 million dollars. Although the Corporation defaulted, no action has yet been taken by SCIDA or the bank through which bonds were issued. Your client is seeking the financial statements of the Corporation.

As you may be aware, the Freedom of Information Law is applicable to agency records. In this regard, "agency" is defined by §86(3) of the Law 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".

In view of the foregoing, I do not believe that the Corporation is an "agency" that falls within the scope of the Freedom of Information Law, for it is not apparently a "governmental entity".

Nevertheless, it is possible that the reports in which your client is interested may have been submitted to a governmental entity, such as SCIDA. It is noted that an industrial development agency is clearly subject to the Freedom of Information Law, for it is a public benefit corporation created in conjunction with Article 18-A of the General Municipal Law (see General Municipal Law, § 856). Since the SCIDA is an agency subject to the Freedom of Information Law, its records fall within the scope of the Law. Therefore, if, for example, the Corporation submitted records to SCIDA, those records would be subject to the Freedom of Information Law.

It is noted that §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".

Based upon the definition of "record", the fact that SCIDA may not have created or produced records concerning the Watkins Glen Grand Prix Corporation is irrelevant; if SCIDA has records in its possession pertaining to the Corporation, those records fall within the scope of the Freedom of Information Law.

Further, it is possible that financial statements and other records may have been produced for SCIDA by the Corporation, but that such records remain in the possession of the Corporation. If that is the case, the records may have been produced "for an agency" and therefore would fall within the scope of rights of access granted by the Law.

In sum, based upon the facts that you have provided, it appears that the Corporation is not subject to the Freedom of Information Law. However, records of the SCIDA pertaining to the Corporation or records produced for the SCIDA by the Corporation would in my view fall within the scope of the Freedom of Information Law.

Lastly, assuming that the records in question are subject to the Freedom of Information Law, I believe that they are accessible. The Law states that all records of an agency 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. In short, it does not appear that any of the grounds for denial would be applicable as a basis 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1813

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

December 23, 1980

E. S. Kent
[redacted]

Dear Mr. Kent:

I have received your letter of November 22. Please accept my apologies for the delay in response.

You wrote that you are interested in gaining access to records pertaining to you, particularly those that may be in possession of the Division of State Police.

In this regard, in making a request, §89(3) of the Freedom of Information Law (see attached) merely provides that an applicant must "reasonably describe" the records in which he or she is interested. It is suggested that, when submitting a request, you include as much specificity as possible, including dates, possible file designations, and similar information that might enable an agency to locate the records sought. Enclosed for your consideration is an explanatory pamphlet on the subject which includes sample letters of request and appeal that may be useful to you.

You also wrote that you may be interested in obtaining court records. Although the Freedom of Information Law specifically excludes the courts and court records from its coverage [see §§86(1) and (3), which respectively define "judiciary" and "agency"]. As a general rule, most court records are available under various provisions of law. For instance, §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 files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found".

In view of the foregoing, if you are interested in gaining access to court records, it is suggested that you apply to the clerk of the appropriate court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1814

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

December 23, 1980

Jerem O'Sullivan
Counsellor at Law
47 North Country Road
P.O. Box 86
Shoreham, NY 11786

Dear Mr. O'Sullivan:

I have received your letter of November 25. Please accept my apologies for the delay in response.

You have indicated that you represent the Shoreham-Wading River Central School District and stated further that the "school board is interested in securing from teaching personnel within the district reports which would reflect the teachers' perceptions of the strong and weak points of the district as related to its educational delivery of services". In order to ensure that the reports submitted by teachers will be candid, you asked whether you may "indicate to the employees that the information would be confidential".

Based upon your description of the materials to be submitted by teachers, it appears that they would be deniable under the Freedom of Information Law.

I direct your attention to §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold 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..."

It is noted that the language quoted above contains what in effect is a double negative. Stated differently, although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Under the circumstances, communications submitted by teachers to the school board or the school district administrators could in my view be characterized as "intra-agency" materials. Concurrently, it appears that the materials would consist of statements of opinion, advice, suggestion, or impression that would be deniable, for they would not likely consist of statistical or factual information, instructions to staff that affect the public, or statements of policy or determinations. Consequently, I believe that materials reflective of "teachers' perceptions" that are essentially advisory in nature could be withheld.

Lastly, I do not believe that it would be appropriate to "promise" confidentiality to the teachers. Judicial determinations rendered both before and after the enactment of the Freedom of Information Law indicate that a promise of confidentiality is all but meaningless. In the alternative, it is suggested that the teachers be informed that their responses are likely deniable under the Freedom of Information Law based upon the rationale presented 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:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-574
FOIL-AO-1815

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

December 24, 1980

Concerned Taxpayers Group
Town of Hastings
Hastings, New York 13076

Dear Concerned Taxpayers:

I have received your letter of November 26. Please accept my apologies for the delay in response.

You wrote that the Town Board of the Town of Hastings holds secret meetings, that certain members of the Board are not permitted to attend meetings, and that tax monies have been "given" to private individuals and companies.

I would like to make several comments with respect to your letter and the newspaper article attached to it.

First, you have called "for a complete investigation" regarding the finances of the Town of Hastings by means of an audit as well as the policies with respect to meetings and access to records. In this regard, the duties of the Committee involve providing advice with respect to rights of access to records under the Freedom of Information Law and meetings of public bodies under the Open Meetings Law; the Committee has neither the authority nor the resources to "investigate". Therefore, if you question the financial status of the Town, it is suggested that you contact the New York State Department of Audit and Control.

Second, as its title implies, the Open Meetings Law applies to all meetings of public bodies, such as town boards. It is noted that the courts have interpreted the Open Meetings Law expansively. In Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the

Court of Appeals, the state's highest court, held that the definition of "meeting" encompasses 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. Therefore, all meetings must be convened and conducted open to the public, unless an executive session may appropriately be convened.

Under the circumstances, I believe that the closed budget sessions described in the article should have been open to the public. In short, the Open Meetings Law permits a public body to enter into an executive session only to discuss one or more among eight subject enumerated in the Law that are appropriate for executive session. Since a discussion of the budget would pertain to the policy of the Town relative to the manner in which public monies might be spent, executive sessions in my opinion should not have been held.

With respect to your contention that even members of the Town Board are not permitted to attend meetings, it is important to point out that a public body can perform its duties only by means of a quorum. The term "quorum" is defined by §41 of the General Constructions Law to mean a majority of the total membership of a public body. However, in order to convene a quorum, reasonable notice must be given to all the members of a public body. Consequently, if, for example, a public body consists of five members and three convene a meeting without informing the remaining two members, even though a majority may be present, the three members have no capacity to carry out the duties of a public body. Stated differently, although three may represent a majority of the total membership, reasonable notice must nonetheless be given to each member in order to convene a quorum and to carry out the powers and duties of a public body. Further §100(2) of the Open Meetings Law states that "[A]ttendance at an executive session shall be permitted to any member of the public body..."

The article attached to your letter also appears to raise questions concerning committees that may have been created by the Town Board. Here I direct your attention to §97(2) of the Open Meetings Law, which defines "public body" to include:

> "...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".

In view of the definition, which as amended makes specific reference to committees and subcommittees, it is clear that the Open Meetings Law applies not only to a governing body, such as a town board, but also to its component committees, subcommittees and similar advisory bodies. Consequently, governing bodies and committees are required to provide notice to the public and the news media prior to all meetings (see Open Meetings Law, §99) and to convene all meetings open to the public.

Third, I must admit that I have no expertise regarding the allegation concerning "gifts" that may have been made to "private individuals and companies". However, I would like to point out that Article VII §8 of the New York State Constitution states that:

> "[T]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for education, mental health or mental retardation purposes".

Therefore, if indeed gifts have been made, unconstitutional acts may have been committed.

Finally, I would like to comment on your capacity to gain access to records regarding the finances of the Town. As a general rule, the Freedom of Information Law states that all records of an agency, such as a town, are available, except those records that fall withnin one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Further, the Law specifically provides that "statistical or factual tabulations or data" found within materials developed by an agency are available [see Freedom of Information Law, §87(2)(g)]. It is also noted that §29(4) of the Town Law requires that the supervisor of each town:

> "[S]hall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk".

In view of the foregoing, any person has the right to inspect the books of account of a town during "all reasonable hours of the day".

To provide additional guidance, enclosed are copies of the Freedom of Information Law, regulations that govern its procedural implementation, and the Open Meetings Law, which is attached to a memorandum explaining amendments to the Law that went into effect on October 1, 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:ss

Enclosures

cc: Town Board
Town of Hastings

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1816

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

December 24, 1980

Milton Goldin
[redacted]

Dear Mr. Goldin:

I have received your letter of December 21 in which you requested "annual financial statements for performing arts centers" located at specific public institutions of higher education that you identified.

Please be advised that the Committee on Public Access to Records is responsible for providing advice regarding the Freedom of Information Law; it does not have custody of records in general or the capacity to compel agencies to comply with the Law.

However, I would like to offer the following suggestions and advice.

First, each agency is required to designate one or more records access officers responsible for responding to requests made under the Freedom of Information Law. Consequently, it is suggested that you direct your requests to the access officers at the specific institutions or to their central offices of the respective governing bodies. For instance, a request for the report of SUNY at Purchase could be directed to that campus or to SUNY's headquarters in Albany; for the reports at Lehman and City Colleges, the requests could be sent to the campuses or to CUNY's central office; and for Westchester Community College, a request could be directed to its access officer or to the access officer for Westchester County. I would conjecture that it may be better to send your requests to the central offices.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought in writing. It is also suggested that you offer to pay the requisite fees for photocopying, which generally may not exceed twenty-five cents per photocopy.

Lastly, in terms of rights of access, the Freedom of Information Law states that all records are available, except those records or portions of records that fall within one or more grounds for denial listed in §87(2)(a) through (h) of the Law. Under the circumstances, I believe that the financial statements are available, for "statistical or factual tabulations or data" found within materials developed by an agency are available [see §87(2)(g)(i)].

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern the procedural implementation of the Law, and an explanatory pamphlet that contains a sample letter of request 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1817

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

December 24, 1980

Thaddeus David 80A2369
Box 51 D-7-31
Comstock, NY 12821

Dear Mr. David:

I have received your letter of November 28. Please accept my apologies for the delay in response.

You have requested advice regarding the means by which you may obtain records concerning felony charges that were dismissed. Without greater information regarding the nature of the records in question, I do not believe that I can provide specific direction.

However, I would like to suggest the following possible avenues of approach.

First, some of the information that you are seeking would likely be in possession of a court. Although the Freedom of Information Law does not apply to courts and court records [see attached, Freedom of Information Law, §§86(1) and 86(3)], court records are often available under other provisions of law. For instance, §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".

In view of the foregoing, you might want to seek records from the clerk of the appropriate court.

Second, while I may be mistaken, it appears that records in which you are most interested is your pre-sentence report. Here I direct your attention to §390.50(2) of the Criminal Procedure Law, which 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 reason for its action. The action of the court excepting information from disclosure shall be subject to appellate review".

If you believe that the pre-sentence report would be useful to you, it is suggested that you or your attorney seek a copy from the appropriate court.

Third, if indeed the charges were dismissed in your favor, it is possible that records regarding the charges might be available to you under §160.50 of the Criminal Procedure Law, a copy of which is attached and the relevant portions marked.

Fourth, in order to obtain a copy of your criminal history record, you may apply to the Division of Criminal Justice Services, 80 Centre Street, New York, New York 10013. I believe that such information is made available

by means of the submission of proof of identity through the use of fingerprints. It is suggested that you discuss the matter with officials at the correctional facility in which you are housed or your attorney in order to obtain more specific direction.

Lastly, in order to request your "prison folder", the Freedom of Information Law requires that an applicant submit a request in writing that "reasonably describes" the record sought. I have enclosed copies of the Freedom of Information Law and regulations that govern the procedural aspects of the Law, both of 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

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1818

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

December 26, 1980

Mr. Robert Cole #75-a-4096
Post Office Box 51
Comstock, New York 12821

Dear Mr. Cole:

I have received your letter of November 28. Please accept my apologies for the delay.

According to your letter, you have unsuccessfully requested copies of records indicating the restrictions that have been imposed upon you and the reasons for your transfer from Eastern Correctional Facility to Comstock. You wrote further that you believe that you should have received the records under 7 NYCRR 5.5 (f)(2).

I have reviewed the provisions of the NYCRR that you cited. Unless the provision represents an amended portion of the regulations, no such provision exists. Section 5.5(f) of the regulations merely defines "inmate"; it does not contain any language directing that particular records be made available.

Having reviewed copies of appeals transmitted to this office pursuant to §89(4)(a) of the Freedom of Information Law, it appears that some of the records that you identified as being denied were not requested.

Specifically, according to a determination rendered on October 30, you requested a "visiting room card", which indicates restrictions on visits. The determination states that "[A]ppellant was offered what he requested and he declined them". In view of the determination, it is suggested that you inspect the visiting room cards, which apparently identify any restrictions on visitation that may have been imposed.

Further, unless I am mistaken, your request did not deal with records concerning your transfer. As such, it is recommended that you submit a new request that clearly identifies the records that you are interested in obtaining.

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:ss

cc: Patrick Fish, Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1819

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

December 26, 1980

Howard M. Sinnott, II
Deputy Town Attorney
Town of North Hempstead
Town Hall
Manhasset, NY 11030

Dear Mr. Sinnott:

Thank you for sending a copy of your determination rendered pursuant to an appeal made under the Freedom of Information Law.

In brief, an applicant requested a copy of a complaint, which resulted "in a visit...from an animal warden..." The complaint was denied on the basis of §87(2)(e)(iii) of the Freedom of Information Law on the ground that the complaint constitutes a record "compiled for law enforcement purposes" which if disclosed would "identify a confidential source..."

While I agree in part with the outcome of the determination, I disagree with the rationale.

First, a complaint submitted by a member of the public could not in my view be characterized as a record "compiled for law enforcement purposes".

Second, it has been held that the "law enforcement purposes" exception to rights of access may appropriately be cited only by a criminal law enforcement agency [see e.g., Broughton v. Lewis, Sup. Ct., Albany Cty. (1978), Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. Unless I am mistaken, the agency that dealt with the complaint, the Department of Community Services, is not a "criminal" law enforcement agency.

Nevertheless, I believe that a different basis for denial may be cited. Specifically, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

In this regard, it has consistently been advised that the name or other identifying details regarding a complainant are deniable on the ground that disclosure would result in an unwarranted invasion of personal privacy. The identity of a complainant is likely irrelevant to the work of the agency, which is concerned only with the validity of the complaint. Further, disclosure of the identity of a complainant might result in "personal or economic hardship" [see Freedom of Information Law, §89(2)(b)(iv)]. As such, it has been suggested that the substance of a complaint is accessible, but that any identifying details regarding the complainant may be deleted on the ground that disclosure of the identifying 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1820

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 29, 1980

Charles J. Brown
Brown & Kelleher
Attorneys at Law
Windham, NY 12496

Dear Mr. Brown:

Thank you for your letter of December 2 concerning a request made under the Freedom of Information Law by Mr. Frank J. Agosta and my response to him.

In view of the description of the controversy that you provided, I am in general agreement with the stance taken by the Town of Ashland. However, I would like to offer the following comments.

First, unless I am mistaken, you have inferred that an agency, such as a town, has no obligation to provide copies of records, even if a photocopy machine is available. I understand that, in this instance, the Town has no photocopying machine at its facilities. Nevertheless, if such a machine was available, I believe that the Town would be obligated to prepare photocopies of accessible records. Please note that the Miller decision that you cited was rendered under the original Freedom of Information Law enacted in 1974. From my perspective, the amended Freedom of Information Law, effective January 1, 1978, requires that copies be made upon request. Specifically, §89(3) of the Law states in relevant part that "...[U]pon payment of, or offer to pay, the fee prescribed therefore, the entity shall provide a copy of such record..." Further, the regulations promulgated by the Committee state in §1401.8(c)(2) that:

> "[I]n agencies which do not have photocopying equipment, a transcript of the requested records shall be made upon request. Such transcripts may either be typed or handwritten. In such cases, the person requesting records may be charged for the clerical time involved in making the transcript".

Consequently, if Mr. Agosta is willing to pay for the clerical time involved in reproducing records, I believe that the Town would be obligated to do so.

With respect to the remainder of your letter, it appears that the Town has made good faith efforts to assist Mr. Agosta in every possible way.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Frank Agosta

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1821

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 29, 1980

Mr. A. Blair Cummins
Director
Wood Library
134 North Main Street
Canandaigua, NY 14424

Dear Mr. Cummins:

I have received your letter of December 3 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter:

> "[T]his past summer, Mr. Horace V. Gales, Safety and Health Inspector, from the Rochester office of the Department of Labor conducted a survey inspection of our building. At the time of the inspection he promised to forward to me a copy of his report. Subsequently, he told me he could not forward the report directly, but that I could obtain same by writing to Mr, J. L. Rivin, Program Manager in New York City."

Notwithstanding the "promise" made by Mr. Gales, Mr. Rivin refused to provide a copy of the inspection report. Further, denials were also made by Mr. Carl J. Mattei, Director of Safety and Health, and by Mr. S. Leonard Wall, an Associate Attorney for the Labor Department.

You have indicated that Mr. Wall cited Chapter 682 of the Laws of 1980 as a basis for denial. The cited provision directs the Industrial Commissioner to

submit a report to the Governor and the Legislature by July 1, 1981, concerning the feasibility of eliminating the exemption of certain establishments, such as public, association and free libraries, from the definition of "places of public assembly" appearing in §2(12) of the Labor Law.

I have reviewed the applicable provisions of the Labor Law, including Chapter 682 of the Laws of 1980. In my view, there is nothing in the Labor Law or the Chapter amendment that would exempt the report in question from disclosure. In this regard, one of the grounds for denial under the Freedom of Information Law concerns records that are "specifically exempted from disclosure by state or federal statute" [see Freedom of Information Law, §87(2)(a)]. There is nothing in the language of the definition of "places of public assembly" that pertains in any way to access to records. In short, there is nothing that could be characterized as a statutory exemption from disclosure in the cited provisions of the Labor Law.

In view of the absence of any statutory exemption from disclosure, the remaining provisions of the Freedom of Information Law are in my view applicable.

It is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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. It is also important to point out that §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..." Therefore, even though the contents of the inspection report may represent information leading to the creation of a report to be submitted to the Governor and the Legislature that is yet to be completed, it is nonetheless a "record" subject to the Freedom of Information Law in all respects.

Under the circumstances and based upon our discussion, it appears that the report is available in great measure, if not <u>in toto</u>.

In my opinion, the only relevant exception to rights of access in this instance directs that portions of the report be made available. Specifically, I direct your attention to §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold 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..."

It is emphasized that the provision quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Since the report in question was prepared by an inspector for the Department of Labor, the report could be characterized as "intra-agency" material. However, to the extent that it contains statistical or factual information, for example, it must in my opinion be made available to you. Contrarily, to the extent that the report contains advice, recommendations, suggestions or similar advisory matter that is not statistical or factual in nature, it is deniable.

Further, since §87(2) of the Law provides that all records are available except "record or portions thereof" that fall within the grounds for denial, the Department of Labor is in my view obliged to review the report in question in its entirety to determine which portions, if any, may justifiably be withheld.

Lastly, it is unclear from your letter whether you submitted a request in writing for the report. If you have not done so, it is suggested that you submit your request in writing. If you are denied, the reasons for the denial must be stated in writing and you must be apprised of your right to appeal to the head of the agency or whomever is 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

cc: S. Leonard Wall

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1822

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

December 30, 1980

Ms. Linda Champlin
[redacted]

Dear Ms. Champlin:

I have received your letter of December 5. Please accept my apologies for the delay in response. You wrote that your parents unsuccessfully applied to the Warren County Department of Social Services for assistance. However, you feel that there is "some reason to believe" that the records in possession of the social worker regarding your parents' application may be incorrect. Your question is whether you have the legal right to inspect those records and "insist" that the contents be corrected.

As a general rule, any records concerning either an applicant for or a recipient of public assistance are confidential under §136 of the Social Services Law. Consequently, neither you nor your parents have a "right" to inspect or seek a correction of records in possession of the County Social Services Department.

Nevertheless, there are provisions in the regulations promulgated by the New York State Department of Social Services which permit, but do not require, the disclosure of case records to applicants, recipients, or relatives, under certain circumstances.

Specifically, I direct your attention to §357.3 of the regulations of the Department of Social Services, which in relevant part state that:

> "(c) Disclosure to applicant, recipient, or person acting in his behalf. (1) The case record shall not ordinarily be made available for examination by the applicant or recipient, since it contains information secured from outside sources. However, particular

> extracts shall be furnished him, or furnished to a person whom he designates, when the provision of such information would be beneficial to him. The case record, or any part of it, admitted as evidence in the hearing 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 on his behalf and when such information is related to the particular service requested.
>
> "(d) Disclosure to relatives. The duty of the agency to investigate the ability and willingness of relatives to contribute support imposed by section 132 of the Social Welfare Law and the liability of legally responsible relatives for support imports that the agency may inform them of the basic circumstances of the applicant's needs insofar as may be necessary and in a discussion looking to a contribution of support, of the amount of the applicant's needs and income. Such a relative is a 'person...considered entitled to such information.' (See Social Welfare Law, §136, subd.2.)"

In view of the provisions quoted above, while there is no right to the records in question, it is possible that they may be furnished at the discretion of Social Service officials.

It is suggested that you contact the appropriate officials and seek to examine the records based upon the provisions of the regulations specified above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1823

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 30, 1980

Clare Overlander
Post Office Box Seven
Croton Professional Building
Thirty Six Oneida Avenue
Croton-on-Hudson, NY 10520

Dear Ms. Overlander:

As you are aware, I have received your letter of December 3 as well as the correspondence appended to it. Please accept my apologies for the delay in response.

Your inquiry concerns rights of access to records of the Town of Cortlandt. The records in which you are interested include a drainage report prepared by the Town Engineer, "a detailed plan" regarding the areas involved in the drainage study, drawings and maps of specified "storm line installations" and related information. However, the report in question apparently has been classified or marked as "confidential", and the Town Attorney wrote that, since your firm represents individuals involved in an action against the Town, "under §87 of the Public Officers Law, specifically subsection (2), your request for access to the Engineer's Report can be and is denied pursuant to paragraphs (i) and (g)". In addition, the Town Attorney wrote that town officials believe that "your direct contact" with the Town "when your office represents the adverse party is inappropriate pursuant to Cannon [sic] 7 and Disciplinary Rule 7-104(A)(1)".

In my opinion, the grounds for withholding offered by Town officials are in great measure without merit. I would like to offer the following comments and observations.

First, it is important to note that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, including a

town, are available, except to the extent that records or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, as noted earlier, the correspondence appended to your letter indicates that the report made by the Town Engineer in which you are interested has been labelled "confidential". In this regard, an agency cannot classify or characterize records as "confidential" unless there is some statutory basis for so doing. From my perspective, the only instance in which a record could be characterized properly as confidential would involve a situation in which a statute enacted by the State Legislature or by Congress specifically precludes disclosure of particular records. In such cases, §87(2)(a) of the Freedom of Information Law is applicable. That provision states that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". However, there is no statutory exemption that may be cited in this instance to justify a blanket denial of access to the records sought.

It is also important to emphasize that the Court of Appeals has apparently abolished the common law "governmental privilege", which was based upon the notion that an agency could withhold records if it could demonstrate that disclosure would be detrimental to the public interest. The Court of Appeals found that:

> "[T]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571 supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate

> right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Matter of Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In view of the decision rendered in Doolan, it is clear that an agency cannot withhold records based upon a mere assertion of confidentiality.

Third, the Town Attorney cited §§87(2)(g) and (i) of the Freedom of Information Law to withhold the records. There is no §87(2)(i) in the Public Officers Law. Although there is a §87(2)(g), I believe that it can be cited as a basis for directing disclosure, rather than withholding. Specifically, §87(2)(g) of the Freedom of Information Law provides that an agency may withhold 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..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policies or determinations found within such materials must be made available.

Under the circumstances, it would appear that much if not all of the information that you are seeking constitutes "statistical or factual tabulations or data" that must be made available. In the case of maps, "design computations" and similar materials, it would appear that such documentation would consist solely of factual information. If that is the case, I believe that records in question must be made available.

It is also noted that the Freedom of Information Law defines "record" [see §86(4)] to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

In view of the definition of "record", it is clear that maps, designs, drawings and similar types of information fall within the scope of rights of access granted by the Law.

Further, the fact that your office represents a client involved in litigation with the Town of Cortlandt is in my opinion of no relevance with respect to rights of access. In Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673 (1976)], a similar situation arose, for records were sought by an attorney representing a client engaged in litigation with the City of Rochester. The City "refused to permit inspection or copying, alleging that petitioner is the attorney for GLDR...represents them in litigation with the City of Rochester, that the information requested 'relates directly to issues which are the subject of [this] litigation' and that petitioner may not obtain such material without resorting to his remedies under CPLR, Article 31". In response to those contentions, the Appellate Division held that:

> "[C]ontrary to respondent's assertion, however, the provisions of the discovery provisions of the Civil Practice Law and Rules do not restrict disclosure of records made public under the Freedom of Information Law. If the documents are available to the public under the latter, they are not restricted ipso facto solely because the applicant is also a litigant. In the absence of any

> proof that documents are not exempt from disclosure by the provisions of the Freedom of Information Law, the petition was properly granted".

Consequently, the fact that you represent a client involved in litigation with the Town of Cortlandt has no bearing upon rights of access; if the records would otherwise be accessible, they must be made available to you. I would also like to point out that the court in Burke specified that the Freedom of Information Law grants equal rights of access to any person, without regard to status or interest.

The Town Attorney also cited Disciplinary Rule 7-104 (A)(1) of the Code of Professional Responsibility as a basis for withholding. The cited provision is entitled "Communicating with One of Adverse Interest" and states that:

> "[D]uring the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so".

In my view, the cited provision in the Code of Professional Responsibility has no bearing upon the request for several reasons. The first reason was mentioned in the preceding paragraphs, i.e. the fact that the courts have held that accessible records should be made equally available to any person, without regard to the status or interest of the applicant, even if an applicant is a litigant. Next, the request for information was not directed to the Town Attorney, but rather to the appropriate officials of the Town. Further, the information sought could not be characterized as the work product of an attorney or materials prepared for litigation, both of which would be confidential under §3101 of the Civil Practice Law and Rules. On the contrary, the materials requested were apparently prepared in the ordinary course of business long before the litigation was commenced.

The correspondence appended to your letter indicates that the records in which you are interested were prepared in 1977. No information has been requested that would in any way subvert the privileged relationship between Town officials and their counsel.

Lastly, the correspondence raises questions concerning the procedural implementation of the Freedom of Information Law by the Town. For instance, Mr. Wood indicated that the Town Clerk advised him "that you refused to fill out her request form and as such we feel that all of your requests to date are invalid". I disagree with Mr. Wood's contention. 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, as indicated by §89(3) of the Freedom of Information Law, any request made in writing that reasonably describes the records sought should suffice.

Further, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

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

Sincerely,

Robert J. Freeman

RJF:ss

cc: Thomas F. Wood

Charles G. DiGiacomo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1824

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

December 30, 1980

Mr. Luigi Burro
79A633
Box 149 (50-4)
Attica, NY 14011

Dear Mr. Burro:

I have received your letter of December 6 in which you requested advice concerning the use of the Freedom of Information Law.

It is noted at the outset that I have made several calls on your behalf. To the best of my knowledge, there is but one office known as the Organized Crime Task Force in New York. In order to direct a request under the Freedom of Information Law to that office, it is suggested that you write to the following address:

Organized Crime Task Force -
Statewide
Ralph W. Smith, Jr., Deputy
Attorney General (Acting)
Agency Building 1, E.S.P.
Albany, New York 12223

With respect to the information in which you are interested, I would like to offer several observations.

First, the Freedom of Information Law provides access to certain existing records. Stated differently, the Law does not require an agency to create records in response to a request [see attached Freedom of Information Law, §89(3)]. Therefore, if, for example, there are no lists in existence that contain the information in which you are interested, the Organized Crime Task Force would not be required to compile such lists on your behalf.

Second, the Freedom of Information Law provides in brief that all records of an agency are accessible, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

In some instances, it is possible that one or more grounds for denial might appropriately be cited by the Organized Crime Task Force to withhold records in which you may be interested.

For instance, §87(2)(b) of the Law provides that an agency may withhold records or portions of records when disclosure would result in an "unwarranted invasion of personal privacy".

Another ground for denial that might be applicable 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 view of the language quoted above, the Organized Crime Task Force has several bases for withholding records compiled for law enforcement purposes.

A third ground for denial that might in some instances be appropriately cited is §87(2)(f), which states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person".

Lastly, in making your request, you should attempt to provide as many particulars as possible regarding the information in which you are interested. It is also noted that the Freedom of Information Law requires that an applicant "reasonably describe" the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1825

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

December 30, 1980

Roger French, Secretary
Longvale Homeowners' Association
P.O. Box 177
Centuck Station
Yonkers, New York 10710

Dear Mr. French:

I have received your most recent correspondence concerning your efforts in gaining access to records of the Municipal Housing Authority of the City of Yonkers.

According to your letter, you requested a series of documents from the Housing Authority in a letter dated November 21, for which you have a signed receipt dated November 24. In the communication of November 21 you requested:

> "1. The complete HUD-5087 with any addenda
>
> 2. The complete FHA FORM NO 2530 with any addenda
>
> 3. The complete HUD 53017 with any addenda
>
> 4. The complete FORM HUD 53015 with all Exhibits and addenda
>
> 5. Any letters of transmittal and qualifying statements."

In addition, you offered to pay the requisite fees for copying.

I would like to offer the following observations and comments.

First, as you are aware, the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, provide direction regarding the time limits for responses to requests. Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days in necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Second, although I am not familiar with the contents of the records in which you are interested, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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. Under the circumstances, it is difficult to envision any applicable bases for withholding without additional information concerning the contents of the records.

It is noted that the records in question could not in my view be withheld on the ground that they constitute inter-agency or intra-agency materials [see Freedom of Information Law, §87(2)(g)]. 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 thereof, except the judiciary or the state legislature."

In view of the foregoing definition, it is clear that the term "agency" includes entities of state and local government; it does not include a federal agency such as the Department of Housing and Urban Development. Similarly, the term "agency" is defined for the purposes of the federal Freedom of Information Act to mean federal agencies. Due to the respective definitions of "agency", documentation transmitted between the Authority and HUD could not be characterized as inter-agency materials. Therefore, the exceptions regarding inter-agency and intra-agency materials could not in my view be cited to withhold the records in question under either the New York Freedom of Information Law or the federal Freedom of Information Act.

Moreover, it is suggested that you might want to direct a request for the same records to the appropriate HUD office. It is possible that the records could be obtained more expeditiously through that office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis A. Reagan
Sidney Schwartz
Evelyn J. Wolff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-1575
FOIL-AO-1826

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

December 31, 1980

Rita Cox
[redacted]

Dear Ms. Cox:

I have received your letter of December 9, as well as the correspondence attached to it addressed to Michael Logrande, Supervisor of the Town of Islip.

You have raised several questions that bear upon both the Freedom of Information Law and the Open Meetings Law.

You wrote that you have been trying for weeks "to get answers" to your questions regarding the budget of the Town of Islip. While I agree that it is the responsibility of government officials to serve the public, there is no law of which I am aware that specifically requires public officials to "answer questions".

For instance, as you are likely aware, the Town Law (§108) requires that a public hearing be held with respect to the preliminary budget prior to the adoption of a budget. Although any member of the public is given a reasonable opportunity to be heard at a public hearing, and although it may be implicit that town officials should listen and respond to comments made by members of the public, there is no explicit requirement that questions be answered. The last sentence of §108 of the Town Law merely states that "[A]t such hearing, any person may be heard in favor of or against the preliminary budget as compiled or for or against any item or items therein contained".

Further, with regard to meetings of public bodies, the Open Meetings Law (see attached) is silent with respect to public participation. The Law states that the public has the right to attend and listen to the deliberations of public

bodies (see §95). Therefore, if a public body determines to permit public participation, it may do so based upon reasonable rules that treat all members of the public equally. However, public participation need not be permitted. In view of the foregoing, it is reiterated that there is no specific provision of law with which I am familiar that requires public officials to "answer questions" that may be directed to them by members of the public, even though providing responses may be an implicit function of holding a public office.

The same general principle is present in the Freedom of Information Law (see attached). That Law is an access to records law; it does not envision cross-examination of public officials by members of the public. Stated differently, while an agency is required to respond to requests for records, it has no obligation to create or compile information in response to a request on behalf of an applicant, unless specific direction to do so is provided [see §89(3), last sentence]. Therefore, as a rule, an agency need not create a record in response to a request for information.

It is emphasized, however, that one of the exceptions to the general rule stated above involves payroll information. Section 87(3)(b) of the Freedom of Information Law states that:

> "[E]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Consequently, the payroll record envisioned by the provision quoted above represents one of the few instances in the Freedom of Information Law in which a record must be compiled and maintained on an ongoing basis.

As such, I believe that the response to your request for payroll information was inappropriate. Your letter to the Supervisor indicates that the Town sought to assess a fee of $95.65 for the creation of a payroll list. In my opinion, which is based upon §87(3)(c) of the Freedom of Information Law, the payroll list should have been in existence, i.e. "maintained" and available on an ongoing basis for public inspection and copying.

In addition, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents for a photocopy not in excess of nine by fourteen inches or the actual copying of reproducing records that are not subject to conventional photocopying methods. Therefore, if, for example, a request for information contained within a computer does not exist in printed form, an applicant may be assessed a fee based upon computer time. However, in this instance, since the Law requires that a payroll record be maintained on an ongoing basis, I believe that you can be assessed a fee not in excess of twenty-five cents per photocopy. Although the Town may have created a payroll record in response to your request with the use of a computer, I do not believe that you should be charged computer time due to the requirement that the payroll record must be maintained on a continuing basis.

You made reference on several occasions to an item of information known as the "budget line". In all honesty, I am not sure of the nature of this information. If the budget line is essentially the title of an employee, it is included in the payroll record required to be compiled under §87(3)(c). If, however, the budget line is something different from the title, questions arise regarding its availability.

For instance, as noted earlier, an agency generally is not required to create a record in response to a request. Therefore, if no list of employees exists that includes the budget line or the dates of public employees' initial employment with the Town, no list of that nature would be required to be compiled. Nevertheless, individual records indicating the dates of employment, for instance, would in my view be available for inspection.

One of your questions directed to the Supervisor is "when and why was the policy changed in regards to the charge for payroll lists". Here, again, I direct your attention to the Open Meetings Law. If a change in policy was made by the Town Board, presumably the Board would have discussed the issue during an open meeting. In this regard, minutes of such a meeting would be required to make reference to any action that may have been taken to change a policy [see Open Meetings Law, §101(1)].

Lastly, your letter raises questions concerning the time in which it has taken town officials to respond to your requests.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide 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 grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days or receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and 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
Executive Director

RJF:jm

Enc.

cc: Michael Logrande
William Bennett