STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1827

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

January 2, 1981

Mr. Herbert H. Klein
Town Clerk
Town of Boston
8500 Boston State Road
Boston, New York 14025

Dear Mr. Klein:

I have received your letter of December 11 and thank you for your comments.

Your letter concerns access to a form sent to an assessor that provides notification of the sale or transfer of ownership of real property. You stated that you were surprised that the forms are not available for public inspection, particularly in view of the fact that government appraisers often need the information found on the forms in order to perform their official duties.

I agree with your contention that it may appear to be inappropriate to withhold the forms in certain cases such as those that you described. However, the direction given on the back of the form that you sent is based upon a new provision of the Real Property Tax Law. Specifically, §574(5) of the Real Property Tax Law, which became effective on November 1, 1980, states that:

> "[F]orms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

In view of the language quoted above, it is clear that the forms in question can be made available only "for purposes of administrative or judicial review of assessments..."

It is noted that I have discussed the matter with a representative of the Office of Counsel of the State Division of Equalization and Assessment. He informed me that there have been numerous complaints regarding the restrictions imposed by §574(5). At this juncture, based upon our conversation, it appears that the only means of redress would involve the enactment of legislation broadening the uses of the form or repealing the new provision in its entirety. If you feel strongly that the provision in question is inappropriate, it is suggested that you express your points of view to your assemblyman or state senator.

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-1828

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

January 2, 1981

Mr. Philip C. Sweet
Records Access Officer
County of Nassau
Office of Consumer Affairs
160 Old Country Road
Mineola, NY 11501

Dear Mr. Sweet:

I have received your letter of December 10 and thank you for your interest in complying with the Freedom of Information Law.

You have raised a series of questions which deal in great measure with personal privacy.

In view of the issues raised, it is noted at the outset that the Freedom of Information Law provides 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. Perhaps 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."

It is often difficult to provide specific guidance with respect to privacy, for the standard in the Law is flexible. In some instances, subjective judgments must be made. For example, while one reasonable person might view a record and determine that disclosure would result in an "unwarranted" invasion of personal privacy, it is possible that an equally reasonable person might determine that disclosure of the same record would result in a "permissible" invasion of personal privacy.

Nevertheless, at this juncture, several judicial determinations concerning the privacy provisions of the Freedom of Information Law have been rendered, and the advice provided in the ensuing paragraphs will be based largely upon those determinations and direction given by other provisions of law.

Your first question is whether a consumer is entitled to inspect complaints filed with the County against a vendor, including the names and addresses of the complainants.

In this regard, it has consistently been advised that the substance of a complaint is available, but that any identifying details regarding a complaint may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. In determining the extent to which privacy should be protected, several courts have viewed privacy in terms of the relevance of particular aspects of a record to an agency. For instance, in cases concerning public employees, it has generally been held that records pertaining to public employees are available when the records relate to performance of their official duties. In such cases, the courts have found that, since public employees have a greater duty to be accountable to the public than any other identifying group, disclosure 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]. Contrarily, if a record has no relevance to the manner in which a public employee performs his or her official duties, it may be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977].

In the case of a complaint submitted by a member of the public to an agency, I believe that the only ground for denial could be §87(2)(b). In terms of relevance to the agency, from my perspective, the question that an agency raises when it receives a complaint is whether or not the complaint has merit; the identity of a com-

plainant is largely irrelevant to the performance of its duties. As such, it is reiterated that, in my view, the substance or nature of a complaint should be made available, while any identifying details concerning the complainant may be deleted based upon §87(2)(b) of the Freedom of Information Law.

Your second question concerns access by a third party to the stenographic transcript of an administrative hearing, such as a home improvement revocation. If I understand your question correctly, you are referring to a hearing concerning the revocation by the County of a license of a person or firm engaged in some sort of commercial activity.

Again, I direct your attention to the privacy provisions of the Law. In the course of a hearing, witnesses may be called to testify, for instance. In such cases, it is possible that identifying details might justifiably be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy.

There is another ground for denial which indicates that portions of a stenographic record, if not the entire record, except identifying details, might be available. Specifically, §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..."

The provision quoted above contains what in effect is a double negative. Stated differently, 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 within such materials must be made available.

Under the circumstances, since a transcript is created by an agency, it could be characterized as "intra-agency" material. However, to the extent that it contains "statistical or factual tabulations or data", i.e. statistical or factual information, it would be available. I would conjecture that much of the information found in a transcript of a hearing could be characterized as factual information that would be available, except to the extent that disclosure would result in an unwarranted invasion of personal privacy.

It is emphasized, however, that there may be other provisions of law that affect rights of access to records of hearings. For instance, various provisions of law, including the Social Services Law, the Tax Law and the Labor Law, require confidentiality of records. The transcript of a fair hearing conducted by a department of social services would be confidential under §136 of the Social Services Law, which provides that records identifiable to an applicant for or a recipient of public assistance must remain confidential. Other provisions of law impose similar restrictions upon disclosure. However, in the context of your question, I could not direct you to statutory provisions requiring confidentiality without greater information regarding the nature of a particular hearing.

Your third question concerns the violations of supermarkets, gasoline retailers, etc. issued by the County Weights and Measures Division under Article 16 of the Agriculture and Markets Law.

I have reviewed the provisions of the Agriculture and Markets Law that you cited and have found no language that would preclude disclosure of records of violations. Consequently, rights of access are determined by the Freedom of Information Law.

In my opinion, records reflective of the issuance of violations are available, for they represent "final determinations" and, therefore, would be accessible under §87(2)(g)(iii). Further, I would assume that records concerning violations would be available from a variety of sources. For instance, an agency that collects fines would likely be required to make an accounting of the monies that it acquires through fines. In addition, assuming that records of violations are transmitted to the Department of Agriculture and Markets, the records would be likely available from that Department under §23 of the Agriculture and Markets Law. In relevant part, the cited provision states that:

> "[A]ll proceedings, documents, papers and records filed or deposited with the department relating to matters within its jurisdiction and powers shall be public records..."

Your last question concerns weights, measures and home improvement violations that are criminal in nature and that have been forwarded to the Office of the District Attorney. In some cases, the violations might be adjudicated, settled by agreement, or otherwise disposed of.

There may be several provisions of law that would be applicable to the situations that you described. For example, §87(2)(e) of the Freedom of Information Law enables an agency to withhold records compiled for law enforcement purposes under certain specified circumstances. Therefore, perhaps that provision could be cited as a basis for withholding in some situations. If, for example, charges are dismissed in favor of the accused, the arrest and related records may be sealed under the provisions of §160.50 of the Criminal Procedure Law.

In other cases, it is likely that records would be available from a court clerk. Specifically, §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 certificate 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 language cited above, records in possession of a court clerk are generally available, unless they have been sealed pursuant to some other provision of law.

If you could provide more specificity regarding access to particular records, I might be able to give you more specific advice.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1829

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

January 5, 1981

Mr. William R. Piper
#79A-0590
Drawer B
Stormville, NY 12582

Dear Mr. Piper:

I have received your letter concerning your unsuccessful efforts in gaining access to records of various law enforcement agencies. Most of the agencies that you identified are federal.

It is emphasized at the outset that this office is charged with the responsibility of providing advice with respect to the New York Freedom of Information Law. Consequently, the Committee has no jurisdiction with respect to the federal Freedom of Information Act or its implementation by federal agencies. Further, the Committee does not have possession of records generally, such as agencies' subject matter lists. In addition, New York has not yet enacted a privacy law similar to the federal Privacy Act.

Nevertheless, enclosed for your consideration are copies of the federal Freedom of Information and Privacy Acts, "A Short Guide to the Freedom of Information Act" published by the U.S. Department of Justice, the New York Freedom of Information Law, regulations promulgated by the Law, and a copy of an explanatory pamphlet on the subject.

As indicated earlier, the Committee does not have possession of the subject matter lists devised by agencies subject to the Law. It is suggested that you request the lists directly from the agencies in question.

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 regret that I cannot provide more specific direction with respect to your requests sent to 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-1830

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

January 5, 1981

Edward W. Dietrich
Higgins & Dietrich
Attorneys at Law
One Marine Midland Tower
360 South Warren Street, Suite 103
Syracuse, New York 13202

Dear Mr. Dietrich:

Thank you for sending for review the "final draft of the proposed Freedom of Information Act for the Town of Pompey".

Having reviewed the draft, I would like to offer several comments.

First and perhaps most importantly, it appears that the proposal is based upon the original Freedom of Information Law enacted in 1974 and the Committee's original regulations promulgated soon thereafter. It is emphasized, however, that amendments to the Freedom of Information Law went into effect on January 1, 1978. In addition, the regulations of the Committee were amended accordingly shortly after the effective date of the new law. It is noted also that the structure of the Freedom of Information Law was reversed. Unlike the original Law which granted access to specified categories of records to the exclusion of all others, the new Law provides access to all records, except those records or portions thereof that fall within one or more grounds for denial listed in §87(2)(a) through (h).

I have enclosed for your consideration copies of the amended Freedom of Information Law, new regulations and model regulations, which may be of particular value to you. By following the model regulations, one can essentially fill in the appropriate blanks and comply with the regulations promulgated by the Committee.

Based upon a review of the draft regulations, I would like to offer the following additional comments.

First, §5.2 makes reference to a records access officer as well as a "fiscal officer". Although the original regulations made reference to a fiscal officer, the new regulations make no such designation. In a related vein, §5.3 of the Town's draft states that the fiscal officer should make payroll information available only to "bona fide members of the news media" and that names of employees of law enforcement agencies should not be included. In this regard, please note that under the new Law, payroll information is available to any person. Further, no distinction is made between employees of law enforcement agencies and other public employees. The applicable provision in the current Law merely 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..." [§87(3)(b)].

Consequently, I believe that the reference to the fiscal officer and the duties of such an officer regarding the payroll record should be deleted.

Second, §5.3(a)(1) lists categories of records to be made available. For the reasons specified earlier, that list, which tracks the original Freedom of Information Law, should be deleted.

Third, §89(4)(a) of the new Freedom of Information Law requires that copies of appeals and the determinations that follow be transmitted to the Committee on Public Access to Records. No direction of that nature is provided in the draft regulations.

Fourth, §5.9 concerns exemptions. That section follows the former §88(7) of the original Freedom of Information Law and should also be deleted.

Fifth, the direction provided in the draft concerning the subject matter list (§5.5) is out of date due to a new provision appearing in §87(3)(c) of the Freedom of Information Law and §1401.6 of the regulations.

Sixth, both the Law and the regulations provide more specific direction with regard to fees, denial of access to records, requests for records and the time limits within which a request must be answered. It is suggested that you follow the direction provided in both the regulations and the model regulations.

In sum, I believe that the Town would better comply if the draft regulations were replaced in their entirety with new regulations based upon the enclosed Committee regulations and the model.

I hope that 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-1831

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

January 6, 1981

Mr. Donald G. Brandon
Chief Inspector
New York State Police
State Campus
Albany, New York 12226

Dear Chief Inspector Brandon:

Thank you for transmitting a copy of the appeal and your determination thereon regarding a request made by Steven M. Tullberg.

If I understand the request correctly, Mr. Tullberg has sought approved licenses for handguns. You denied access based upon §87(2)(e)(i) and §87(2)(g) of the Freedom of Information Law.

If my interpretation of the request is correct, I must respectfully disagree with your determination to deny access.

I direct your attention to §400.00(5) of the Penal Law, which is entitled "Licenses to carry, possess, repair and dispose of firearms". The cited provision states in relevant part that "[T]he application for any license, if granted, shall be a public record" and that "[A] duplicate copy of such application shall be filed by the licensing officer in the executive department, division of state police, Albany..."

Based upon the clear direction provided by §400.00(5), I believe that approved licenses regarding firearms are available. It is noted that the Freedom of Information Law preserves rights of access to records granted by means of other provisions of law or judicial determination. Specifically, §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."

In view of the provision quoted above, I do not believe that any of the grounds for denial listed in §87(2) of the Freedom of Information Law could be cited to withhold records deemed "public" under the Penal Law.

Further, §87(2)(e)(i) of the Freedom of Information Law provides that an agency may withhold records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings. From my perspective, it is questionable whether an approved application could be characterized as a record compiled for law enforcement purposes; on the contrary, it might be characterized as a record compiled in the ordinary course of business. In addition, since rights of access apply only to those applications that have been approved, it is in my view doubtful at best whether disclosure could interfere with a law enforcement investigation or a judicial proceeding.

With respect to §87(2)(g) concerning inter-agency and intra-agency materials, the first subparagraph of the cited provision indicates that statistical or factual information found within such materials are available. I believe that an approved application consists of factual information.

Lastly, it is noted that arguments similar to those raised in your denial were offered in Kwitny v. McGuire [422 NYS 2d 867 (1979), aff'd, App. Div., First Dept., NYLJ, August 25, 1980]. However, it was held in Kwitny that approved pistol license applications on file with the New York City Police Department must be made available under §400.00(5) of the Penal 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: Steven Tullberg

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1832

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

January 6, 1981

Mr. Jack Guildroy
[redacted]

Dear Mr. Guildroy:

As you are aware, I have received your letters of December 22 and 29, in which you requested an advisory opinion under the Freedom of Information Law.

According to your first letter, while in attendance at a meeting of the Permanent Commission on Public Employee Pension and Retirement Systems, you had difficulty in understanding the documents that were discussed during the course of the meeting. Consequently, on December 8, you requested the documents to be discussed at the meeting of the Commission held on December 18. According to your letter, while at the meeting of December 18, the Chairman of the Commission, James F. Regan, acknowledged receipt of your request. You wrote further that:

> "[T]he Commission then denied my request, on the grounds that the consultant's report was a working paper only, and that it should not be made available until it was in a final form."

Based upon your description of the facts, I would like to offer the following comments.

First, as we have discussed in the past, the Open Meetings Law imposes no obligation upon a public body to provide those in attendance with copies of materials that may be discussed or to which reference may be made during the course of a meeting.

Second, rights of access to records are determined by the provisions of the Freedom of Information Law. It is also noted that an agency subject to the Freedom of Information Law need not respond to a request for records immediately. 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)].

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)].

With regard to the basis for withholding offered by Mr. Regan, I must respectfully disagree with the rationale that you attributed to him.

It is noted initially that the Freedom of Information Law defines "record" in §86(4) to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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, it is clear that as soon as the Commission has possession of records, those records are subject to rights of access granted by the Law. The fact that records may be characterized as "working papers" or that records may not be "final" does not in my opinion remove them from the scope of the definition of "record".

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 appearing in §87(2)(a) through (h) of the Law.

Third, I have discussed the records in which you are interested with James Ayers, Counsel to the Commission. According to Mr. Ayers, the documentation in question was prepared jointly by a consultant and the staff of the Commission. In this regard, 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. 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 must be made available. Based upon my discussions with you and Mr. Ayers, it appears that portions of the documentation consist of statistical or factual data that are required to be made available. Other aspects of inter-agency or intra-agency materials that are reflective of opinion, advice, or recommendation, for example, could justifiably be withheld.

If the Commission reviews materials that were submitted to it and developed solely by the consultant, the exception for inter-agency and intra-agency materials would not in my opinion apply. Since a consulting firm is not an "agency" as defined by §86(3) of the Law, I do not believe that materials submitted to an agency by a consultant could be characterized as inter-agency or intra-agency materials. Moreover, there are several recent judicial determinations that reached the same conclusion, i.e., that records transmitted to an agency by a private firm outside of government do not constitute inter-agency or intra-agency materials, even though there may have been a contractual agreement between an agency and a firm [see e.g., Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer Cty., April 24, 1980; Phillips v. Brier, Sup. Ct., Albany Cty., (August 22, 1980); and Sea Crest Construction Corp. v. Stubing, Sup. Ct., Nassau Cty., (Jan. 7, 1980)].

Finally, as requested, enclosed is a copy of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:Jm
Enc.
cc: James F. Regan
James Ayers

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1833

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

January 8, 1981

Mr. Eugene Nelson
79-A-2393 E-2-44
Box 51
Comstock, NY 12821

Dear Mr. Nelson:

I received this morning an appeal that you directed to me as executive director of the Committee on Public Access to Records.

Your appeal has been made following a denial of access to records by David S. Worgan, Records Access Officer for the District Attorney of New York County.

Please be adivsed that the appeal should not have been sent to this office. The Committee on Public Access to Records is responsible for providing advice under the Freedom of Information Law; it has no authority to issue rulings binding upon agencies or to compel compliance with the Freedom of Information Law.

Section 89(4)(a) of the Law (see attached) 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."

The cited provision also states that the person or body designated to determine appeals "shall immediately forward" a copy of an appeal and its determination that follows to the Committee on Public Access to Records.

In view of the foregoing, it is suggested that you transmit your appeal to the person designated by the District Attorney of New York County to render appeals under the Freedom of Information Law. I would like to point out, too, that the regulations promulgated by the Committee provide in relevant part 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)].

Consequently, if Mr. Worgan denied access to records in writing, the denial should have included the name, title, business address and business telephone number of the person or body designated to determine appeals by the District Attorney.

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:jm

Encs.

cc: David S. Worgan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1834

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

January 9, 1981

Ms. Evelyn Gilbert
[redacted]

Dear Ms. Gilbert:

As I promised during our conversation of yesterday afternoon, I have contacted the Commission of Correction on your behalf. Your inquiry concerns access to records relative to the proposed renovation of the existing jail or construction of a new county jail in Livingston County.

I spoke to George King, Counsel to the Commission, on your behalf. He informed me that the Commission has supplied you with virtually all of the information that it currently has regarding the proposal. Mr. King also suggested that, in all likelihood, the County, and particularly the County Legislature, would be the most appropriate source for gaining information on the subject.

As I indicated to you by telephone, it is suggested that you direct a request in writing under the Freedom of Information Law to the appropriate County officials. Section 89(3) of the Law (see attached) states that an applicant for records must "reasonably describe" the records in which he or she is interested in writing. If you would like copies of records, it is suggested that you offer to pay the requisite fees for photocopying.

In addition, an agency has five business days from its receipt of a request to provide a response (see also, attached regulations, §1401.5). 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1835

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

January 12, 1981

Lee W. Stemmer
[redacted]

Dear Mr. Stemmer:

I have received your letter of December 11 and apologize for the delay in response.

Once again, your inquiry concerns your capacity to gain access to records of the Town of Pompey. Specifically, as of the date of your letter, you had not received records requested on October 8, even though the Town Clerk indicated by letter on October 16 that the records in question would be made available to you.

I regret that I must reiterate comments made in my earlier correspondence to you.

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, assuming that the Town Clerk is the designated records access officer, she has the responsibility to "coordinate agency response to public requests for access to records" [see regulations, §1401.2(a)]. Therefore, in my opinion, the records access officer is responsible for ensuring that responses to requests for records are given within the time limits specified in the Freedom of Information Law and the regulations. Based upon your letter, it appears that the Assessor has apparently refused to bring the records in which you are interested to the Town Clerk. In this regard, I believe that the Town Clerk should likely inform the Town Board of her responsibilities under the Freedom of Information Law in an effort to obtain the assistance of the Board in requiring the Assessor to perform the duties that he or she is required to perform.

Third, as indicated in my letter to you last year, §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 not be in the physical custody of the Town Clerk, that officer nonetheless maintains legal custody of the records in question based upon the provision of the Town Law cited earlier.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Town Board
Carole Guynup

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1836

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

January 12, 1981

Gary Wolanske, President
North Tonawanda Taxpayer's Association
P. O. Box 253
North Tonawanda, New York 14120

Dear Mr. Wolanske:

I have received your letter dated November 25. Please be advised that it did not reach this office until the last week in December.

You have requested an advisory opinion regarding whether the North Tonawanda Taxpayer's Association is entitled to obtain a portion of the resume of the North Tonawanda Youth Bureau Executive Director's resume indicating the experience that qualifies her for the position. The City denied access on the basis of §89(2)(b)(i) of the Freedom of Information Law, which states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories of personal references of applicants for employment..."

I would like to offer several comments with respect to your inquiry.

First, there may be situations in which a single record may be both accessible and deniable in part. The introductory language of §87(2) states that all records of an agency are available, except that an agency may withhold "records or portions thereof" that fall within one or more grounds for denial that appear in the ensuing paragraphs.

Second, the ground for denial that is most relevant under the circumstances is §87(2)(b), which states in general that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." The cited provision makes reference to subdivision (2) of §89 of the Law, which lists examples of unwarranted invasions of personal privacy, one of which is §89(2)(b)(i).

Third, there have been several judicial interpretations of the privacy provisions to which reference was made earlier with respect to public employees. It is noted initially that the courts have found that public employees enjoy a lesser right to privacy than any other identifiable group, for public employees have a responsibility to be more accountable to the public than any group. In addition, the courts have found in essence that records that are relevant to the performance of the official duties of a public employee are available on the ground that disclosure 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, 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 concerning public employees that are not relevant to the performance of their official duties may be denied 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].

Under the circumstances, it is possible that there may be portions of a resume that are available under the Freedom of Information Law, and portions that may be denied.

For instance, a resume might contain a public employee's social security number, home address, home telephone number, marital status, military experience and similar information of a personal nature. I would conjecture that those types of items have no relevance to the performance of one's official duties and may justifiably be deleted from a resume. Similarly, aspects of one's employment history might also be withheld on the ground that they are irrelevant to the performance of one's official duties.

However, if the position that an individual holds has specific requirements in terms of educational or work experience, it is possible that a court would find that disclosure of those portions of a resume indicating those areas of educational or work experience that are required for placement in the position would be available on the ground that disclosure would result in a permissible invasion of personal privacy.

In a related area, it is noted that the eligible list developed following the administration of a civil service examination is available. Such a list identifies those individuals who passed a civil service exam as well as their scores. If the individual in question took a civil service exam, the eligible list pertaining to that exam is available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bonnie Brown

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1837

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

January 12, 1981

Mr. Barry Burkins
#76-D-101
Great Meadow Correctional
Facility
Box 51
Comstock, New York 12821

Dear Mr. Burkins:

I have received your letter of December 11 and apologize for the delay in response.

You indicated that you are interested in obtaining the tapes or transcripts of radio communications made by officers of the Albany Police Department as well as a record containing the charges for which you were booked at the time of your arrest on March 21, 1976.

I would like to offer several comments with respect to your inquiry.

First, the Freedom of Information Law (see attached) is an access to records law. Stated differently, §89(3) of the Law specifically states that, as a general rule, an agency need not create a record in response to a request. Under the circumstances, it is possible that records of the radio communications to which you made reference may no longer exist. For instance, while police departments often tape record such communications, if a tape recording has been erased or destroyed, very simply, there may be no records to be made available.

Second, the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states that all records of an agency, such as a police department, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Third, assuming that the radio communications that you are seeking remain in existence, there may be grounds for withholding. Section 87(2)(e) of the Freedom of Information Law states that an agency may withhold records or portions that:

> "...are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures".

The provision quoted above is based largely upon potentially harmful effects of disclosure. While the radio communications in question may have been created or compiled for law enforcement purposes, it is in my view doubtful at this time whether disclosure could interfere with an investigation, deprive a person of a right to a fair trial, or reveal non-routine criminal investigative techniques or procedures. It is possible, however, that the communications might contain information regarding a confidential informant, for instance. If that is the case, the appropriate portions of tapes or transcripts of the radio communications could likely be withheld.

Another ground for denial that arises in the context of law enforcement investigations is §87(2)(f). That provision states that an agency may withhold records or portions thereof when disclosure would "endanger the life or safety of any person". Since I am not familiar with the contents of the records in question, it is unknown to me whether the language quoted above would be applicable.

Fourth, with respect to the record of your arrest, which is generally known as the "booking record", I believe that such information should be made available to you. Even under the original Freedom of Information Law, which was not as expansive in terms of rights of access as the current Law, access was granted with respect to "police blotters and booking records".

It is also suggested that criminal history information, which would include records of arrest, is maintained by the New York State Division of Criminal Justice Services. I believe that criminal history information pertaining to you can be made available by the Division upon presentation of proof of identity by means of fingerprints. You may contact the Division of Criminal Justice Services at 80 Centre Street, New York, New York 10007. Further, you might want to contact a representative of Prisoners' Legal Services or a similar organization in order to help you in gaining such records.

Fifth, in making a request for records under the Freedom of Information Law, §89(3) of the Law states that an applicant must "reasonably describe" in writing the records in which he or she is interested. It is suggested that you direct your request for records to the Albany Police Department and that you reasonably describe the records that you are seeking and provide as much detail as possible in order that the Police Department may attempt to locate the records as readily as possible.

Lastly, some of the information that you are seeking may exist as part of court records, particularly if the information was introduced during a trial. In this regard, although the Freedom of Information Law does not include the courts or court records within its coverage, many court records are available under §255 of the Judiciary Law. If you believe that a court clerk would have possession of records in which you are interested, you should request such records from 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-1838

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

January 13, 1981

Ms. Barbara Burkholder
League of Women Voters of
Albany County
24 Warren Street
Albany, New York 12203

Dear Mr. Burkholder:

I have received your letter of December 15 and appreciate your interest in compliance with the Freedom of Information Law.

You have asked that I review the "Rules for Inspection of Records" adopted by the City of Albany in order to determine the extent to which they are consistent with the Freedom of Information Law and the regulations promulgated by the Committee. Having reviewed the rules, I would like to offer several comments.

It is noted at the outset that §89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Public Access to Records promulgate general regulations regarding the procedural implementation of the Freedom of Information Law. In turn, §87(1) of the Law requires all agencies, such as the City of Albany, to promulgate rules and regulations consistent with those developed by the Committee.

In my view, there are several inconsistencies between the Rules for Inspection in question and the Freedom of Information Law and regulations of the Committee. Perhaps most importantly, however, the rules are lacking in several areas that will be described in the ensuing paragraphs.

The first rule states:

> "[T]he applicant must fill out a requisition with a carbon copy over his signature; the records sought to be examined shall be specified with such degree of clarity that they may be readily identified. Only one requisition shall be honored at a time."

In this regard, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for a denial of access. Section 89(3) of the Law states in relevant part that an applicant for records must submit a "written request for records reasonably described". As such, any request made in writing that reasonably described the record or records sought should be sufficient.

The first rule also requires that a request specify records sought in order that they may be "readily identified". Under the original Freedom of Information Law enacted in 1974, applicants were required to request "identifiable records". However, in many instances, it was impossible to identify records if an applicant was not entirely sure of the particular records in which he or she may have been interested. Consequently, one of the amendments to the Law that became effective on January 1, 1978 is §89(3), which merely requires that a request "reasonably describe" the record sought.

The first rule states that "[O]nly one requisition shall be honored at a time." The Freedom of Information Law imposes no restriction on the number of records that may be requested.

For the reasons described above, I believe that the first rule is unduly restrictive in several respects.

The third rule requires that requests "shall be made by an applicant to the appropriate Department head." Here I direct your attention to §1401.2 of the regulations of the Committee, which, as noted earlier, have the force and effect of law and with which each agency must comply. In relevant part, the cited provision of

the regulations states that the governing body of a public corporation, such as the City of Albany:

> "...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, I believe that the rules should identify one or more records access officers based upon the direction provided in the provision quoted above.

The eleventh rule states that an examination of records is restricted to the hours of one to three p.m. on regular business days. However, §1401.4(a) of the Committee's 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."

As such, I believe that the public should have the opportunity to examine accessible records during regular business hours.

The thirteenth rule states that:

> "[T]he introduction or use of photo copying or duplicating equipment shall be prohibited."

In my opinion, the restriction imposed by the thirteenth rule is invalid. Specifically, §87(2) of the Freedom of Information Law states that agencies shall "make available for public inspection and copying all records...", except those records that fall within one or more grounds for denial that are described in paragraphs (a) through (h) of the cited provision. Based upon both §87(2) and §89(3) of the Law, I believe that a member of the public may use his or her duplicating equipment. In some instances, however, if such equipment requires electricity or space, for example, a reasonable charge may in my view be assessed for such services. Further, §89(3) of the Freedom of Information Law requires an agency to produce copies of records "upon payment, or offer to pay" the requisite fees for photocopying.

The fifteenth rule states that:

> "[T]he number and volume of records requested for production at any given time shall be reasonable and non-disruptive of the ordinary business of the particular office."

Although I agree that every law should be given a reasonable construction by the public and government, I do not believe that restrictions in terms of volume or a request can be imposed. It has long been held that "mere inconvenience" to an agency is not a sufficient ground for withholding records. Further, most recently, it was found that a shortage of manpower to comply with a request is no defense to a denial, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)].

As indicated earlier, if the rules that you sent represent the entire body of procedures concerning the implementation of the Freedom of Information Law, they are in my view lacking in many respects.

For instance, there is nothing in the rules that indicates that responses to requests must be given within specific time periods. In my view, such direction should be given in a manner consistent with §1401.5 of the Committee's regulations.

There is nothing in the rules concerning the obligation of the City when a denial of access to records is made. In this regard, §1401.7 of the Committee's regulations requires that a denial of access shall be in writing stating the reasons therefor and advising the person denied access of his or her right to appeal. The rules should also indicate the identity of the person or body to whom an appeal should be directed.

There is no provision regarding fees for copying. Language similar to that found in §1401.8 of the Committee's regulations should be included.

Lastly, in an effort to ensure that the provisions of the Freedom of Information Law and the Committee's regulations are carried out appropriately, copies of this opinion, the Committee's regulations and a set of model regulations designed to assist agencies in complying will be sent to the Common Council and the City 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

cc: Common Council
Gary Burns, City Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1839

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 13, 1981

Mr. Sidney Harring
John Jay College of
Criminal Justice
Dept. of Law & Police Science
The City University of New York
444 West 56th Street
New York, New York 10019

Dear Mr. Harring:

I have received your letter of December 15. Please accept my apologies for the delay in response.

Your inquiry concerns a request for records pertaining to you that are in possession of Buffalo State College. Several of the records that you requested were denied on the ground that they constitute "intra-agency communications".

I would like to offer the following comments and advice with respect to the situation.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as SUNY, 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, the applicable ground for denial cited by Joyce Fink, Records Access Officer for Buffalo State College, 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 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 information, instructions to staff that affect the public, or final agency agreements of policies or determinations must be made available.

Third, it is noted that the introductory language of §87(2) permits an agency to withhold "records or portions thereof that fall within one or more of the grounds for denial". As such, when a request for records is directed to an agency, the agency is obliged to review the records sought in their entirety to determine which portions, if any, may be justifiably be withheld.

Under the circumstances, the records that you have been denied might properly be characterized as "intra-agency communications" that fall within the scope of §87(2)(g). However, the mere characterization of those communications as "intra-agency materials" is not determinative with respect to rights of access. Although a record might be "intra-agency" in nature, it might consist in its entirety of statistical or factual information that is accessible under §87(2)(g)(i). Similarly, an intra-agency communication might be reflective of a final determination that is available [see §87(2)(g)(iii)]. In short, to the extent that the "intra-agency communications" that have been withheld contain statistical or factual information or final agency policies or determinations, I believe that they must be made available to you. Unfortunately, I have no familiarity with the contents of the records, nor does the Committee have the capacity to inspect records in order to determine rights of access.

Copies of this opinion will be sent to the appropriate SUNY officials. Perhaps the records in question will be reviewed due to the contents of this opinion.

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: Joyce Fink

Sanford Levine

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1840

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

January 13, 1981

Bette Cuffari Farron
[redacted]

Dear Ms. Farron:

I have received your letter and wish to apologize for the delay in response. The Committee is awaiting delivery of the pamphlets that you requested. When they are delivered, the 200 copies that you have asked for will be sent to you immediately.

Your inquiry concerns the inability of your organization, an association of taxpayers, to obtain records concerning a proposed new jail for Livingston County. It is noted that a similar inquiry was recently directed to this office by Ms. Evelyn Gilbert, who I believe is a member of your association. The State Commission of Correction as contacted on behalf of Ms. Gilbert, and I was informed by the Counsel to the Commission that she has received virtually of the information that the Commission maintains regarding the issue.

It was suggested by Counsel to the Commission that more information on the subject is likely maintained by the County Legislature. As such, I recommend that you request records from the appropriate county offices, such as the County Legislature.

In order to make a request, §89(3) of the Freedom of Information Law (see attached) states that an applicant must reasonably describe in writing the records in which he or she is interested. It is also noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, which includes a county office, 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. As a general rule, the grounds for denial are based upon potentially harmful effects of disclosure.

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 (see attached) 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1841

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

January 14, 1981

Charles J. Drha
[redacted]

Dear Mr. Drha:

I have received your letter of December 15 in which you requested assistance with respect to requests made under the Freedom of Information Law.

Specifically, you wrote and transmitted several letters of request to Sergeant Robert Andretta, Commanding Officer of the New York City Housing Authority Police Medical Unit. You wrote further that the records, which include x-rays, are particularly important to you, for you have been overexposed to radiation and your doctors have informed you that you should not undergo additional x-rays. Nevertheless, according to your letter, Sergeant Andretta has consistently refused to provide the records.

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

First, it is possible that Sergeant Andretta might not have the unilateral authority to release medical records in his custody. In this regard, I have enclosed a copy of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and with which agencies must comply. I direct your attention to §1401.2(a), which requires that the governing body of the New York City Housing Authority:

> "...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 suggested that you direct a request in writing to the records access officer of the Authority, who I believe is Norman Parnass. Having dealt with the Housing Authority on numerous occasions, I believe that your request will be answered accordingly and in compliance with the prescribed time limits for 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 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 terms of rights of access, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, the Law states that all records of an agency, including the Authority, 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 there is but one relevant ground for denial. However, that provision may also be cited as a basis for disclosure of some of the medical records in which you are interested.

Specifically, §87(2)(g) 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..."

The cited 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, I believe that medical tests and similar factual information, such as x-rays, must be made available to you. However, in some cases, some aspects of medical records might be reflective of advice or opinion that would be deniable under §87(2)(g).

Also enclosed is a copy of §17 of the Public Health Law, which provides essentially that, with your authorization, the physician or hospital of your designation may request and receive medical records prepared by another doctor or hospital. Although some of the medical records that you are seeking might justifiably be withheld under the Freedom of Information Law, the same records might be required to be made available to the physician of your choice under §17 of the Public Health Law. Consequently, it is suggested that you designate a physician to request medical records pertaining to you on your behalf.

You also wrote that during your twenty-one years of service with the Authority, you have sustained seven "line of duty injuries". However, Sergeant Andretta informed you that he could find records regarding only two injuries. In this regard, once again it is recommended that you direct

your request to the Authority's records access officer. Further, it is suggested that, in making your request, you provide as much detail as possible regarding the records in which you are interested, including information regarding the type of injuries sustained, dates, and similar identifiers that might enable the records access officer to locate the records readily.

I hope that I have been 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: Records Access Officer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1842

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

COMMITTEE MEMBERS
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MARCELLA MAXWELL
HOWARD F. MILLER
BASIL A. PATERSON
IRVING P. SEIDMAN
GILBERT P. SMITH Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 14, 1981

David W. Truscott, Chairman
Committee for the Preservation
of the Youmans House
10 Orchard Street
Delhi, New York 13753

Dear Mr. Truscott:

I have received your letter of December 16 and apologize for the delay in response.

You have described a situation concerning your attempts to gain a copy of a blueprint for a proposed office building that would replace the Youmans House in Delhi. Although the clerk of the Delaware County Board of Supervisors has indicated that you may "use their official" copies of the blueprints and plans in possession of the County, you wrote that "copies of a blueprint can only be made on a machine which does not exist in Delhi". In addition, you have requested information characterized as a "building program", but no response has been given with respect to that aspect of your request. The building program was alluded to at a meeting of the County Building Committee by Mr. David Munsell, Chairman of the Committee.

I would like to offer several comments with respect to your inquiry.

First, I believe that all records in which you are interested are subject to rights of access granted by 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, com-

> puter tapes or discs, rules, regulations or codes".

In view of the definition quoted above, it is clear that drawings, designs, blueprints and similar plans constitute "records" subject to the Law.

Second, it appears that records in which you are interested, as you have described them, are available. In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a county, 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. From my perspective, none of the grounds for denial could appropriately be cited. With respect to materials created by County officials, §87(2)(g)(i) states that statistical or factual information found within inter-agency and intra-agency materials should be made available. With respect to records submitted to the County by a person or firm outside of government, I do not believe that any ground for denial would be applicable based upon the background information that you have provided.

Third, in terms of reproduction of the records in which you are interested, §89(3) of the Freedom of Information Law states that:

> "[E]ach entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such requests in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied. Upon payment of, or offer to pay, the fee prescribed therefore, the entity shall provide a copy of such record..."

Based upon the language quoted above, I believe that an agency is obliged to produce a copy of an accessible record upon payment of the requisite fees. However, under the circumstances and in all honesty, I am not sure that I can

recommend a clear course of action with respect to reproduction of the blueprint. As you may be aware, §89(1)(b)(iii) of the Freedom of Information Law states in essence 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 other records. Consequently, if a record is not subject to conventional photocopying methods, an agency may assess a fee based upon the actual cost of reproduction. You wrote that there is no machine that can duplicate the blueprints in Delhi. Perhaps, however, there is such a machine in a nearby municipality, such as Sidney or Binghamton. If you and County officials would be willing to do so, it is suggested that you offer to pay the actual cost of reproducing the blueprints plus other costs involved for transportation and time, for example. The only other alternative that I can suggest (and I am not an expert regarding the reproduction of technical documents) is that the blueprints be photographed.

Lastly, 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, 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: Arretta Early

David Munsell

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1843

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

January 20, 1981

George M. Ebert
One Sterling Station
Sterling, NY 13156

Dear Mr. Ebert:

I have received your letter of December 18 and apologize for the delay in response.

You wrote that on January 1, mental health services will be transferred from the Oswego County system to a private hospital. In this regard, both employees and clients of the present mental health center have expressed concerns to you regarding the transfer of confidential patient records from the center to the hospital. You have asked for my opinion on the subject.

In brief, the Freedom of Information 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 listed in the Law.

The most relevant exception under the circumstances in §87(2)(a), which provides that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". Here I direct your attention to §33.13 of the Mental Hygiene Law, which generally requires that clinical records regarding patients in mental hygiene facilities remain confidential, and which has been enclosed for your consideration.

With respect to the legality to the transmittal of the records in question without the authorization of the clients, §33.13(d) states that nothing in the preceding provisions of the Mental Hygiene Law requiring confidentiality.

> "...shall prevent the exchange of information concerning patients, including identification, between (i) facilities providing services for such patients pursuant to an approved unified services plan, as defined in article eleven, or pursuant to agreement with the department and (ii) the department or any of its facilities. Information so exchanged shall be kept confidential and any limitations on the release of such information imposed on the party giving the information shall apply to the party receiving the information".

In view of the foregoing provision, it would appear that the confidentiality provisions required of the County would essentially be transferred to the hospital that now maintains patient records.

Further, it is noted that the Freedom of Information Law is applicable only to governmental entities; it does not apply to a private hospital, for example. Therefore, the hospital to which the records have been transferred would be under no obligation under the Freedom of Information Law to disclose any of its 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1844

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

January 21, 1981

Mr. Philip A. Lalonde
[redacted]

Dear Mr. Lalonde:

As you are aware, I have received your letter of December 18 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the attached application for public access to records directed to the records access officer of the Albany City School District, you were denied the "[D]ates of birth of children in Miss [redacted] Emotionally Disturbed class at School #26".

In my opinion, the information that you are seeking should be available.

It is noted at the outset that you stated that the information regarding dates of birth of the children in the class in question is important and relevant to a hearing involving your child. Further, the School District is required to establish a limitation of three years in terms of the dates of birth of children attending a special class. Section 200.4(c)(1)(i) of the regulations promulgated by the Commissioner of Education pertaining to a special class states that:

> "(1) Special classes for pupils handicapped because of severe physical reasons. School districts may organize special classes for pupils who are blind, deaf, orthopedically handicapped or neurologically impaired, in accordance with the following criteria:
>
> (i) The chronological age range of the pupils served shall not exceed three years."

In view of the foregoing, it is clear that the dates of birth are relevant to the performance of the duties of the School District and its compliance with state regulations.

In terms of rights of access, the Freedom of Information Law 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 grounds for denial listed in §87(2)(a) through (h) of the Law (see attached).

Under the circumstances, three grounds for denial should be brought to your attention.

First, §87(2)(a) states that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". In this regard, the federal Family Educational Rights and Privacy Act, 20 USC §1232g, which is commonly known as the "Buckley Amendment", states that any "education records" identifiable to a particular student or students are confidential to all but the parents of the students, and that as a general rule education records cannot be disclosed without the consent of the parents. Under the circumstances, if, for instance, a record indicates the names of students in the class and their dates of birth, the names or other identifying details should be deleted in order that only the dates of birth of the students in the class would remain.

The second ground for denial is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". As such, the same conclusion is reached as in the case of §87(2)(a), specifically, that identifying details may be deleted to protect privacy while the remaining information, i.e. dates of birth, would be accessible.

The third ground for denial of relevance 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 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, and final agency policy or determinations must be made available.

In this instance, a record indicating the names of students in the class and their dates of birth would consist solely of factual information that is available under §87(2)(g)(i). Again, however, the identifying details, such as the names of students, could be deleted under both the Family Educational Rights and Privacy Act and §87(2)(b) of the Freedom of Information Law concerning unwarranted invasions of personal privacy.

I would like to point out that in a situation in which a parent sought records indicating the results of standarized tests that were listed on a printed page with the names of students in alphabetical order, the Appellate Division held that the names should be deleted and that, to ensure the protection of privacy, the scores should be "scrambled" in order to change the order in which students were listed [Kryston v. Board of Education, East Ramapo School District, 430 NYS 2d 688, ___ AD ___ (Aug. 11, 1980)]. The court found further that scrambling the scores would not constitute the creation of a record. In this case, if, for example, the dates of birth appear on a record in which student names are listed alphabetically, based upon the Kryston decision cited above, the School District would be obliged to "scramble" the dates of birth in order to preclude the identification of any particular student, while providing access to the dates of birth.

I hope that 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: Bruce Venter
David Brown

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1845

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

January 21, 1981

Ms. Bernice C. Sweeting
[redacted]

Dear Ms. Sweeting:

I have recently received your letter of December 18 in which you requested information regarding the means by which you may obtain records in possession of various agencies.

It is emphasized at the outset that the Committee on Public Access to Records is responsible for providing advice with respect to the Freedom of Information Law; the Committee does not have possession of records generally, nor does it have the capacity to compel agencies to disclose records. Nevertheless, I would like to offer the following comments.

First, a number of areas of inquiry concern records in possession of courts. In this regard, it is noted that the Freedom of Information Law does not include the courts and court records within its scope. However, court records are often 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 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 provision quoted above, it is suggested that you request court records from the clerks of the appropriate courts and that in so doing you attempt to provide as much specificity as possible regarding the particular records in which you are interested.

Second, several potential requests concern records in possession of police departments or offices of districts attorney. In this regard, I would like to point out that the Freedom of Information Law requires that an applicant "reasonably describe" in writing the records in which he or she is interested. Consequently, rather than requesting "all records" concerning surveillance, for example, without more, it is again suggest that you attempt to provide as much specificity as possible when making a request. Identifying information, such as dates, file designations, or similar information would likely enable an agency to respond more readily to a request.

Third, the Freedom of Information Law states that all records are available, except those records that fall within one or more grounds for denial listed in §87(2)(a) through (h) (see attached). Please be advised that there may be several grounds for denial that could appropriately be cited regarding records of a police department or a district attorney. For instance, §87(2)(e) states that an agency may withhold records "compiled for law enforcement purposes" under certain circumstances specified in the Law; §87(2)(f) states that an agency may withhold records when disclosure would "endanger the life or safety of any person." Depending upon the nature of the records sought, it is possible that one or more grounds for denial might be cited.

Fourth, among the agencies that you cited is the Bureau of Child Welfare. In this regard, it is noted that the Social Services Law, §136, provides in brief that any records identifiable to an applicant for or a recipient of public assistance are confidential. However, it is also important to point out that the regulations promulgated by the State Department of Social Services provide that such records may be made available to an applicant for or a recipient of public assistance or a relative if in the judgment of social service officials, disclosure would be in the best interests of an applicant or recipient.

Lastly, you requested information regarding the means by which you may obtain birth records pertaining to you. As a general rule, birth certificates and related information are provided to the subject to such records. Since you were born in New York City, it is suggested that you call the New York City Health Department, which has a bureau that deals with birth and death records and may be reached by calling 247-0130.

I hope that 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-1846

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

January 21, 1981

Charles J. Drha
Director of Organizations
and Public Relations
Civil Service Merit Council
157 - 12 Powell's Cove Blvd.
Beechhurst, Queens, NY 11357

Dear Mr. Drha:

I have received your letter of December 15 and apologize for the delay in response. As the Director of Organizations and Public Relations of the Civil Service Merit Council, you have raised a series of questions regarding access to medical records by members of the uniformed forces, including New York City Police, Housing, Transit, Fire, Correction, and Sanitation Officers.

In my view, there are several provisions of law with which you should be familiar.

First, the Freedom of Information Law often grants rights of access to medical records to the subjects of the records. Specifically, the Freedom of Information Law is based upon a presumption of access and 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 §87(2)(a) through (h). Further, §89(2)(c) of the Law states that records pertaining to an individual should be made available to him or her, unless one of the grounds for denial may appropriately be cited.

From my perspective, there is but one ground for denial that could justifiably be cited to withhold medical records from the subjects of the records. 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. Stated differently, although an agency may withhold inter-agency and intra-agency materials, it must provide access to portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations.

In the case of records prepared by departmental doctors, I believe that such records could properly be characterized as "intra-agency materials". However, to the extent that such materials contain statistical or factual information, such as laboratory test results, for instance, I believe that they must be made available. To the extent that the records contain advice or opinion, for instance, it appears that such information could be denied.

In the case of records submitted to an agency by doctors other than those employed by the agency, it does not appear that there would be a ground for denial and that such information must be made available.

Your second question concerns a situation in which a request is made in writing by certified mail with return receipt and an agency fails to reply.

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)].

Third, you have asked what can be done if a private doctor or hospital requests records on behalf of a patient and receives no reply. In all honesty, all that I can suggest is that all parties concerned be made aware of the provisions of §17 of the Public Health Law concerning the release of medical records. That provision states in relevant part that:

> "[U]pon the written request of any competent patient, parent or guardian of an infant, or committee for an incompetent, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital, provided, however, that such records concerning the treatment of an infant patient for venereal disease or the performance of an abortion operation upon such infant patient shall not be released or in any manner be made available to the parent or guardian of such infant. 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".

Fourth, if a member of the uniformed forces is referred to a doctor not employed by an agency, you have asked whether that doctor may object release of a medical report prepared by that doctor to the subject of the report. In my opinion, the doctor could not require that the department maintain confidentiality of the records in question, nor could the agency promise to the doctor that the records would be kept confidential. It has long been held that a promise of confidentiality may be all but meaningless, and it was most recently held by the state's highest court, the Court of Appeals, that rights of access to government records are fixed by the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979)].

Fifth, when a request is made directly to a doctor under the Freedom of Information Law, you have asked whether that person can refuse to release a medical report to the subject of the report. It is noted in this regard that the Freedom of Information Law is applicable only to records in possession of government. Consequently, records of private doctors would not fall within the scope of the Freedom of Information Law. However, as indicated earlier, §17 of the Public Health Law requires that a doctor or hospital release medical records to another doctor or hospital requesting such records on behalf of a patient.

In addition, the Board of Regents, which licenses persons in the health professions, including physicians, has promulgated regulations regarding "unprofessional conduct". Section 29.2(a)(6) of the regulations states that unprofessional conduct in the profession of medicine includes:

> "...upon a patient's written request, failing to make available to a patient, or, to another licensed health practitioner consistent with that practitioner's authorized scope of practice, copies of the record required by paragraph (3) of this subdivision and copies of reports, test records, evaluations or X rays relating to the patient which are in the possession or under the control of the licensee, or failing to complete forms or reports required for the reimbursement of a patient by a third party. Reasonable fees may be charged for such copies, forms or reports, but prior payment for the professional services to which such

> records relate may not be required as a condition for making such records available. A practitioner may, however, withhold information from a patient if, in the reasonable exercise of his or her professional judgment, he or she believes release of such information would adversely affect the patient's health, and this section shall not require release, to the parent or guardian of a minor, of records or information relating to venereal disease or abortion except with the minor's consent".

Sixth, you have asked what can be done if a physician fails to reply and ignores a request. In such circumstances, it is suggested that a complaint be sent to the appropriate board for professional licensing at the State Education Department.

Seventh, if there are a number of doctors treating a patient, you have asked whether an agency must provide each doctor with copies of records sought. Assuming that the records are available, I do not believe that the Freedom of Information Law imposes any restriction on the number of requests that might be made or the number of copies requested. It is noted, however, that the Freedom of Information Law permits agencies to assess fees for reproducing records. As a general rule, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents per photocopy or the actual cost of reproducing records not subject to conventional photocopying methods.

Eighth, you asked what can be done if an agency insists on providing copies of medical records only to "a doctor". Again, some aspects of medical records are in my view available to the subject of the records. Consequently, assuming that records are accessible, they must be made available to the subject.

Ninth, you have asked whether the Freedom of Information Law applies to private doctors or hospitals. It is reiterated that the Freedom of Information Law includes within its scope only governmental entities based on the definition of "agency" appearing in §86(3) of the Law (see attached).

Tenth, you have asked what can be done by those officers in situations in which an applicant for medical records may be subjected to "harassment". Please be advised that the major responsibility of the Committee involves providing advice to persons in need of assistance with respect to the interpretation of the Freedom of Information and Open Meetings Laws. As you may be aware, I have prepared hundreds advisory opinions on behalf of the Committee at the request of members of the public, representatives of government and the news media. Although an advisory opinion is not binding of an agency, I am hopeful that in many instances, an opinion from this office may be persuasive and help to avoid litigation. Further, the courts have cited the opinions of the Committee with increasing frequency as the basis for their own determinations, and two appellate divisions have held essentially that an opinion of the Committee should be upheld unless it is unreasonable [see Sheehan v. City of Binghamton, 59 AD 2d 808, (1977); Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979)].

Lastly, you asked whether any particular time is most appropriate for reaching this office and whether I could participate as a guest speaker before the Civil Service Merit Council. As a general rule, I am in the office between the hours of 8:30 a.m. and at least 5:00 p.m. Unless I am absent, I would be more than happy to discuss issues concerning access to records with you. In addition, I have participated as a speaker before numerous groups and would be honored to address the Civil Service Merit Council so long as a reasonable amount of advance notice is provided.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1847

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

January 23, 1981

Mr. Theodore Newstad
[redacted]

Dear Mr. Newstad:

I have received your letter of December 19 and apologize for the delay in response.

You have asked for assistance in obtaining the names and addresses of your former navy shipmates with whom you served more than thirty years ago. In all honesty, while I do not believe that I can help you in gaining the names and addresses that you are seeking, I would like to offer the following comments.

First, the Committee on Public Access to Records is responsible for advising with respect to the New York Freedom of Information Law, which is applicable only to agencies of state and local government in New York. Since the information in question is likely maintained by a federal agency, the applicable statute is the federal Freedom of Information Act.

Second, it is in my view questionable whether any federal agency maintains records indicating the names and the current addresses of your former shipmates. In this regard, the federal Freedom of Information Act grants access to certain existing records and a federal agency would not be required under the Act to locate or "track down" the persons in which you are interested.

Third, the federal Act requires that an applicant "reasonably describe" the records sought. As such, it is suggested that you transmit a request in writing to the Department of the Navy in Washington and that you include as much information as possible that would enable the

Department to locate records, i.e. names, dates, location, type of unit, etc. If the Navy continues to maintain a base in Fond du Lac, a similar request might be sent to its public information officer. To send a request to the Department of the Navy, it is suggested that you write to:

Theodore T. Belazis
Office of General Counsel
Department of the Navy
Crystat Plaza, Bldg. 5, Rm. 480
Arlington, VA 20360

Lastly, in your phone book under "United States Government", you will find a member for the federal information center, which can be called toll free. You might want to briefly describe your situation to a representative of the federal information center, who might be able to assist you in contacting the appropriate office.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1848

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

January 23, 1981

Floss Frucher
Executive Deputy Director
NYS Office for the Aging
Empire State Plaza
Albany, New York 12223

Dear Ms. Frucher:

As you are aware, I have received your letter of December 19 in which you requested an advisory opinion under the Freedom of Information Law. I appreciate your interest in complying with the Law and hope that you will accept my apologies for the delay in response.

Your inquiry, according to our discussion was precipitated by a request directed to the Office for the Aging by Irving A. Landa of the Gray Panthers of the New York Capital District. Mr. Landa requested records indicating "the names, ages and grades of all employees of your agency Grade 12 and above". Mr. Landa also stated in a letter seeking the advice of this office that:

> "...the ages of the employees is the heart of our request since we are interested in whether or not the SOFA is complying with Federal guidelines mandating preference in hiring to those applicants 60 years of age and over".

The issue raised in your letter as well as that submitted by Mr. Landa is whether the disclosure of records reflective of the identities of employees of the Office for the Aging and their ages would result in "an unwarranted invasion of personal privacy" and, therefore, be deniable under §87(2)(b) of the Freedom of Information Law.

I would like to offer several comments in an effort to resolve the controversy in a manner that might enable the Gray Panthers to determine whether federal guidelines have indeed been met and, concurrently, to enable the Office for the Aging to protect against unwarranted invasions of personal privacy.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are accessible, except to the extent that records fall within one or more grounds for denial appearing in §87 (2)(a) through (h) of the Law (see attached). It is emphasized that the introductory language of §87(2) permits an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Consequently, it is clear that the Law envisions situations in which a single record may be accessible or deniable in whole or in part. In some instances, portions of a record might justifiably be withheld or deleted while the remainder must be made available.

Second, the Freedom of Information Law states that, unless specific direction is provided to the contrary, an agency need not create or compile a record in response to a request. Therefore, if, for example, the Office for the Aging does not maintain a record or records reflective of the information sought, it would not be obliged to create a new record.

Third, §87(3)(b) of the Law specifically requires that each agency maintain:

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

As such, an applicant may review a payroll record that indicates the name and, by means of the title and salary, the grade of all public employees.

Fourth, as indicated earlier and assuming that a record or records exist that contain the information sought, the only relevant ground for denial is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy. In this regard, there are several judicial determinations that concern the protection of privacy relative to public employees. Based upon case law, it is clear

that public employees enjoy a lesser protection of privacy than the public generally, for public employees have a greater duty to be accountable than any other identifiable group.

Further, as a general rule, the courts have held that records that are relevant to the performance of a public employee's official duties are accessible, 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); Montes v. State, Sup. Ct., Nassau Cty., NYLJ, March 9, 1979; Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Blecher v. Board of Education, City of New York, Sup. Tc., Kings Cty., NYLJ, October 25, 1979]. Conversely, it has also been held that records or portions of records identifiable to public employees that do not relate to the performance of their official duties may be withheld or deleted on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy (see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Based upon extant case law, I would conjecture that a court would find that the portion of a record identifying a public employee indicating his or her age may be deleted for age likely has minimal relevance to the performance of one's official duties. If this contention is accurate, disclosure of records of the identities of public employees with their ages would result in an unwarranted invasion of personal privacy.

From a different perspective, however, unless the ages are disclosed, it may be all but impossible to determine whether the Office for the Aging is in compliance with the federal guidelines to which Mr. Landa referred.

In this regard, I would like to offer several alternative suggestions that could serve to protect privacy and enable the Gray Panthers to determine whether the agency has complied with the federal guidelines to which Mr. Landa referred.

First, as suggested to you by telephone, Mr. Landa or any other person could obtain the payroll record required to be compiled under the Freedom of Information Law, which includes the name, public office address, title and salary

of every employee of the agency. When in receipt of the payroll listing, he could send inquiries to all employees who could individually respond to questions concerning their ages and grade. By so doing, an individual employee could determine for himself or herself whether disclosure of his or her age would result in an unwarranted invasion of privacy. In the same vein, inquiries could be sent and responses could be given merely with respect to age and without any additional identifiers, such as names. Based upon the responses, statistics might be compiled to enable the Gray Panthers to determine the percentage of employees who are over or under a particular age.

Second, perhaps Mr. Landa could devise a form and prepare multiple copies that the Office for the Aging could distribute among its employees. Again, it would not likely be necessary to include identifying details, such as names, but rather only boxes to be checked off indicating a grade level and an age. Upon receipt of completed forms, statistics could be compiled independently.

Third, the Office for the Aging could review its records indicating the ages of its employees and provide access to records indicating age after having deleted identifying details. Again, the information in which Mr. Landa is interested would be available without compromising the privacy of any particular person.

Fourth, although the Department would not be required to create a record, it could review its records and tabulate the number of individuals over a particular age who hold positions of Grade 12 and above.

Fifth, the Office for the Aging could contact the employees sixty years of age or older and who are in positions of Grade 12 and above in order to seek a waiver with respect to disclosure of records indicating their ages. However, this alternative may be inordinately cumbersome.

Lastly, the Freedom of Information Law is permissive. While an agency may withhold certain records based upon the exceptions to rights of access, there is nothing in the Law that requires an agency to withhold 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
Executive Director

RJF:ss

Enclosure

cc: Irving A. Landa

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1849

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

January 23, 1981

[redacted]

Dear [redacted]:

I have received your letter of December 18 and apologize for the delay in response. Your letter and the attached correspondence indicate that you have "been consistently denied copies" of records concerning your child, including test results, by various officials of the Elwood School District.

Based upon the facts presented in the correspondence, I believe that the information that you are seeking must be made available to you under various provisions of law.

First, as you intimated in your letter, the records are apparently accessible to you under the federal Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment states that a parent has the right to gain access to "education records" pertaining to his or her child, and that, as a general rule, such records may not be disclosed to third parties unless an educational agency or institution obtains the consent of the parents.

Second, I believe that the records in question must also be made available under the Education of the Handicapped Act. The regulations promulgated by the then U.S. Department of Health, Education and Welfare under that Act state in §121a.562(a) that:

> "[E]ach participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency

> shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made."

In view of the foregoing, it is clear that parents of students have the right to inspect education records pertaining to their children that are used by the agency. Moreover, the quoted provision specifies that an agency shall comply with a request "before any meeting...or hearing" concerning an individualized education program or relating to the "identification, evaluation, or placement of the child". As such, it is clear that, as a parent, you have the right to inspect the records in question before a determination is made by the Committee on the Handicapped regarding the educational program of your child.

Third, the Freedom of Information Law requires that an agency make copies of accessible records upon payment of or offer to pay the requisite fees for photocopies [see attached, Freedom of Information Law, §89(3)]. As a general rule, an agency can charge no more than twenty-five cents per photocopy not in excess of nine by fourteen inches [see Freedom of Information Law, §87(1)(b)(iii)].

Although neither the Family Educational Rights and Privacy Act nor the Education of the Handicapped Act requires that photocopies of education records be made, it is reiterated that the New York Freedom of Information Law requires that copies of accessible records by made on request and upon payment of the appropriate fees.

In a related vein, based upon a conversation with another resident of your District, it has been contended by some that records in which you are interested, such as "protocols" concerning students, do not constitute "records" available under any provision of law. If indeed that contention has been made, I respectfully disagree. Section 86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Further, §99.3 of the regulations promulgated under the federal Family Educational Rights and Privacy Act defines "record" to mean:

> "...any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche."

In view of both of the definitions quoted above, it is clear that the information in which you are interested constitutes a "record" subject to rights of access granted by any of the applicable provisions of law cited in the preceding paragraphs.

It is noted that I have contacted the U.S. Department of Education on your behalf with respect to the interpretation of the Family Educational Rights and Privacy and Education for the Handicapped Acts. I was informed that the "protocols" are considered "records" subject to the provisions of both Acts and accessible to parents. This conclusion was reached in view of the fact that the contents of protocols are generally shared by their authors with school district officials and others. Consequently, they fall within the scope of the definition of "education records" appearing in §99.3 of the regulations promulgated under the Family Educational Rights and Privacy Act, and therefore are accessible to parents under the Act.

It is also noted that §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abridge rights of access to records granted by other provisions of law or by means of judicial determinations. Therefore, even though examination questions and answers might be withheld in some instances under §87(2)(h) of the Freedom of Information Law, that provision could not be cited as a basis for withholding, since such records must clearly be made available under the two federal acts cited earlier.

Lastly, 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 than 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

Enc.

cc: Arthur Bunce
H. Burr
E. Fitzgerald
Richard Hehir
C. Laufman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1850

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

January 27, 1981

W. Brian Barr, CSW
Director of Clinical Services
La Salle School
391 Western Avenue
Albany, New York 12203

Dear Mr. Barr:

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

You wrote that you have been requesting for some months "all intra-agency communications regarding La Salle School that are in possession of the New York State Department of Social Services". However, to date, you have received no response.

I would like to offer the following comments and advice.

First, I have contacted the Department of Social Services on your behalf to learn more of the status of your request. Ms. Ester Dallman, assistant to the records access officer, informed me that the public information office has located the records sought, which are voluminous, and that the records are now being reviewed to determine rights of access.

Second, it is important to note that the Freedom of Information Law requires that an applicant for records "reasonably describe" the records sought in writing. To assist Department officials in locating the records in which you are interested, a request should provide as much specificity as possible, including references to the specific subject matter of records, dates, titles, file designations, and similar identifiers.

Third, the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states that all records are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Fourth, one of the grounds for denial may have particular relevance to the records sought. 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..."

It is emphasized that the language quoted above contains what in effect is a double negative. Stated differently, 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, to the extent that inter-agency communications relative to your inquiry exist, I believe that Department officials are required to review those materials to determine the extent, if any, to which they may justifiably be withheld.

Fifth, 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)].

Lastly, as indicated earlier, Department officials are in the process of reviewing the records in which you are interested. As such, it appears that a response to your request will be rendered shortly.

I hope that 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: Ester Dallman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1851

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

January 26, 1981

Mrs. Joan Hutchinson
[redacted]

Dear Mrs. Hutchinson:

I have received your letter of December 18 and apologize for the delay in response.

Enclosed for your consideration are copies of the provisions of law that you requested.

You have raised questions regarding the contents of a letter addressed to you by Harry R. Burr, Association Superintendent of the Elwood Union Free School District. That correspondence indicates that Mr. Burr has relied upon a position offered by the State Education Department that "various psychological tests or protocols are available to be seen and reviewed by parents, but copies of tests or protocols are not permitted."

In my view, assuming that the psychological tests and protocols pertain to your child or children, copies must be made available to you upon request and upon payment of the requisite fees for photocopying.

First, as you intimated in your letter, the records are apparently accessible to you under the federal Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment states that a parent has the right to gain access to "education records" pertaining to his or her child, and that, as a general rule, such records may not be disclosed to third parties unless an educational agency or institution obtains the consent of the parents.

Second, I believe that the records in question must also be made available under the Education of the Handicapped Act. The regulations promulgated by the then U.S. Department of Health, Education and Welfare under that Act state in §121a.562(a) that:

> "[E]ach participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made."

In view of the foregoing, it is clear that parents of students have the right to inspect education records pertaining to their children that are used by the agency. Moreover, the quoted provision specifies that an agency shall comply with a request "before any meeting...or hearing" concerning an individualized education program or relating to the "identification, evaluation, or placement of the child". As such, it is clear that, as a parent, you have the right to inspect the records in question before a determination is made by the Committee on the Handicapped regarding the educational program of your child.

Third, the documents in which you are interested are in my view "records" that fall within the definition of "record" appearing in both §86(4) of the Freedom of Information Law and §99.3 of the regulations promulgated under the Family Educational Rights and Privacy Act, and that they constitute "education records" as defined by the regulations devised under the Family Educational Rights and Privacy Act.

Section 86(4) of the New York Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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, §99.3 of the regulations promulgated under the Family Educational Rights and Privacy Act defines "record" to mean:

> "...any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche."

In view of both of the definitions quoted above, it is clear that the information in which you are interested constitutes a "record" subject to rights of access granted by any of the applicable provisions of law cited in the preceding paragraphs.

It is noted that I have contacted the U.S. Department of Education on your behalf with respect to the interpretation of the Family Educational Rights and Privacy and Education for the Handicapped Acts. I was informed that the "protocols" are considered "records" subject to the provisions of both Acts and accessible to parents. This conclusion was reached in view of the fact that the contents of protocols are generally shared by their authors with school district officials and others. Consequently, they fall within the scope of the definition of "education records" appearing in §99.3 of the regulations promulgated under the Family Educational Rights and Privacy Act, and therefore are accessible to parents under the Act.

Fourth, while neither the Family Educational Rights and Privacy Act nor the Education of the Handicapped Act requires that photocopies of education records be made, the New York Freedom of Information Law does require the copies of accessible records be made on request and upon payment of the appropriate fees [see Freedom of Information Law, §89(3)]. As a general rule, an agency, which includes a school district, can charge no more than twenty-five cents per photocopy not in excess of nine by fourteen inches [see Freedom of Information Law, §87(1)(b)(iii)].

I would like to point out that the issue has arisen in the past and that I have been advised by a representative of the U.S. Department of Education that if a state law requires that accessible records be photocopied, such direction remains effective even though a right to copy does not exist under the applicable provisions of federal 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.

cc: Harry R. Burr
Hannah Flegenhimer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1852

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

January 26, 1981

Mr. Ronald Taylor
Ron Taylor, Inc.
[redacted]

Dear Mr. Taylor:

I recently received your letter of January 7 in which you requested a copy of "the report on problems facing our city and state." You attached an editorial from the New York Post which purports to relate to such a report.

Please be advised that the Committee on Public Access to Records is charged with the authority to advise 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 produce records.

Nevertheless, I have made numerous telephone inquiries on your behalf in order to locate or determine the existence of a report on the subject that you mentioned. There is no record of issuance of a report by a Senate Committee on Natural Calamities, and it appears that, although hearings may have been held following the 1977 New York City blackout, no Senate report was prepared.

I have learned, however, that several investigations may have been initiated by a variety of government agencies and private corporations in 1977 that relate to the subject matter. For instance, I was told that the Public Service Commission prepared a voluminous report on the subject, as did the Federal Energy Regulatory Commission, whose functions were apparently taken over by the new U.S. Department of Energy. In addition, I was informed that Con Edison also performed its own study following the blackout.

It is suggested that you request reports from the entities to which reference was made in the preceding paragraphs. To do so, it is recommended that you reasonably describe the reports sought in writing and that you offer as much descriptive information as possible regarding the specific subject matter, dates, file designations, or similar identifying information to assist those entities in locating the requested materials. Further, you might want to offer to pay the requisite fees for photocopying.

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-1853

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

January 26, 1981

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

Dear Mr. LaBelle:

I have received your inquiry directed to the records access officer of the Committee on Public Access to Records of January 22, 1981. In addition, I have received the same materials addressed to Thomas H. Collins, who is characterized in the correspondence as the chairman of the Committee.

Please be advised that Gilbert P. Smith is the Chairman of the Committee; Thomas H. Collins is a member of the Committee. Nevertheless, the correspondence that you transmitted will be sent to both Mr. Smith and Mr. Collins.

First, you requested a "certified copy of the minutes" of the Committee on Public Access to Records that directed that its director prepare a letter dated January 6 "in opposition to certain action taken by the New York State Police Committee on Appeals". You also requested a certified copy of the Committee's "approval and adoption" of the opinion.

The second area of request concerns a demand for minutes granting the director of the Committeeauthority to render opinions, if no minutes specifically delegated the authority to draft the opinion dated January 6.

In this regard, there are no minutes that authorized the director to prepare the specific advisory opinion to which you made reference. However, on October 26, 1978, the Committee at a meeting passed a resolution authorizing the director to "do all that is necessary to perform the duties of the Committee". As a matter of fact, the resolution

was precipitated by a gathering in which you and the director were in attendance, and in which you raised questions concerning the means by which the Committee's regulations were drafted and the relationship between the Committee and its director. Following your questions, a memorandum was sent to the Committee describing the conversation in preparation for its upcoming meeting. Enclosed is a certified copy of the minutes of the meeting which, in the fourth paragraph of the second page, clearly delegate authority to the executive director to carry out the duties of the Committee. Also enclosed is a certified copy of the memorandum sent to the Committee prior to its meeting.

With respect to the authority of the Committee, I direct your attention to §89(1)(b) of the Public Officers Law, which states in part that the Committee shall:

> "i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article; and
>
> ii. furnish to any person advisory opinions or other appropriate information regarding this article..."

Since the provisions quoted above authorize the Committee to furnish advisory opinions to agencies and to any person regarding Article 6 of the Public Officers Law (the Freedom of Information Law), clearly the Committee and its director by means of delegation may prepare advisory opinions.

The third area of your inquiry requests

> "[A] certified copy of the request of the Division of New York State Police, directed to the Committee on Public Access to Records, which asked that the Committee furnish to the said New York State Police, an opinion or other information regarding Article 6 - Freedom of Information Law - as provided for in §89(b)(i) of the Public Officers Law, relating to the opinion of said Mr. Freeman contained in the letter set forth in Exhibit 'A' attached hereto".

In this regard, there was no request for an advisory opinion submitted by the Division of State Police or any person or entity. Nevertheless, as indicated previously, §89(1)(b) authorizes the Committee to furnish advisory opinions to persons and agencies. In addition, §89(4)(a) of the Public Officers Law requires agencies to forward to the Committee copies of appeals relative to denials of access and the ensuing determinations. I believe that the requirement that appeals and determinations be forwarded to the Committee is intended to enable the Committee to offer advice regarding the interpretation of the Law when necessary. Without the authority to advise relative to determinations rendered on appeal, the oversight function of the Committee would be rendered hollow.

As stated in the explanatory pamphlet prepared and reviewed in its entirety by the Committee entitled "The Freedom of Information and Open Meetings Laws...Opening the Door",

> "[C]opies of all appeals and the determinations thereon must be sent by the agency to the Committee on Public Access to Records (section 89(4)(a)). This requirement will enable the committee to monitor compliance with law and intercede when a denial of access may be improper".

As such, it is the policy of the Committee to render advice when it receives determinations on appeal that may in its view be inaccurate.

In sum, although the Committee did not review the opinion to which you made reference, it did grant general authority to prepare advisory opinions to its director pursuant to a resolution found in the enclosed minutes. Further, although no request for the opinion in question was made, it has long been the policy of the Committee to render advisory opinions where appropriate pursuant to §89(1)(b) of the Public Officers Law and in conjunction with §89(4)(b) 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1854

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

January 27, 1981

Harris J. Samuels
Assistant County Attorney
Oneida County Dept. of Law
County Office Building
800 Park Avenue
Utica, New York 13501

Dear Mr. Samuels:

As you are aware, your letter addressed to the Department of Law has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

You have requested an opinion in response to a complaint by a local attorney that the Oneida County Clerk has assessed a fee in excess of that permitted under the Freedom of Information Law. Specifically, the attorney has argued that a fee of one dollar per photocopy for deeds that are not certified cannot be assessed due to the direction provided by §87(1)(b)(iii) of the Freedom of Information Law. That provision states that an agency may not charge more than twenty-five cents per photocopy up to nine by fourteen inches, unless another provision of law specifies that a higher fee may be assessed.

You have contended that the fee of one dollar per page is justified due to the provisions of §8021(a)(7) of the Civil Practice Law and Rules, which states that a clerk may charge a fee of one dollar for each page "for preparing and certifying a copy of any paper or instrument filed or recorded".

In all honesty, I am not sure of what the appropriate fee for photocopying should be, since §8021(a)(7) concerns situations in which records are requested for preparation and certification. From my perspective, the question is whether any of the provisions of §8021 of the Civil Practice Law and Rules are applicable to the service sought. If none

of those provisions is applicable, I believe that the fee for copying should be restricted to twenty-five cents on the ground that no provision of law other than the Freedom of Information 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:ss

cc: George Braden

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1855

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

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IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 28, 1981

Mr. Richard E. Serano
Secretary & General Counsel
Cole, Layer, Trumble Company
1818 Market Street
Philadelphia, PA 19103

Dear Mr. Serano:

I have received your letter of December 18, in which you expressed your disagreement with advisory opinions prepared by this office rendered at the request of Barbara Lombardo and R. Gardner Congdon.

At this juncture, it does not appear that the issue concerning access can be decided by any institution other than a court. Nevertheless, I would like to offer the following comments regarding your letter.

First, with respect to the definition of "record" appearing in §86(4) of the Freedom of Information Law, while I may have inaccurately attributed a quote to you in my letter to Mr. Congdon, I believe that the second paragraph of your letter addressed to me of December 19 misquoted the Law. You wrote that records are defined by the Law as "'any information kept, held, filed, produced or reproduced by, with of for an agency' including but not limited to" certain types of materials specified in the Law. As such, you omitted the phrase which in my view is central to the issue. Specifically, the definition includes the phrase "in any physical form whatsoever". Consequently, leaving aside the issue of custody of information for the moment, I believe that the definition of "record" includes information "in any physical form whatsoever", whether it consists of a draft , something that is non-final, or even information that is "in production". If there is information, in whatever the form might be, I believe that it constitutes a "record" that falls within §86(4) of the Freedom of Information Law.

Second, the one case that you did cite, Novack v. Schuler, 389 N.Y.S. 2d 223, 88 Misc. 2d 796, 1976, was rendered under the Freedom of Information Law as originally enacted in 1974. As you may be aware, the structure of the original statute was completely different from that of the current statute. Under the original Law, an agency was required to make available only those records falling within specified categories of accessible records listed in the Law. Consequently, if an applicant could not conform his or her request to one or more of the categories of accessible records, that person had no rights. Further, the original Law contained no definition of "record". The current Law, unlike the original enactment, is based upon a presumption of access. Rather than designating categories of accessible records, the Law now states 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).

Lastly, assuming that statements made in Ms. Lombardo's letter are accurate, i.e. that Cole, Layer, Trumble is "making the files available to at least one supervisor and possibly any supervisor that demands to see them for his town", I feel compelled to reiterate the conclusion reached earlier. Specifically, if there are materials made available to public officials of Saratoga County, it appears that such materials must of necessity constitute "records" subject to the Freedom of Information Law.

If you would like to discuss the matter further, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-580
FOIL-AO-1856

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

January 28, 1981

Adeline Levine, Ph.D.
[redacted]

Dear Dr. Levine:

As you are aware, I have received your letter of December 26, in which you requested information regarding access to records under the Freedom of Information Law.

Specifically, you wrote that you have attempted without success to obtain minutes of meetings and related information from the Panel to Review Scientific Studies and the Development of Public Policy on Problems Resulting from Hazardous Wastes, which was created pursuant to Executive Order #102 on June 4, 1980. You wrote further that the chairman of the Panel is Dr. Lewis Thomas of the Memorial Sloan-Kettering and that its secretary is Dr. Saul Farber, Dean of the New York University Medical Center School of Medicine.

I have made several inquiries on your behalf regarding your request. Having spoken with the records access officers at both the State Health Department and the State Department of Environmental Conservation, neither has yet located in their respective agencies any of the information in which you are interested. I am hopeful, however, that one or both of the agency officials will soon locate at least some of the information that you are seeking.

Notwistanding the apparent lack of information in possession of the Departments of Health and Environmental Conservation, I believe that the Panel is required to provide access to many of the records that you are seeking.

In this regard, I direct your attention initially to the Open Meetings Law, a copy of which has been attached.

In my view, the Panel in question is a "public body" subject to the 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".

Based upon a review of the definition in terms of its components, it appears that each of the conditions precedent to a finding that the Panel is a public body is present.

First, the Panel is an entity consisting of at least two members. Second, it may perform its duties only by means of a quorum pursuant to the provisions of §41 of the General Construction Law. Third, in view of the Executive Order, it is clear that the Panel conducts public business. And fourth, also based upon the language of the Executive Order, the Panel performs a governmental function for the State. Consequently, I believe that the Panel is a public body subject to the Open Meetings Law in all respects.

With regard to minutes, §101 of the Open Meetings Law describes minimum requirements concerning minutes of open meetings in subdivision (1) and executive sessions in subdivision (2). Further, §101(3) states that minutes of meetings of public bodies shall be made available in accordance with the provisions of the Freedom of Information Law, that minutes of open meetings must be compiled and made available within two weeks of such meetings, and that minutes reflective of action taken in executive sessions must be compiled and made available within one week of the executive sessions during which the action was taken.

In sum, I believe that the Panel is a "public body" subject to the Open Meetings Law that is required to prepare minutes.

In terms of the specific types of information that you are seeking, I would like to offer the following comments.

First, it is important to note that the Freedom of Information Law is an access to records law. Stated differently, 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, for example, there are no records indicating the identities of those who were interviewed by the Panel or with whom discussions were held "in the intervals between meetings", the Panel need not create records containing that information.

Second, it appears that the Panel is an "agency" subject to the Freedom of Information Law. Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

Since the Panel was created by means of an Executive Order, it may likely be characterized as a "governmental entity" performing a governmental function for the State. If that is so, the Panel is an agency that must comply with the Freedom of Information Law.

The first area of your request for records to Dr. Farber concerns the identities of persons present at each meeting. In this regard, I would conjecture that if minutes were indeed compiled, they would indicate the members of the Panel who were present. However, they might not necessarily include the identities of non-members.

The second question seeks information regarding the identities of those who may have been consulted or interviewed during the meetings and who participated at the meetings and in the intervals between meetings. Again, an agency need not create a record in response to a request. However, if records reflective of the information sought have been prepared, it would appear that they are accessible under the Law.

It is noted at this juncture 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

The only ground for denial that I can envision with respect to the identities of persons present at meetings or with whom discussions were held 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". The cited provision might be applicable if, for instance, persons having medical problems related to hazardous waste may have been contacted. In such a case, identifying details might justifiably be deleted.

In your third area of inquiry, you asked which records, studies or reports were reviewed at each meeting of the Panel and when the Panel received and reviewed the appraisals of the reports reviewed for the purpose of compiling the Panel's final report. If such listings have been compiled, I believe that they would be available. In terms of rights of access to the contents of the reports considered, without greater knowledge of their contents, it would be inappropriate to conjecture as to rights of access. Again, however, the only grounds for denial are those appearing in §87(2) of the Freedom of Information Law.

In this regard and 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 an 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).

Your fourth question concerns the date on which the Panel "as a whole" reviewed and approved the final report for its distribution to the Governor, the State Legislature and the media. Once again, I direct your attention to the Open Meetings Law. As indicated previously, minutes of meetings are required to be compiled. In addition, §99 of the Law requires that notice be given prior to all meetings of public bodies. Subdivision (1) of §99 concerning meetings scheduled at least a week in advance states that notice must 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 the meeting. Subdivision (2) pertains to meetings scheduled less than a week in advance and states that notice must be given in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Based upon contentions expressed earlier, minutes would likely indicate when the Panel reviewed and approved a final report, as well as the identities of Panel members who participated in the meetings.

The fifth area of inquiry concerns a copy of the report and the accompanying press releases. From my perspective, if the report and release were transmitted to the news media, they should be made available to you.

Lastly, it is noted that §87(1)(b)(iii) of the Freedom of Information Law permits agencies to assess a fee for photocopying of up to twenty-five cents per photocopy not in excess of nine by fourteen inches, unless another provision of law permits the assessment of a higher fee. In the future, it is suggested that requests for records include an 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

Enclosures

cc: Saul J. Farber, M.D.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1852

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

January 28, 1981

Mr. Robert L. Beebe
Division of Equalization
and Assessment
Agency Building #4
Empire State Plaza
Albany, NY 12223

Dear Mr. Beebe:

I have received your thoughtful letter of December 22 in which you requested a reconsideration of advisory opinions prepared at the request of R. Gardner Congdon and Barbara Lombardo. The opinions relate to the application of the Freedom of Information Law to real property assessment revaluation data that is being compiled by the Cole, Layer, Trumble Company for Saratoga County.

Based upon conversations and correspondence with representatives of Cole, Layer, Trumble, it does not appear that the issues in this particular controversy will be resolved. On the contrary, it appears that the issues could only be resolved judicially.

At your request, the opinions directed to Mr. Congdon and Ms. Lombardo have been reviewed. However, I do not feel in good faith that they should be altered. Further, I would like to offer the following comments with respect to the contents of your letter.

First, with respect to the custody of records and assuming that the statements made in Ms. Lombardo's letter are accurate, i.e. that Cole, Layer, Trumble is "making the files available to at least one supervisor and possibly any supervisor that demands to see them for his town", I feel compelled to reiterate the conclusion reached in earlier opinions. Specifically, if there are materials made available to public officials of Saratoga County, it appears that they must of necessity constitute "records" subject to the Freedom of Information Law.

In short, leaving aside the issue of custody of information for the moment, I believe that the definition of "record" includes information "in any physical form whatsoever", whether it consists of a draft, something that is non-final, or even information that is "in production". If there is information available to Saratoga County officials, in whatever the form might be, I believe that it constitutes a "record" that falls within §86(4) of the Freedom of Information Law.

Second, to justify the withholding of "predecisional information", you cited McAulay v. Board of Education of the City of New York [61 AD 2d 1048 (1978),48 NY 2d 659 (aa'f w/no opinion)] and Matter of Spaeth (Board of Education of the City of New York) [Sup. Ct., NYLJ, Friday, July 20, 1979]. Both of those decisions dealt with predecisional materials found within inter-agency or intra-agency materials that fell within the scope of the exception to rights of access appearing in §87(2)(g) of the Freedom of Information Law. In this case, however, while the materials in question might be characterized as "predecisional", they could not in my view be considered inter-agency or intra-agency in nature. Consequently, I do not believe that either McAulay or Spaeth is determinative.

Third and similarly, you cited the case of Delaney v. DelBello [405 NYS 2d 276, 62 AD 2d 281], which held that recommendations drafted in statistical form may be withheld. I disagree with the holding in Delaney, for it conflicts with a determination offered by the Court of Appeals in Dunlea v. Goldmark [380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd w/no opinion, 43 NY 2d 754 (1977)]. Further, as indicated previously, since Cole, Layer, Trumble does not fall within the definition of "agency" in §86(3) of the Freedom of Information Law, I do not believe that the materials that it develops could be characterized as inter-agency or intra-agency.

The last point that I would like to make concerns the possible assertion of the common law privilege regarding "official information". Although the decision rendered in Cirale v. 80 Pine St. Corp. [35 NY 2d 113, 117 (1974)] had often been cited as a basis for asserting the governmental privilege, recent case law has apparently overruled Cirale and abolished the governmental privilege. Specifically, in Matter of Doolan v. BOCES (48 NYS 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 Street 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 wast of, public funds" (id. at 347).

In view of the foregoing, the Court of Appeals has provided new and specific direction regarding the relationship between the governmental privilege and the Freedom of Information Law, and appears to have effectively "overruled" the 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.

Once again, I appreciate your concerns, but I do not believe that the issuance of a different opinion would solve the controversy at this time.

If you would like to discuss the matter, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-579
FOIL-AO-1858

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

January 29, 1981

Mr. Joe A. Oliva
[redacted]

Dear Mr. Oliva:

Your letter and the attached materials sent to Attorney General Abrams have been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law and the Open Meetings Law.

You have requested that an investigation be conducted regarding the City of New Rochelle and its Board of Education with respect to their implementation of both statutes. Please be advised that the Committee on Public Access to Records does not have the authority or the resources to "investigate". However, the Committee does have the capacity to advise with respect to the interpretation of both Laws, and, as such, I would like to offer the following comments.

First, with respect to the Freedom of Information Law, it is noted that the Law is based upon a presumption of access. Stated differently, the Law requires that all records be made 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).

Second, in terms of the majority of the information in which you are interested, it appears to be clearly available. Section 87(2)(g)(i) of the Law provides that statistical or factual information found within inter-agency and intra-agency materials must be made available. Under the circumstances, the vouchers,

similar records of the expenditure of public money, logs indicating odometer readings of city vehicles and similar documents would constitute "inter-agency" materials. However, I believe that they would be available, for they consist of factual information.

Moreover, §51 of the General Municipal Law has for decades required that "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts..." and related information in possession of a municipality, such as the City of New Rochelle or a school district, must be made available.

Third, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" in writing the records in which he or she is interested. Consequently, when making a request, it is suggested that you provide as much identifying information as possible to assist a designated records access officer in locating the records sought.

Fourth, 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 (see attached) 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)].

Fifth, at this juncture, I direct your attention to the Open Meetings Law, a copy of which is also attached. In brief, the Open Meetings Law requires that all meetings of public bodies be convened as open meetings. The Law states further that an executive session, which is defined as a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §97(3)], may be held only to discuss those subjects listed in the Law that are appropriate for executive session [see §100(1)(a) through (h)].

It is noted that several of the grounds for executive session to which you referred in your letter are apparently appropriate for executive session. For instance, §100(1)(d) of the Law permits a public body to enter into executive session to discuss "proposed, pending or current litigation". With regard to discussions of "personnel", §100(1)(f) of the Law 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..."

Lastly, I have also enclosed a copy of an explanatory pamphlet regarding both the Freedom of Information Law and Open Meetings Law. 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:jm

Encs.

cc: Richard Rifkin
New Rochelle City Council
New Rochelle Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1859

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

January 29, 1981

Mr. Levi Wilkins, 850-81-008
Rikers Island, Cell Block 5
Elmhurst, New York 11373

Dear Mr. Wilkins:

As you may be aware, I have received your letter of December 28. Please accept my apologies for the delay in response. You have requested assistance in gaining access to various types of records that relate to your arrest and conviction.

Although I do not believe that I can assist you directly, I would like to offer the following comments.

First, with respect to the Freedom of Information Law in general, it is noted that the Law is based upon a presumption of access. Stated differently, the Law states 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 (see attached).

Second, the ground for denial that is most often cited with respect to records of a criminal investigation is §87(2)(e). That 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".

It is emphasized that the language of the exception quoted above, as in the case of several of the other exceptions to rights of access, is based upon potentially harmful effects of disclosure. Consequently, records compiled for law enforcement purposes may be withheld under §87(2)(e) only when the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise. By means of example, if a request is made today for records that were compiled with respect to an ongoing criminal investigation, those records might justifiably be denied, for the records might if disclosed "interfere" with the investigation. However, if a trial has been concluded and the case has been closed, the same records might be available in the future, for disclosure would no longer interfere with an investigation.

Third, it is important to note that, as a general rule, an agency need not create records in response to a request. In the context of your inquiry, if, for example, there are no records indicating the length of time that a particular address was under surveillance, an agency would have no obligation to create such records on behalf of an applicant. However, for example, if there are records that indicate that a particular location was under surveillance, the reason for surveillance and similar information, such records would be subject to rights of access granted by the Law. Those rights would be determined by the contents of the particular records under consideration. Although I could not conjecture with respect to the contents of such records, assuming that they exist, it would likely be difficult to justify a denial of access in view of the length of time that has passed and in view of the fact that the case has apparently been terminated by means of your conviction.

Similarly, if there are logs or similar documentation, such as police blotters, and if they indicate that agents were dispatched to a particular address on a particular date, it would appear that such records would be available for the same reasons mentioned earlier.

Fourth, it is possible that many of the questions that you have raised could be answered by means of a review of court records. Although the Freedom of Information Law does not include within its scope the courts or court records [see definitions of "judiciary" and "agency" in §§86(1) and (3) respectively], most court records are available by applying to the clerk of the appropriate court. 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, it is suggested that you apply for records in possession of the court in which you were tried. It is possible that, after having reviewed those records, you may obtain a great deal of information regarding the police investigation, the actions of the District Attorney, and the warrants.

Fifth, you raised questions regarding copies of the worksheets prepared by the arresting officer on the day of your arrest, as well as the days before and after your arrest. Again, I direct you to the provisions of §87(2)(e) quoted earlier concerning records compiled for law enforcement purposes. In addition, §87(2)(g) of the Freedom of Information Law may be relevant. 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 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 must be made available. Under the circumstances, assuming that the worksheets in question exist, they could be characterized as "intra-agency" materials. To the extent that they contain factual information, I believe that they would be available, unless another ground for denial applies. Conversely, to the extent that they contain statements of advice, impression or recommendations, for example, they would be deniable.

Sixth, you have raised questions regarding the "memo worksheets" concerning your case prepared by the District Attorney. I believe that such worksheets would be confidential, for they would likely consist of the work product of an attorney which is privileged under §301(d) of the Civil Practice Law and Rules.

Seventh, you have asked whether a disbursement of $1,000 was paid to an informant, and when and why such a disbursement may have been paid. As noted previously, records compiled for law enforcement purposes which if disclosed would identity a confidential source may be withheld. In a related vein, §87(2)(f) states that an agency may withhold records or portions thereof when disclosure would "endanger the life or safety of any person". If the name of the informant had been publicly disclosed at your trial, for instance, it does not appear that the bases for denial mentioned earlier could justifiably be cited. Further, as a general rule, records of disbursement or payment made by agencies are available.

Eighth, you asked for reasons that the police may have given for removing you from the house without clothing. Again, I would conjecture that such information may be contained within court records.

Ninth, with respect to your treatment in the hospital, it is possible that you may view some of the medical records under the Freedom of Information Law and perhaps all medical records indirectly under another provision of law. Since the hospital in which you were treated, Kings

County Hospital, is a governmental entity, the medical records pertaining to you would be subject to the Freedom of Information Law. I believe that medical records consisting of factual information, such as laboratory tests and similar information, would be available under §87(2)(g)(i), which was quoted earlier. However, medical records consisting of advice or opinion would be deniable under the Freedom of Information Law.

Nevertheless, §17 of the Public Health Law, a copy of which is attached, states in brief that medical records in possession of a physician or a hospital must be forwarded to a second physician or hospital to seek such records at the request of a patient. As such, if you designate a physician of your choice who may be treating you to request medical records pertaining to you that are in possession of the Kings County Hospital, they must be made available to that physician.

Lastly, in terms of procedure, I have enclosed a copy of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law. According to the regulations, each agency is required to designate one or more records access officers who respond initially to requests made under the Freedom of Information Law. It is also important to point out that the Law requires that an applicant "reasonably describe" the records sought in writing. Consequently, it is suggested that you address your requests to the records access officers of the agencies maintaining possession of the records that you are seeking and that you supply as much identifying information as possible, including dates, file designations, docket numbers, etc. Also enclosed is an explanatory pamphlet which 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-1860

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

January 23, 1981

Robert E. Fay, M.D.
[redacted]

Dear Mr. Fay:

I have received your letter of December 18, as well as the correspondence appended to it. You have requested that I review the correspondence and to advise whether, in my view, you are "asking for too much".

In brief, the correspondence indicates that you are a divorced father living in Oneonta, that your children attend school in the Colonie School District and that you have joint custody of your children. You have written to various District officials and asked that you be provided with the same information by the District regarding your children as the children's mother, who apparently resides in the District and also has joint custody.

From my perspective, you have not asked for too much, for I believe that, under Federal law, you enjoy the same rights as the other divorced parent, and the District has the same obligations to you as it does to the other parent.

My contention based largely upon the provisions of the Federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) and the regulations promulgated under the Act by what had been the U.S. Department of Health, Education and Welfare and is now the U.S. Department of Education. The Family Educational Rights and Privacy Act states essentially that all "education records" pertaining to a particular student or students under the age of eighteen years are accessible to the parents of the students. The Act also states that, as a general rule, education records identifiable to a particular student or students are confidential with respect to third parties, unless confidentiality is waived by a parent.

Further, the term "parent" is defined in the regulations cited earlier to mean:

> "...a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation, or custody, or a legally binding instrument which provides to the contrary" (see attached regulations, §99.3)

It is emphasized that I have discussed the definition of "parent" with officials of the U.S. Department of Education, on numerous occasions in order to obtain their expert advice. In this regard, I have been advised that a parent, custodial or otherwise, enjoys rights under the Act, unless a legally binding instrument, such as a divorce decree, specifically provides to the contrary. Stated differently, even a divorced parent without custody of the children has rights under the Act, unless a legal instrument specifically precludes or prohibits a parent from asserting his or her rights under the Act.

Based upon the Family Educational Rights and Privacy Act and the advice rendered by officials of the Department of Education, it is my opinion, particularly in view of the fact you have joint custody, that you should be treated in the same fashion and have the same rights of access to records as the parent with whom your children reside.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1861

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

January 30, 1981

Claude Phillips
[redacted]

Dear Mr. Phillips:

I have received your letter of December 30 as well as the correspondence appended to it.

In brief, you have made three requests for records in possession of the City of Troy. However, you wrote that no responses to your requests have been given as yet. It is noted that the requests are respectively dated November 28, December 3, and December 15.

Under the circumstances that you have described, I believe that you have been "constructively" denied access to records and that you may appeal to the head of the agency or whomever has been designated to render determinations on appeal.

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)].

Lastly, with respect to the substance of your requests, your inquiries concern access to purchase orders, vouchers and similar fiscal information of the City of Troy. In my view, to the extent that such records exist, they are available, for §87(2)(g)(i) of the Freedom of Information Law states that statistical or factual information found within inter-agency or intra-agency materials must be made available. While the records in question may properly be characterized as "intra-agency" materials, it would appear that they consist of factual information that is accessible.

Moreover, §51 of the General Municipal Law has for decades required that "[A]ll books of minutes, entry or account and the books, bills, vouchers, checks, contracts..." and related information in possession of a municipality, such as the City of Troy, 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
Executive Director

RJF:ss

cc: Robert Brier, Records Access Officer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1862

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

January 30, 1981

Anthony M. Costanzo
Public Records Access Officer
Department of Civil Service
State Office Building Campus
Agency Building #1
Albany, New York 12239

Dear Mr. Costanzo:

I have received your memorandum of December 31, your letter of December 22, as well as Mr. Mooney's letter of December 3 addressed to Thomas Walsh, Assistant County Attorney of Rockland County. Please accept my apologies for the delay in response.

I hope that you will understand that I seek to respond to correspondence received by this office in chronological order. Consequently, I must admit that my letter to Mr. Walsh dated December 15 was prepared without having given appropriate attention to Mr. Mooney's letter to Mr. Walsh, a copy of which was sent to me, and which was received approximately two weeks after I had received Mr. Walsh's inquiry.

Based upon our conversation and Mr. Mooney's letter, I am in basic agreement with your contentions and those expressed in Mr. Mooney's letter. It is also noted that the details regarding the controversy had been unknown to me until our discussion in the latter part of December.

Viewing the situation from the current perspective, I would like to offer the following comments.

First, it appears that the Department of Civil Service has acted in a manner above and beyond its legal responsibilities. Specifically, as I now understand the situation, the Department is in the process of reprogramming its computer in order to create a new record at the request

of Rockland County. In this regard, as you are aware, §89 (3) of the Freedom of Information Law states that an agency generally need not create a record in response to a request. If indeed the Department is involved in the creation of a record, I believe that it is doing more than it is required to do under the Freedom of Information Law.

Second, it is clear that Mr. Mooney's response to Mr. Walsh was reflective of an offer to provide a computer tape in lieu of the information requested, from which Rockland County "could do the necessary programming to convert the computer-stored data to a readable format". In addition, Mr. Mooney wrote that the computer tape could be made available "within a couple of weeks". Based upon the Department's offer of the computer tape, it appears that an effort was made to comply in all respects with the requirements of the Freedom of Information Law. Again, I believe that the Department's efforts to create a new record in the format desired by Rockland County represents an action that is beyond the scope of the Department's legal requirements under the Freedom of Information Law.

Please accept my apologies for any inconvenience that may have been caused by my earlier opinion. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Mr. Mooney

Mr. Walsh

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1863

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

January 30, 1981

Mr. John L. Williams
79A-2348 E-2-34
Box 51
Comstock, NY 12821

Dear Mr. Williams:

I have received your letter of December 31 in which you raised questions as to whether items of correspondence sent to you with my letter of December 16 had been removed.

Having reviewed my response to you, it appears that the only enclosure was the Freedom of Information Law, which was included with my letter. Consequently, I do not believe that officials of the Comstock Correctional Facility removed anything from my letter to you.

However, based upon the intimations made in your most recent letter, I have enclosed a copy of the regulations promulgated by the Committee. The regulations govern the procedural aspects of the Freedom of Information Law. Further, each agency is required to adopt its own regulations consistent with and no more restrictive than those promulgated by the Committee.

Moreover, in making a request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" in writing the records in which he or she is interested.

Lastly, with respect to court records, no document was included, for §255 of the Judiciary concerning access to court records was quoted in full.

I hope that 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-1864

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

February 11, 1981

Richard J. Warren, Esq.
[redacted]

Dear Mr. Warren:

I have received your letter of January 19 in which you asked for an opinion regarding a request by the Recruiting Office of the Department of the Air Force for directory information regarding the graduating class of the Adirondack Central School. You questioned the School's authority to disclose, notwithstanding the contents of a letter submitted by the Department of the Air Force to the School in which cooperation by the School with the Air Force is "encouraged".

It is emphasized at the outset that I have discussed the issue with a representative of the U.S. Department of Education, who is responsible for administering the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment".

In brief, the Buckley Amendment states that "education records" identifiable to a particular student or students are confidential to all but the parents of the students and that only the parents may waive confidentiality.

Although "directory information" may be disclosed by an educational agency or institution subject to the provisions of the Buckley Amendment, such as agency or institution may do so only after having followed procedures specified in the regulations promulgated by the then U.S. Department of Health, Education and Welfare. Specifically, §99.37 of the regulations, entitled "Conditions for disclosure of directory information", states that:

"(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in §99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student."

Based upon discussions with officials of the U.S. Department of Education as well as a review of the Act and the regulations, the Adirondack Central School cannot in my view disclose directory information unless and until it has met the conditions for disclosure of directory information prescribed in §99.37 of the regulations.

Further, I believe that the language of the letter sent by the Department of the Air Force to the School District is misleading. The language quoted from the legislation indicates that educational institutions should cooperate with the Recruiting personnel. Nevertheless, I have been informed by the U.S. Department of Education that there is no direction in any legislation that would require a school district to disclose directory information unless the conditions described above have been met.

In view of the foregoing, it is my view that the Adirondack Central School is prohibited from disclosing directory information, unless and until it has adopted a policy regarding directory information in compliance with §99.37 of the regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas F. Campbell

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1865

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

February 2, 1981

Mr. Daniel Yost
[redacted]

Dear Mr. Yost:

As you are aware, your letter addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

You wrote that you requested information from the Division of Fire Prevention and Control, which is a unit of the Department of State. In this regard, I would like to offer the following comments.

First, as intimated earlier, New York has enacted a Freedom of Information Law, a copy of which is attached for your consideration.

Second, in brief, the Law states that 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).

Third, most relevant to your inquiry is §87(2)(b), which states that an agency may withhold records or portions thereof that:

> "...if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article".

In turn, §89(2)(b) of the Freedom of Information Law lists five illustrative examples of unwarranted invasions of personal privacy. It appears that the information in which

you are interested was denied on the basis of §89(2)(b)(iii), which 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".

In view of the foregoing, if you requested a list of names and addresses, I believe that the denial was proper.

Lastly, it is noted that the Freedom of Information Law provides that an agency generally need not create a record in response to a request. As such, if, for example, the Division of Fire Prevention and Control does not maintain the information in which you are interested in a list, it 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
Executive Director

RJF:ss

Enclosure

cc: Joseph Cooper

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1866

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

February 2, 1981

Mr. Wes Marsh
Field Representative
NYS United Teachers
277 Alexander Street
Rochester, NY 14607

Dear Mr. Marsh:

As you are aware, I have received your letter of January 7. You have asked that the Committee "conduct an investigation" regarding the implementation of the Freedom of Information Law by the Keshequa Central School District. It appears that you are particularly interested in obtaining salary information.

It is noted initially that the responsibility of the Committee largely involves providing advice with respect to the interpretation of the Freedom of Information Law. The Committee has neither the power nor the authority to "investigate". Nevertheless, I would like to offer the following comments.

First, as a general rule, it is important to point out that an agency, such as a school district, need not create a record in response to a request, unless specific direction is provided to the contrary.

Second, in the case of salary information, the Freedom of Information Law does provide direction that requires that a payroll record be compiled. Specifically, §87(3)(b) of the Law requires that each agency 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, it is clear that the School District must maintain on an ongoing basis a record that indicates the names, public office addresses, titles and salaries of all of its officers and employees.

Third, one of the attachments to your letter, Exhibit V, indicates that questions have arisen with the School District regarding the privacy of employees and the possibility that disclosure would result in "an unwarranted invasion of personal privacy". From my perspective, §87 (3)(b) concerning salary information is intended to ensure that the type of information in which you are interested be compiled and made available. Further, even before the enactment of the Freedom of Information Law, it had been held judicially that salary information relative to public employees must be made available [see e.g., Winston v. Mangan, 338 NYS 2d 654 (1972)].

In this regard, I would like to point out that §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 rights 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 limit rights of access granted by other provisions of law or by means of judicial interpretation. In the case of salary information, the courts determined that it is accessible prior to the enactment of the Freedom of Information Law. As such, I believe that it remains available.

Moreover, with regard to the privacy of public employees, the courts have held in several cases that records that are relevant to the performance of public employees' official duties are available, for disclosure in such instances would result in a permissible invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905, (1975); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Gannett Co. v. County of Monroe, 59 AD 309 (1977); aff'd 45 NY 2d 954 (1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. In fact, in one of the cases cited above (Gannett, supra), the state's highest court found that payroll information concerning public employees who had been laid off due to budget cuts is available.

In sum, I believe that the salary information in which you are interested is available and that the payroll record envisioned by §87(3)(b) must be made available.

Lastly, it is unclear whether you have requested information concerning gross annual salaries or gross annual wages. While salary information would appear in the payroll record, there might not be a compilation of gross wages in a similar form. In this regard, the District would be under no obligation to tabulate figures appearing in various documents to arrive at a total. Nevertheless, individual documents reflective of payments would in my view be accessible. Consequently, if you are interested in obtaining information reflective of gross wages, you might want to review both the payroll record required to be compiled under §87(3)(b), as well as additional documents reflective of other payments in order that you can perform your own tabulation.

I hope that 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: Superintendent of Schools

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1867

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

February 2, 1981

Raymond Bonazzo
80-A-502
Box 149
Attica, NY 14011

Dear Mr. Bonazzo:

I have recently received your letter of January 7 in which you raised questions under the Freedom of Information Law concerning your conviction.

First, 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached).

Second, perhaps the most relevant ground for denial with respect to records created in conjunction with a criminal investigation is §87(2)(e). That provision 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".

The provision quoted above is based largely upon potentially harmful effects of disclosure. Consequently, if, for example, a police or sheriff's department is now engaged in a criminal investigation, records pertaining to that investigation may likely be withheld, for such records might if disclosed "interfere" with an investigation. However, the same records might become available after an investigation has been closed. Since the records in which you are interested apparently pertain to a closed case, it is in my view doubtful that §87(2)(e) could be cited as a basis for withholding.

Third, another ground for denial that might be applicable is §87(2)(f), which states that an agency may withhold records when disclosure would "endanger the life or safety of any person". The extent to which the language quoted in the proceeding sentence would be applicable would depend upon the circumstances of the particular case.

With respect to the daily duty chart of assignments of a particular investigator, it is important to point out that §89(3) of the Freedom of Information Law provides that, as a general rule, an agency need not create a record in response to a request. In the context of your inquiry, a police department might not have records indicating the duties of a particular police officer alone. However, there may be duty charts concerning all of the officers for particular dates. If such duty charts exist, they would likely be available, for they pertain to a period occurring more than two years ago.

Fourth, it would appear that the incident report that you are seeking should be made available. Again, since the events to which the report pertains transpired long ago, it is in my view doubtful that the harmful effects of disclosure envisioned in the grounds for denial would indeed arise.

Lastly, it is emphasized that the Freedom of Information Law does not include within its scope the courts or court records [see definitions of "judiciary" and "agency" appearing in §§86(1) and (3) respectively]. I would conjecture that much of the information that you are seeking, including information pertaining to the search warrant and surveillance activity, would be in possession of a court. In this regard, I direct your attention to §255 of the Judiciary Law, which states that:

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

In view of the foregoing, to the extent that the records that you are seeking are in possession of courts, it is suggested that you apply for the records from the clerk of the appropriate court.

Enclosed for your consideration are copies of regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1868

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

February 3, 1981

Mr. Ernest A. Kaarsberg
[redacted]

Dear Mr. Kaarsberg:

As you are aware, your letter of December 3 addressed to the Attorney General has been forwarded to the Committee on Public Access to Records. The Committee is responsible for advising with respect to the New York Freedom of Information and Open Meetings Laws.

Enclosed for your consideration are copies of the state Freedom of Information Law, regulations promulgated by the Committee that govern its procedural implementation, and an explanatory pamphlet on the subject that may be particularly useful to you.

You asked whether one can obtain copies of all documents referring to oneself from state, city and other local governments, as well as from business firms and private organizations.

In this regard, it is noted that the Freedom of Information Law applies only to records of government. In brief, the Law states that all government records are available, except those records or portions of records that fall within one or more grounds for denial appearing in §87(2)(a) through (h). I believe that in many instances, an individual may gain access to records pertaining to himself or herself. However, based upon a review of the grounds for denial, there may be circumstances in which an individual may justifiably be denied access to records pertaining to him or her. For instance, §87(2)(e) states that an agency may withhold records compiled for law enforcement purposes under specified circumstances. If, for example, an individual is the subject of a criminal law enforcement investigation and disclosure would interfere with the investigation, the records may be withheld.

As noted earlier, the Freedom of Information Law does not apply to businesses and other private organizations. However, often the public can gain information regarding such organizations through the Freedom of Information Law. For instance, if an agency maintains a contractual relationship with a firm, the agency likely has possession of information regarding that firm. To the extent that government maintains records regarding the firm, those records would be subject to the Freedom of Information Law.

With respect to privacy, the Freedom of Information Law provides that an agency may withhold records the disclosure of which would result in "an unwarranted invasion of personal privacy" [§87(2)(b)]. The Law also states, however, that an individual may gain access to records pertaining to him or her, so long as a ground for denial does not apply [§89(2)(c)]. In addition, although Congress has enacted a privacy act applicable to records of federal agencies, New York has not yet passed similar legislation.

Lastly, in order to make a request, the Law requires that an applicant reasonably describe in writing the records in which he or she is interested. It is suggested that in making a request, you direct the request to the records access officer of the agency in possession of the records that you are seeking. Again, the pamphlet may be useful in this regard, for it contains sample letters of request and 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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1869

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

February 3, 1981

[redacted] [redacted]
Wallkill Correctional Facility
Box - G
Wallkill, New York 12589

Dear Mr. Mauleon:

I have received your letter of January 6. Please accept my apologies for the delay in response.

You wrote that you have been unable to date to locate the proper agency from which you can receive a copy of your juvenile arrest record. I have contacted the Division of Criminal Justice Services on your behalf and have been advised that its criminal history records pertaining to you will be made available to you on request. As a matter of fact, there is apparently a specific procedure that may be used by inmates to obtain criminal history information.

It is suggested that you write to:

Gary Schreivogl
Director of Identification Operations
Division of Criminal Justice Services
Executive Park Tower
Stuyvesant Plaza
Albany, NY 12203

I was informed by the Office of Counsel to the Division that Mr. Schreivogl will be able to assist you in gaining the 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

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-582
FOIL-AO-1870

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

February 3, 1981

Sue Herba, President
Concerned Citizens of Mayfield
P. O. Box 419
Mayfield, NY 12117

Dear Ms. Herba:

I have received your extensive and thoughtful letter in which you raised a series of questions regarding the implementation of the Freedom of Information and Open Meetings Laws by the Town Board and other public bodies of the Town of Mayfield.

While I do not feel that it is appropriate to comment with respect to the attitudes of public officials to which you made reference, I would like to offer the following comments regarding the interpretation of two statutes over which the Committee has advisory responsibility.

The first issue that you raised concerns fees for photocopying. According to your letter, the Town Clerk reported that the actual cost of photocopying records of of eight by eleven inches is eight and one-half cents per photocopy and that the cost of photocopying records of eight by fourteen inches is twenty-five and one-half cents per copy. Despite protests made by the Concerned Citizens of Mayfield, a resolution was passed enabling the Town to charge fifty cents per photocopy for records that are eight by fourteen inches.

In this regard, I direct your attention to §87(1)(b)(iii) of the Freedom of Information Law, which states that the fees for photocopies of records:

> "...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, I believe that the Town is restricted to a charge of twenty-five cents per photocopy for records up to nine by fourteen inches. Consequently, in my view the fee of fifty cents per photocopy of records of eight and one-half by fourteen inches exceeds the limit permitted by the Freedom of Information Law. In addition, based upon your letter, it is clear that if the Town charges twenty-five cents per photocopy for duplicating records of eight by eleven inches, it is operating at a profit with respect to records of that size. Further, while the cited provision states that a fee higher than twenty-five cents per photocopy may be assessed when another provision of law so provides, a resolution passed by the Town Board permitting a fee of fifty cents per photocopy is not in my opinion a "law". Stated differently, I do not believe that a resolution could be considered a law that permits the assessment of a fee higher than twenty-five cents per photocopy. As such, at the present time, I believe that the Town is restricted to charge a fee of no more than twenty-five cents per photocopy of records not in excess of nine by fourteen inches.

The second issue that you raised concerns a vacancy on the Town Board and an apparent deadlock within the Board with respect to a possible replacement. You wrote that the Board has met privately to interview candidates and that the meetings during which such interviews were held were not preceded by notice.

Here I direct your attention to the Open Meetings Law. Relevant under the circumstances is the definition of "meeting" appearing in §97(1) of the Law. The definition is broad and has been interpreted expansively by the courts. Specifically, in Orange County Publications 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 any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Therefore, based upon the facts presented in your letter, the gatherings in which candidates for the Town Board are interviewed are in my opinion meetings subject to the Open Meetings Law in all respects.

It is also noted that all meetings must be preceded by notice given in accordance with §99 of the Open Meetings Law. With respect to meetings scheduled at least a week in advance, §99(1) states that notice must 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. With regard to meetings scheduled less than a week in advance, §99(2) prescribes that notice be given in the same manner as described in §99(1) "to the extent practicable" at a reasonable time before such meetings. As such, notice must be given prior to all meetings of a public body.

It is important to point out, however, that the subject of the meetings in question, i.e. interviews of candidates for the Town Board, could in my view be conducted during executive sessions. The Law lists eight areas of discussion that are appropriate for executive session, one of which is §100(1)(f). 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..."

From my perspective, since the interviews dealt with a matter leading to the appointment of a particular person to the Town Board, I believe that the discussion would fall within the scope of §100(1)(f).

Your next area of inquiry concerns a request by one of the Board members for a monthly financial statement from the Supervisor. You indicated further that specific information regarding the expenditure of Town funds has not been forthcoming. In this regard, I would like to direct your attention to several provisions of law.

First, §87(2)(g)(i) of the Freedom of Information Law states that statistical or factual information found within inter-agency and intra-agency materials is available. With respect to the information in question, although it may be characterized as "intra-agency", I believe that it consists solely of factual information that is available.

Second, §29(4) of the Town Law entitled "Powers and duties of supervisor" states that the supervisor of a 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."

Third, §51 of the General Municipal Law, which has been in effect for decades grants access to:

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

In view of the three provisions of law cited in the preceding paragraphs, it is clear that the financial information in which you are interested must be kept and made available to the public.

In all honesty, I do not know whether a monthly financial report must be prepared. To obtain additional information regarding the responsibilities of the Town, it is suggested that you contact the Division of Municipal Affairs at the Department of Audit and Control. In a related vein, you asked questions regarding the manner in which you can be certain "of what is paid to whom" and the length of time in which a town board must act upon a motion that was carried. In this regard, it is again suggested that you contact the Department of Audit and Control, for I do not have the expertise to respond to those questions.

Your next area of inquiry concerns your capacity to employ tape recorders at meetings of the Board. In my view, a public body cannot restrict the use of portable, batter-operated, inconspicuous tape recorders.

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 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.

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 the Committee's view, 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 would not detract from the deliberative process, the Committee does not believe that a rule prohibiting the use of such devices would be reasonable or valid.

It is important to point out that a recent opinion of the Attorney General is consistent with the direction provided by the Committee. In response to the question of whether a town board may preclude the use of tape recorders at its meetings, the Attorney General reversed earlier opinions on the subject and advised that:

> "[B]ased upon the sound reasoning expressed in the Ystueta decision, which we believe would be equally applicable to town board meetings, we conclude that a town board may not preclude the use of tape recorders at public meetings of such board. Our adoption of the Ystueta decision requires that the instant opinion supersede the prior opinions of this office, which are cited above, and which were rendered before Ystueta was decided".

In view of the foregoing, I do not believe that a public body can prohibit the use of tape recorders at open meetings.

You wrote that the Town spent $15,000 for a front-end loader that was purchased from Fulton County. Several individuals stated their belief that the purchase should have been put out to bid. While I am not an expert with respect to that type of question, it appears that the purchase was proper, for §103(6) of the General Municipal Law states that:

> "[S]urplus and second-hand supplies, material or equipment may be purchased without competitive bidding from the federal government, the state of New York or from any other political subdivision, district or public benefit corporation."

Lastly, you wrote that you and others are fearful of "retaliation" when a person or group "rocks the boat". Although I cannot offer a good response, I believe that, as a general rule, the laws are intended to protect the public. Further, I believe that in many instances risks must be taken in order to achieve a desired goal.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Blaha
Arthur Montanye
Debra Perham
Ivan VanNostrand
Edward Vosburg

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

February 3, 1981

James F. Gleason, Jr.
Assistant Business Manager
International Brotherhood
Electrical Workers
Local Union, 41
S-3564 California Road
Orchard Park, NY 14127

Dear Mr. Gleason:

I have received your letter of January 12 in which you raised questions under the Freedom of Information Law.

Specifically, you made reference to my earlier letter to you dated December 9, in which it was advised that a failure to respond on the part of the Commissioner of the Department of Community Development of the City of Buffalo within the appropriate time limits should be considered a denial that may be appealed. However, you stated that you "consider this to be a Catch-22 situation", for, without a response, you are unaware of the identity of the person to whom a request should be directed.

In this regard, it is reiterated that under the Freedom of Information Law and the regulations promulgated by the Committee [see attached regulations, §1401.7(b)], a failure to respond within the appropriate time limits results in a constructive denial of access that may be appealed.

In order to provide you with direction, I have contacted a representative of the Office of Corporation Counsel of the City of Buffalo on your behalf. I was informed that under the City's ordinance, an appeal should be directed to the City's Corporation Counsel, Joseph P. McNamara. In making your appeal, §1401.7(e) of the Committee's regulations requires that you should include the date and location of your request for records, the nature of the records that were denied, and your name and return address.

I hope that 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-1872

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

February 4, 1981

Mrs. Pearl Michaels
[redacted]

Dear Mrs. Michaels:

I have received your letter of December 30 and apologize for the delay in response. In addition, the correspondence that you sent to the Department of Audit and Control was forwarded to this office.

Your inquiry concerns rights of access to "reimbursable pupil participation sheets". Having reviewed the form in question that you attached, I believe that it is available. In brief, §87(2)(g)(i) of the Freedom of Information Law states that statistical or factual information found within inter-agency and intra-agency materials are accessible. Since the information in which you are interested consists of factual information, it appears that it must be made available to you.

It is noted that I contacted the Office of Counsel to the New York City Board of Education on your behalf to obtain additional information regarding your request. Having discussed the matter with Ms. Nancy Lederman, an attorney for the Board, it was agreed that the records in question should be made available.

It is suggested that you apply once again for the records to Mr. Riccobona.

I hope that I have been 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: Nancy Lederman

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

February 4, 1981

James W. McCabe, Sr.
Member of the Assembly
Room 716
Legislative Office Bldg.
Albany, New York 12248

Dear Assemblyman McCabe:

I have received your letter of February 2 concerning a question raised by a constituent regarding the application of the Freedom of Information Law.

Having reviewed the correspondence attached to your letter, I do not believe that the information sought is available under the Freedom of Information Law.

As a general rule, the Law applies only to records of government. 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 entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature".

Based upon a review of applicable provisions of law as well as a discussion with a representative of the Office of Counsel of the State Education Department, neither the Broome County Dental Society, its Peer Review Committee nor the New York State Dental Society could be characterized as governmental entities subject to the Freedom of Information Law. Consequently, the records in which your constituent is interested fall outside the scope of rights of access granted by the Law.

Nevertheless, in situations in which a member of the public seeks to initiate a complaint against a professional, such as a dentist, licensed by the Education Department, such action may be taken by contacting the Department's Division of Professional Conduct.

In order to obtain additional information, it is suggested that your constituent write to:

Division of Professional Conduct
State Education Department
622 Third Avenue
New York, NY 10017

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: Congressman McHugh

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

February 4, 1981

Robert E. Mills
[redacted]

Dear Mr. Mills:

I have received your letter of January 12 in which you asked for advice regarding a request for records directed to the Superintendent of the William Floyd Union Free School District.

You indicated that as of January 12, you had received no response to an appeal forwarded to the Superintendent on December 10. Further, your initial request was apparently made in June. The records in which you are interested consist of contracts and related records of the monies paid by the District to the Primus Development Corporation.

First, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee prescribe particular time limits for responses to requests and appeals. 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 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, I believe that the time limits for response described in the preceding paragraphs have been excluded.

Second, with regard to rights of access, I believe that the records in which you are interested are clearly available.

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, 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 do not believe that any of the grounds for denial could be cited.

In the case of a contract between a public corporation, such as a school district, and a firm, such a record would be available, for there is no ground for withholding.

Other records reflective of monies paid to a corporation would also be 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 noted that 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. Under the circumstances, although internal records indicating expenditures by the District could be characterized as "intra-agency materials", I believe that they constitute factual information that is available under §87(2)(g)(i).

Further, §1721 of the Education Law states that:

> "[I]t shall be the duty of the board of education of a union free school district to keep an accurate record of all its proceedings in books provided for that purpose. It shall also be the duty of said board to cause to be published once in each year, during the month of July or during the month of August, in at least one public newspaper, published in such district or, if one public newspaper is not published in such district, then in a public newspaper having general circulation within such district, a full and detailed account of all moneys received by the board or the treasurer of said district, for its account and use, and of all the moneys expended therefor, giving the items of expenditure in full; should there be no paper published in or having general circulation within said district said board shall publish such account by notice to the taxpayers, by posting copies thereof in five public places in said district".

In view of the provisions of law to which reference has been made, I believe that the records in which you are interested are clearly 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: Nicholas Poulos

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

February 4, 1981

Mrs. Marie A. Fuesy
Legislative Assistant to
Assemblyman Jon S. Fossell
The Assembly
The Capitol
Albany, NY

Dear Mrs. Fuesy:

As you are aware, I have received your letter of January 15. Although I am hopeful that the controversy has been resolved by a representative of the United States Department of Education, I would like to offer the following comments.

The controversy that you described concerns a situation in which a divorced parent has unsuccessfully sought to review the school records of his daughter, who is a student at the Spackenkill Union Free School District. According to your letter, the parent in question has been denied access to his daughter's records "based on the fact that his daughter is in the custody and is living with her mother..."

In my view, even though a divorced parent might not have custody of his or her children, that factor is not determinative of rights of access.

My contention based largely upon the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) and the regulations promulgated under the Act by what had been the U.S. Department of Health, Education and Welfare and is now the U.S. Department of Education. The Family Educational Rights and Privacy Act states essentially that all "education records" pertaining to a particular student or students under the age of eighteen years are accessible to the parents of the students. The Act also states that, as a general rule, education records identifiable to a particular student or students are confidential with respect to third parties, unless confidentiality is waived by a parent.

Further, the term "parent" is defined in the regulations cited earlier to mean:

> "...a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation, or custody, or a legally binding instrument which provides to the contrary" (see attached regulations, §99.3)

It is emphasized that I have discussed the definition of "parent" with officials of the U.S. Department of Education, on numerous occasions in order to obtain their expert advice. In this regard, I have been advised that a parent, custodial or otherwise, enjoys rights under the Act, unless a legally binding instrument, such as a divorce decree, specifically provides to the contrary. Stated differently, even a divorced parent without custody of the children has rights under the Act, unless a legal instrument specifically precludes or prohibits a parent from asserting his or her rights under the Act.

Based upon the Family Educational Rights and Privacy Act and advice rendered by officials of the Department of Education, it is my opinion that the divorced parent in question has the same rights of access as the parent who has custody with whom the child resides.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Seymour Wolk
Superintendent of Schools

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1876

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

February 5, 1981

Joseph K. Thoman, Jr.
Business Administrator
Penn Yan Central School District
Chestnut Street
Penn Yan, New York 14527

Dear Mr. Thoman:

I have received your letter of January 14 in which you requested "information on guidelines for accessibility to personnel records".

I would like to offer several comments with respect to your inquiry.

First, I do not believe that there are any "guidelines" that may be cited regarding access to personnel records. Rights of access are, however, determined by §87(2) of the Freedom of Information Law (see attached). The cited provision states in brief 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).

Second, it is important to note that the definition of "record" in the Freedom of Information Law is expansive. Specifically, §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".

As such, virtually all records in possession of a school district, for example, are subject to rights of access granted by the Freedom of Information Law.

Third, numerous inquiries have arisen with respect to the privacy of public employees and §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". Although in some instances subjective judgments must of necessity be made regarding the extent to which disclosure might result in an unwarranted invasion of personal privacy, substantial direction has been provided by the courts. For instance, it is clear that public employees enjoy a lesser degree of privacy than members of the public generally, for the courts have found that public employees must be more accountable than any other identifiable group. Further, several judicial determinations have found that records that are relevant to the performance of a public employee's official duties are available, for in such instances, disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Blecher v. Board of Education, City of New York, Sup. Ct., Kings Cty., NYLJ, Oct. 25, 1979; 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, Oct. 30, 1980]. Conversely, it has been held that records that are irrelevant to the performance of a public employee's official duties may justifiably be withheld under the privacy provisions [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977]. If possible, it is suggested that you might review the decisions cited above, for I believe that they provide an overview of rights of access to personnel records.

Fourth, another ground for denial might be applicable. Specifically, §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 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 policy or determinations must be made available.

Lastly, with respect to employee's rights to inspect records pertaining to them, §89(2)(c) of the Freedom of Information Law states essentially that an individual may inspect and copy records pertaining to him or her, except to the extent that one or more of the grounds for denial is applicable. In addition, often collective bargaining agreements contain provisions concerning access by employees to records pertaining to them. In some instances, such agreements might provide rights of access to employees 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1877

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

February 5, 1981

Mrs. Carolyn James
[redacted]

Dear Mrs. James:

I have received your thoughtful letter of January 12 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you are a student at the State University at Farmingdale and have attempted for a year to alter a registration procedure that compels students to enroll for courses "without the benefit of knowing who the teacher will be." You indicated further that you have discussed the problem with several administrators who have advised you that the procedure cannot be changed for three reasons. The reasons are that:

> "1-In some instances the professor scheduled to teach a course is not known as one must be hired pending the outcome of registration.
>
> 2-The final results of the registration may cause some changes to be made on the tentative lists that the department draws up prior to registration.
>
> 3-Some teachers do not want their names released to students until the first night of class."

You stated that you are sympathetic to the problems but that you "do not believe that they are viable enough to deny a student who is paying for a course and who is assuming the full responsibility of his education the opportunity of selecting courses based, at least in part, on a particular teacher." You also wrote that, having spoken with persons at other colleges inside and outside of the state system, it appears that students are generally afforded the opportunity to know the names of the teachers for whose courses they registered. You have asked whether you may "demand" information regarding the identities of professors who will teach particular courses when you register.

First, in my view, the first two reasons offered by the administration at Farmingdale are entirely reasonable. As indicated by the administration, in some instances it cannot be known who will teach a particular course. In such cases, it would be all but impossible for the University to provide an accurate listing of the names of professors who will teach particular courses.

Nevertheless, in situations in which the administration at State University of New York at Farmingdale knows who will teach particular courses, I believe that records indicating the identities of such teachers and the courses to be taught are accessible under the Freedom of Information Law.

It is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of agency, such as the State University, 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).

From my perspective, assuming that records exist which indicate the identities of professors who will teach particular courses, there is only one ground for denial that is relevant, and that ground could also be cited as a basis for disclosure due to its structure. Specifically, §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 emphasized that the provisions 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 must be made available.

Under the circumstances, a record reflective of the identities of professors who will teach particular courses could properly be characterized as "intra-agency" materials. However, I believe that the contents of such records would constitute factual information that is available under §87(2)(g)(i). In addition, it might be argued that such records are reflective of a final agency determination that would be available under §87(2)(g)(iii).

With respect to the contention that some teachers do not want their names released to the students until the first night of class, I do not believe that such a request could constitute a justification for withholding. First, it has long been held that a request for confidentiality is all but meaningless. Second, with respect to privacy, §87(2)(b) of the Law states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". However, with regard to the privacy of public employees, it has consistently be held that public employees enjoy a lesser degree of privacy than members of the public generally, for the courts have found that public employees must be more accountable than any other identifiable group. Further, several judicial determinations have found that records that are relevant to the performance of a public employee's official duties are available, for in such instances, disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Blecher v. Board of Education, City of New York, Sup. Ct., Kings Cty., NYLJ, Oct. 25, 1979; 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 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, Oct. 30, 1980]. Conversely, it has been held th records that are irrelevant to the performance of a publ employee's

official duties may justifiably be withheld under the privacy provisions [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In my opinion, if a record indicates the identity of a professor who will be teaching a particular course, that record is accessible under the Freedom of Information Law, for it is relevant to the performance of one's official duties.

Lastly, in terms of procedure, I have enclosed copies of both the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law. In brief, each agency is required to designate one or more records access officers responsible for answering requests under the Freedom of Information Law. In order to make a request, a letter should be forwarded to the designated records access officer in which you reasonably describe the record or records sought. That person has five business days from the receipt of a request to provide a response. If access is denied, the reasons for the denial must be given in writing and the applicant must be informed of his or her right to appeal to the head of the agency or whomever is designated to determine appeals. Also enclosed is an explanatory pamphlet that 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-586
FOIL-AO-1878

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

February 6, 1981

Jody Adams
[redacted]

Dear Ms. Adams:

I have received your letter of January 14 and appreciate your continued interest in the Freedom of Information and Open Meetings Laws.

Your most recent inquiry concerns your capacity to attend meetings of what are characterized as supervisors' associations in Suffolk County. You wrote that two groups of town supervisors met informally and that the attendees do not consider their meetings to be public. You have indicated your belief that the meetings are important because the public, if it had the capacity to attend, could gain basic information that leads to decision making. In addition, you attached a news article concerning gatherings of a "top county financial officer" with leaders from East End towns and villages.

From my perspective, the question raised with respect to both areas of inquiry is whether those in attendance constitute a "public body" as defined by §97(2) of the Open Meetings Law.

As you are aware, "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".

With respect to the gathering of supervisors, it does not appear that the supervisors' associations constitute a "public body". There are often associations of various public officials in which persons holding similar positions discuss common problems. For instance, there are groups known as the Association of Towns, the Conference of Mayors and Village Officials, the County Officers Association, and similar organizations which, although comprised of public officials, do not in my view act within their associations as public bodies. More than anything else, when acting as members of the associations, the members generally exchange points of view, discuss trends, and discuss issues of common interest. If the supervisors' associations engage in the same types of activities as those discussed above, I do not believe that they could be characterized as public bodies.

In the case of the situation described in the news article, it appears that the gathering was attended by representatives of various units of government, and that no particular public body was represented by a quorum of its members. If that was indeed the case, there was no entity present that could be characterized as a "public body". If, however, the group in question is the same as that which you characterized as a "liaison committee", it would in my view be an entity that would constitute a public body subject to the Open Meetings Law.

I would like to suggest another avenue for gaining information relative to the groups that you identified. Even if the groups of public officials could not be characterized as public bodies subject to the Open Meetings Law, presumably records in their possession would be subject to the Freedom of Information Law.

Section 86(4) of the Freedom of Information Law defines records to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

In view of the foregoing, if a town supervisor, for example, receives communications from an association that relates to the performance of his or her official duties, such communications would constitute "records" subject to rights of access granted by the 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-585
FOIL-AO-1829

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

February 6, 1981

Michael Maione
WPUT Radio
Brewster, NY 10509

Dear Mr. Maione:

I have received your mailgram in which you asked for an opinion under the Freedom of Information Law.

Your inquiry concerns rights of access to a budget document transmitted by the Putnam County Executive to the Clerk of the Putnam County Legislature. The document in question contains recommendations for salaries regarding various managerial positions in County government.

In terms of background, as you may be aware, I have discussed the issue with Vincent Libell, Putnam County Attorney, and Michael Sansolo, a reporter for the White Plains Reporter-Dispatch. As I understand the situation, the document in question and the procedure that has been followed regarding its review represent an aberration from the normal budget process followed by a county. Based upon various conversations, some months ago, the County began its normal budget review process. During that process, questions arose regarding the salaries for particular positions. In order to review those salaries and attempt to develop standards for the future, a consulting firm was hired by the County to make recommendations regarding salary levels for specific positions. The report of the consultant has been completed and made available, and the County Executive has recently submitted his recommendations to the County Legislature after having reviewed the consultant's report.

As I have contended in discussions with you and the individuals identified earlier, it appears that the document in question is part and parcel of the budget review

process, even though its implementation might result in the adoption of policy that could be in effect for a period of years. It also appears that a review of the document in question is necessary now, for decisions regarding salaries for the current fiscal year will likely be made pursuant to a review of the document sought. Stated differently, the recommendations found within the document in which you are interested would, if the usual budget procedure had been followed, have been included within a tentative budget. It appears further that the only reason for the absence of the recommendations in question from the tentative budget is the unusual process that has transpired due to the additional review of salaries for particular positions. As such, it is my view that the document sought should be considered an extension of the tentative budget of the County.

In this regard, if my contention that the document in question is a necessary incident to the budget review process and represents an addendum to the tentative budget, I believe that it is available. Article 7 of the County Law describes the procedure by which County government prepares, reviews, and adopts a budget. The intent of Article 7 is in my opinion to make available for public inspection the budget documents that lead to the adoption of a final budget. For instance, §357(2) of the County Law states that:

> "[U]pon the filing of the tentative budget with the clerk of the board of supervisors the clerk shall transmit forthwith a copy thereof to the chairman of the committee designated or created to review the tentative budget. The committee, upon receipt of such copy, shall proceed to review the tentative budget. Within fifteen days after the receipt of such copy of the tentative budget the committee may file a report with the clerk of the board of supervisors setting forth any proposed changes, alterations or revisions in the tentative budget. A copy of the report of the 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".

Further, §359 of the County Law requires that the clerk of a county board of supervisors prepare at least a hundred copies of a tentative budget for public distribution prior to a public hearing preceding the adoption of a budget. In addition, §208(4) of the County Law states that:

> "[E]xcept as otherwise provided by law and subject to reasonable rules and regulations of the officer having 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".

Based upon the provisions quoted above, I believe that it is the intent of the County Law to require that the County make available and that the public have the capacity to know of the proposals that may become the budget. Again, based upon the facts as I understand them, the document in question would, if the usual procedure had been followed, be included within the tentative budget, which would clearly be accessible. Therefore, I believe that the document in which you are interested is also available.

With respect to the Freedom of Information Law, I direct your attention to the case of Dunlea v. Goldmark [380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)]. In Dunlea, the state's highest court, the Court of Appeals, upheld lower court decisions which found that statistical, numerical figures were available, even though they were advisory in nature and could be accepted, rejected or modified by the Executive. It appears that the information in question is similar to that at issue in Dunlea.

Lastly, during our conversation, you also raised questions concerning the possible discussion of the recommendations made in the document by the County Legislature. Here I direct your attention to the Open Meetings Law. In brief, the Open Meetings Law requires that all meetings of a public body, such as a County Legislature, be convened open to the public and preceded by notice given in accordance with §99 of the Law. Section 100(1) prescribes the procedure for entry into executive session, and paragraphs (a) through (h) of the cited provision specify and limit the areas of discussion that may appropriately be considered in executive session.

Possibly relevant to the situation is §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..."

It is emphasized that the language quoted above represents a change from the analagous provision in the Open Meetings Law as originally enacted. Under the former provision, a public body had the capacity to enter into an 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..."

With the addition of the word "particular" in the current §100(1)(f) of the Open Meetings Law, it is clear that a public body may enter into executive session when it discusses a "particular person". It is also clear that a discussion of personnel in general or a discussion of policy that does not relate to any particular individual must now be discussed during an open meeting.

If, for instance, the salary designated for a particular position or item is under discussion, I believe that such a discussion must be held open to the public, unless and until the discussion relates a particular individual. Stated differently, if a discussion relates to the position of county administrator and to any person who might hold that position, I believe that the discussion would be required to be open. If, however, the discussion dealt with an individual holding the position of county administrator and whether or not that person, based upon his or her employment history, merits an increase in pay, an executive session would be proper.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Robert Bondi
Vincent Libell
Michael Sansolo

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

February 9, 1981

Ms. Carole S. Guynup
Town Clerk
Town of Pompey
R.D. 2
Manlius, NY 13104

Dear Ms. Guynup:

I have received your letter of January 15 and appreciate your interest in complying with the Freedom of Information Law. Your inquiry concerns a situation that has arisen in the Town of Pompey, which you serve as Town Clerk. Your question concerns your capacity as legal custodian of all town records to maintain control over records in the physical possession of the Town Assessor.

All that I can suggest is that you you continue in your efforts through the Town Attorney and the Town Board to clarify your duties and responsibilities vis-a-vis custody of the records in question. It is also recommended that you might want to seek an opinion from the Department of Audit and Control. I believe that the Department has considered the issue on several occasions and rendered several advisory opinions regarding the custody of town 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1881

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 10, 1981

Samuel S. Yasgur
County Attorney
Department of Law
600 County Office Building
148 Martine Avenue
White Plains, NY 10601

Dear Mr. Yasgur:

Thank you for transmitting a copy of your determination on appeal rendered with respect to the request made by Harry Donsky, Editor of the Ossining Citizen-Register.

The appeal concerned a request for "347 affidavits compiled during the Westchester District Attorney's investigation of the Ossining Fire Department 50/50 Lottery..." You wrote that the affidavits could be withheld, for they "were obtained in connection with a criminal investigation" and consequently "are exempt from disclosure pursuant to §87(2)(e) of the Public Officers Law". You also wrote that the request would be denied:

> "...since these types of affidavits are specifically exempted from disclosure under New York State Criminal Procedure Law §250.10 and 240.20. As such, they fall within the purview of Public Officers Law §87 2(a) which specifically states those records exempted from disclosure by Federal or State statute are not accessible".

I respectfully disagree with the denial for the following reasons.

First, it does not appear that §87(2)(e) of the Freedom of Information Law could be cited with justification as a basis for withholding the records in question. 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. identy 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, as in the case of the majority of exceptions to rights of access appearing in §87(2) of the Freedom of Information Law, are based upon potentially harmful effects of disclosure. From my perspective, since the investigation has been closed, and since no criminal charges resulted from the investigation, the harmful effects of disclosure envisioned by §87(2)(e) would not arise. Although the affidavits may have been compiled for law enforcement purposes, I do not believe that disclosure would "interfere with law enforcement investigations", for any such investigations have been terminated. Similarly, disclosure would not deprive a person of a right to a fair trial, for there will apparently be no trial. There is no indication in your letter that the affidavits would identify a confidential source, and it appears further that the criminal investigative techniques or procedures used by the District Attorney were routine in nature. If my contentions are accurate, §87(2)(e) of the Freedom of Information Law would not constitute a basis for withholding.

It is also noted that the language of §87(2)(e) represents a significant change in rights of access from the analagous provision that appeared in the Freedom of Information Law as originally enacted. Under the original statute, an agency could withhold any "investigatory files compiled for law enforcement purposes" [see original Freedom of Information Law, §88(7)(d)]. Nevertheless, the amendments to the Law no longer are open ended with regard to the capacity to deny; on the contrary, as stated earlier, the grounds for denial are based largely upon potentially harmful effects of disclosure.

Second, with respect to the provisions of the Criminal Procedure Law upon which you relied, §§240.10 and 240.20, I do not believe that either of those provisions is applicable. Both of the sections that you cited appear in Article 240 of the Criminal Procedure Law, which is entitled "Discovery". Section 240.10 merely defines terms applicable to Article 240; it has no bearing upon rights of access. Section 240.20 concerns information that may be disclosed by a prosecutor to a defendant in the context of an ongoing criminal proceeding. As such, it is my view that §240.20 of the Criminal Procedure Law is irrelevant to the request made by Mr. Donsky, for the request is unrelated to a criminal trial and Mr. Donsky is not a defendant seeking to employ discovery in the course of a criminal proceeding. Therefore, I do not believe that either of the provisions of the Criminal Procedure Law that you cited could justify withholding of the records in question. Further, based upon the foregoing, I do not believe that §87(2)(a) of the Freedom of Information Law could be cited as a basis for withholding.

If you disagree with the foregoing opinion based upon additional facts that were not described in your determination to deny access, please contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Mr. Donsky
Mr. Charles Feuer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1882

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

February 10, 1981

Arthur R. Major
[redacted]

Dear Mr. Major:

I have received your letter of January 18.

Your letter cites two sets of rules and regulations and you have asked whether those regulations are "the only ones necessary when requesting information on a local government level (city, town, county)?" You have also asked who is responsible for the development of local rules and regulations and their distribution.

In this regard, I direct your attention to the provisions of the Freedom of Information Law. Section 89(1)(b)(iii) requires that the Committee on Public Access to Records promulgate general regulations regarding the procedural implementation of the Freedom of Information Law. In turn, §87(1)(a) of the Law requires that the governing body of each public corporation, which includes units of local government, is required to promulgate regulations based upon the general rules and regulations adopted by the Committee. Consequently, each unit of government in the state is required to adopt its own regulations consistent with and no more restrictive than those promulgated by the Committee.

With respect to the means by which you may know of the regulations adopted by a unit of local government, you may simply request a copy of the rules promulgated under the Freedom of Information Law by a particular municipality. Further, I direct your attention to §1401.9 of the regulations promulgated by the Committee entitled "[P]ublic notice", 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".

Lastly, in order to make a request, an applicant is merely required to submit a request in writing "reasonably describing" the records sought [see Freedom of Information Law, §89(3)].

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee, and an explanatory pamphlet that may be 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1883

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

February 10, 1981

Robert Kerwick
Sole Assessor
Office of Assessor
60 Rock City Road
Woodstock, NY 12498

Dear Mr. Kerwick:

I have received your letter of January 16 and appreciate your interest in complying with the Freedom of Information Law.

Your inquiry concerns access to forms sent to assessors which provide notification of the sale or transfer of ownership of real property. In a memorandum sent to Ulster County Assessors by Jack Reynolds of the Real Property Tax Services Agency, reference was made to the fact that the forms in question are not available for public inspection.

I agree with your contention that it may appear to be inappropriate to withhold the forms in certain cases such as those that you described. However, the direction given on the back of the form that you sent is based upon a new provision of the Real Property Tax Law. Specifically, §574(5) of the Real Property Tax Law, which became effective on November 1, 1980, states that:

> "[F]orms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board".

In view of the language quoted above, it is clear that the forms in question can be made available only "for purposes of administrative or judicial review of assessments..."

It is noted that I have discussed the matter with a representative of the Office of Counsel of the State Division of Equalization and Assessment. He informed me that there have been numerous complaints regarding the restrictions imposed by §574(5). At this juncture, based upon our conversation, it appears that the only means of redress would involve the enactment of legislation broadening the uses of the form or repealing the new provision in its entirety. If you feel strongly that the provision in question is inappropriate, it is suggested that you express your points of view to your assemblyman or state senator.

I hope that 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-1884

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

February 17, 1981

William K. Aumick, Chairman
Deerpark Police Commission
Huguenot, NY 12746

Dear Mr. Aumick:

I have received your letter of January 22 and appreciate your interest in complying with the Freedom of Information Law. You have requested a written confirmation of an oral opinion rendered in response to an oral inquiry by Shirley Zeller, Town Clerk of the Town of Deerpark, in which it was advised that the "General Arrest Procedures" found in the Town's "Rules and Regulations manual" are available.

It is emphasized 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 a Town, 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) of the Law (see attached).

In my view, only two of the grounds for denial are relevant to rights of access to the records in question. However, I do not believe that either ground could justifiably be cited to withhold the records.

The first relevant 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 language quoted above, as in the case of the majority of the grounds for denial, is based upon potentially harmful effects of disclosure.

With regard to the specific records at issue, it is in my view questionable whether a manual containing procedures generally used could be characterized as records "compiled for law enforcement purposes". On the contrary, it is possible that the court might find that they were compiled in the ordinary course of business. Nevertheless, even if the procedures could be considered records compiled for law enforcement purposes, I do not believe that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would arise. For instance, disclosure of the procedures would not likely interfere with an investigation, deprive any person of a right to a fair trial, or identify a confidential source. Further, it appears that the procedures in question are routine in nature and, therefore, would fall outside the scope of §87(2)(e)(iv).

The second relevant ground for denial is §87(2)(g), which, due to its structure, can also be cited as a basis for disclosure. 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 noted 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the procedures could be characterized as "intra-agency materials". However, I believe that they constitute "instructions to staff that affect the public" that are accessible under §87(2)(g)(ii). Further, it would appear that the procedures are reflective of the policy of the Town and its Police Department. If that is the case, the records would also be available under §87(2)(g)(iii).

Lastly, it is possible that the records in question are based upon provisions of the Criminal Procedure Law concerning arrests. It is suggested that a review of Articles140 through 160 of the Criminal Procedure Law might be worthwhile.

I hope that I have been 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-1885

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

February 17, 1981

Mr. John Hairston
76-A-3528
Ossining Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Hairston:

I have received your letter of January 21 in which you requested assistance in your efforts in gaining a copy of your indictment from the Clerk of the Supreme Court, Westchester County.

Having reviewed the correspondence that you forwarded, it appears that you have gone through all the necessary steps and that the indictment should be sent to you.

In all honesty, I doubt there is anything that this office can do on your behalf, for the Freedom of Information Law is not applicable to the courts and court records. Section 86(3) of the Freedom of Information Law defines "agency" broadly to including virtually all units of government in New York, except the courts and the State Legislature. As such, the Freedom of Information Law and the procedural regulations promulgated under the Law would apparently be of no legal utility here.

Nevertheless, in order to attempt to remind the Clerk of his responsibilities and your request, a copy of this response will be sent to the Clerk. Further, it is suggested that you seek to gain the aid of Prisoners' Legal Services or a similar organization. Perhaps such an organization could provide you with prompt assistance.

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: Clerk of the Supreme Court,
Westchester County

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1886

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

February 17, 1981

Mr. 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 received your letter of January 21 in which you explained that Rockland County is now spending a substantial sum of money for employee health benefits, and that it is anticipated that this sum will shortly increase by approximately twenty-five percent.

In conjunction with these expenditures, you have unsuccessfully requested from the Department of Civil Service records indicating the amount of money it has paid out for health benefits for county employees pertaining to a particular calendar year. The information is being sought to enable the County "to make an evaluation of the costs of these benefits". Nevertheless, you wrote that:

> "[T]he Department of Civil Service has constantly refused to divulge this information based upon the theory that it does not keep this information and will not, or cannot, request the private carriers to supply this information to that department."

It is my understanding that the Department of Civil Service once maintained possession of the information in which you are interested, which is known as "insurance experience data". However, having discussed the matter

with various officials of the Department over the course of years, it appears that the data in question is no longer maintained by or in possession of the Department; on the contrary, I believe that the data is now only in possession of the insurance carriers, which fall outside the definition of "agency" appearing in §86(3) of the Freedom of Information Law. As such, it appears that the information sought is outside the scope of the Freedom of Information Law.

It is noted that your inquiry has been raised by other municipalities, and that the same response has of necessity been given. All that I can suggest is that you seek to ameliorate the situation by legislative means.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony Costanzo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1887

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

February 17, 1981

Mr. Thomas P. O'Connor
[redacted]

Dear Mr. O'Connor:

I have received your letter of January 22, as well as the correspondence attached to it, in which John Biggins of the Division of Criminal Justice Services informed you that the Division's files do not reveal the existence of a criminal history record pertaining to you.

In response to Mr. Biggins' letter, you have asked what you can do "to obtain the file - since there is one and now they deny it exists".

It is noted at the outset that the agency served by Mr. Biggins, the Division of Criminal Justice Services, is separate and distinct from the agency that you previously contacted, the Division of State Police. The former, to the best of my knowledge, does not engage in criminal investigations; on the contrary, in the context of your inquiry, it engages largely in record keeping activities. In brief, the Division of Criminal Justice Services maintains criminal history information, a record of arrests and convictions of individuals in New York.

It may also be important to direct you to §160.50 of the Criminal Procedure Law, a copy of which is attached. Under the cited provision, in brief, if a criminal charge or proceeding against an individual is dismissed in his or her favor, records pertaining to the charge may be sealed or purged. Therefore, if, for example, an individual is arrested and the charges are later dismissed in his or her favor, the records concerning the arrest might be purged. By so doing, records cannot be disclosed that could have unfavorable effects upon an individual's life.

In view of the foregoing, if you were never arrested or convicted, or even if you were arrested but the charges were dismissed, the response given by Mr. Biggins was likely completely accurate.

As noted in our earlier correspondence, the "file" in which you are interested may be in possession of the Division of State Police. The vehicle for reviewing the file is the Freedom of Information Law,with which you are familiar. Further, if your efforts in gaining access to the records in question are unsuccessful, it would appear that your only recourse would involve the initiation of a judicial challenge to a denial of access under Article 78 of the Civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1889

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

February 17, 1981

Mr. Raymond Bonazzo
80-A-502
Box 149
Attica, NY 14011

Dear Mr. Bonazzo:

I have received your letter of January 20, in which you wrote that agencies generally deny your requests for records on the basis of §87(2)(e) of the Freedom of Information Law.

As requested, enclosed is a copy of the Freedom of Information Law, which is found in the Public Officers Law, §§84 to 90. Section 87(2) of the Law states in brief that all agency records are available, except to the extent that records or portions of records fall within one or more of the grounds for denial enumerated in §87(2)(a) through (h).

In conjunction with your inquiry, §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.

In view of the language quoted above, records compiled for law enforcement purposes may be withheld only when the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise due to disclosure.

You also requested regulations "for filing" under the Freedom of Information Law. In this regard, enclosed is a copy of the regulations promulgated by the Committee which govern the procedural aspects of the Law. Each agency in the state is required to adopt its own regulations consistent with and no more restrictive than those promulgated by the Committee.

In order to make a request, an applicant may be required to submit a request in writing in which the records sought are "reasonably described" [see Freedom of Information Law, §89(3)]. Also enclosed for your consideration is an explanatory pamphlet on the Freedom of Information Law that may be particularly useful to you, for it contains sample letters of request and appeal.

In addition, the pamphlet also describes the functions of and the services provided by the Committee. In brief, this office provides advice to any person having a question regarding the interpretation of either the Freedom of Information Law or 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-1889

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

February 20, 1981

Willie Hunter Jackson, Jr.
Inst. #76A1775
NYSID-11535534
2728 Broadway
New York, NY 10025

Dear Reverend Jackson:

I have received your request which is dated January 28, but was received by this office on February 19.

You wrote that you are interested in obtaining various records regarding an arrest and sentence.

Please be advised that the Committee on Public Access to Records is responsible for giving advice regarding the Freedom of Information Law. The Committee does not have possession of records generally, such as those in which you are interested, nor does it have the capacity to compel an agency of government to comply with the Freedom of Information Law.

Nevertheless, I would like to offer the following suggestions.

First, in order to make a request, you should reasonably describe the records in which you are interested in writing and direct your request to the "records access officer" of the agency that maintains possession of the records that you are seeking.

Second, it appears that much of the information that you are seeking would be in possession of a court. In this regard, it is noted that the Freedom of Information Law does not apply to the courts or court records [see attached, Freedom of Information Law, definitions of "judiciary" and "agency" appearing in §§86(1) and (3) respectively]. However, most court records are available upon request from the

clerk of a court under §255 of the Judiciary Law. As such, it is also suggested that you direct your request to the clerks of the courts that have possession of the records in which you are interested.

Lastly, enclosed is a copy of an explanatory pamphlet on the Freedom of Information Law 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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1890

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

February 24, 1981

Mr. James L. Thompson
Assistant
Dept. of Accounting and
Information Systems
North Texas State University
Danton, Texas 76203

Dear Mr. Thompson:

As you are aware, your letter addressed to the Attorney General of the State of New York has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the New York State Freedom of Information Law.

I have enclosed a number of documents that may be useful to you. Further, I would like to offer the following explanations regarding some of the documents that might in a brief manner shed some light on various provisions.

The first enclosure is the New York Freedom of Information Law, which is applicable to virtually all units of government in the state. While the courts and court records are outside the scope of the Law, most court records are available under various provisions of the Judiciary Law and other court acts. Further, although the State Legislature is covered by the Law (see §88), it is treated differently from the remainder of government. Enclosed is an explanatory pamphlet concerning the Freedom of Information Law that may be particularly useful to you.

Second, records that are confidential are deniable under §87(2)(a) of the Freedom of Information Law, which provides that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". In order to give you an indication of some of the records that are deemed confidential by statute, I have enclosed a copy of the Committee's first annual report on the Freedom of Information Law submitted in 1978, which contains a discussion of the protection of privacy and on pages 13 and 14 lists a number of statutes requiring confidentiality.

Third, New York has enacted a Fair Credit Reporting Act, a copy of which has been enclosed.

With regard to financial institutions, I do not believe that there is any statute specifically dealing with rights of access granted to the public. However, records regarding credit might be available under the Fair Credit Reporting Act. In addition, records relative to routine investigations of the financial condition of banks are confidential under §36 of the Banking Law, which has been enclosed for your consideration.

There is no statute of which I am aware concerning disclosure by insurers. A bill was introduced during the 1980 session of the State Legislature which purported to be the equivalent of the Fair Credit Reporting Act for the insurance industry. From my perspective, it was full of holes; it did not pass.

Lastly, with regard to medical records, such records may be obtained indirectly from a physician or hospital under §17 of the Public Health Law, a copy of which is enclosed. Under that section, when a physician or hospital seeks records on behalf of a patient from another physician or hospital, the records must be made available. In addition, also enclosed is a portion of the regulations adopted by the State Board of Regents, which licenses physicians and others in the health profession. Under the regulations, it is considered unprofessional conduct on the part of the doctor to fail to provide access to medical records to the subject of the records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AD-1891

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

February 24, 1981

William E. Buntain
[redacted]

Dear Mr. Buntain:

As you are aware, your letter addressed to the Attorney General of the State of New York has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

I have enclosed a number of documents that may be useful to you. Further, I would like to offer the following brief explanations regarding some of the documents.

First, with regard to privacy, there is no original constitutional provision or amendment that guarantees a right to privacy. Other than statutes requiring confidentiality of records, the only provisions of which I am aware concerning invasions of privacy are §§50 and 51 of the State Civil Rights Law, copies of which are enclosed. Those provisions deal with the unauthorized use of a person's name or likeness for commercial purposes without that person's consent.

In terms of the privacy of records, there are numerous statutes that require the confidentiality of particular records. Those records would be deniable under the Freedom of Information Law under §87(2)(a) (see enclosed), which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". In order to provide an indication of some of the types of records that are deemed confidential by statute, I have enclosed a copy of the Committee's first annual report on the Freedom of Information Law issued in 1978. That report contains a fairly lengthy discussion of privacy in New York and on pages 13 and 14 lists a number of statutes that require confidentiality.

Second, the Freedom of Information Law is applicable to virtually all units of government in the state. While the courts and court records are outside the scope of the Law, most court records are available under various provisions of the Judiciary Law and other court acts. Further, although the State Legislature is covered by the Law (see §88), it is treated differently from the remainder of government. Enclosed is an explanatory pamphlet concerning the Freedom of Information Law that may be particularly useful to you.

Third, New York has enacted a Fair Credit Reporting Act, a copy of which has been enclosed.

With regard to financial institutions, I do not believe that there is any statute specifically dealing with rights of access granted to the public. However, records regarding credit might be available under the Fair Credit Reporting Act. In addition, records relative to routine investigations of the financial condition of banks are confidential under §36 of the Banking Law, which has been enclosed for your consideration.

There is no statute of which I am aware concerning disclosure by insurers. A bill was introduced during the 1980 session of the State Legislature which purported to be the equivalent of the Fair Credit Reporting Act for the insurance industry. From my perspective, it was full of holes; it did not pass.

Lastly, with regard to medical records, such records may be obtained indirectly from a physician or hospital under §17 of the Public Health Law, a copy of which is enclosed. Under that section, when a physician or hospital seeks records on behalf of a patient from another physician or hospital, the records must be made available. In addition, also enclosed is a portion of the regulations adopted by the State Board of Regents, which licenses physicians and others in the health profession. Under the regulations, it is considered unprofessional conduct on the part of the doctor to fail to provide access to medical records to the subject of the records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1892

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

February 24, 1981

James F. Scheutzow
80C694
135 State Street
Auburn, NY 13021

Dear Mr. Scheutzow:

I have received your letter of February 16 in which you requested copies of various records relative to parole, probation, arrest, presentence reports and related information.

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 those in which you are interested, nor does it have the capacity to compel agencies to comply with the Freedom of Information Law.

Nevertheless, I would like to offer the following comments.

First, your requests should be directed to the agencies that have possession of the records that you are seeking. In order to make a request, you should reasonably describe the records that you are seeking in writing and direct the request to the records access officer of the appropriate agency.

Second, with regard to records in possession of correctional institutions, I have enclosed §5.20 of the regulations promulgated by the Department of Correctional Services. Those regulations provide guidance regarding your capacity to gain access to records pertaining to you in possession of a correctional facility.

Third, in terms of your arrest record, enclosed is §5.22 of the regulations of the Department of Correctional Services which indicate that the criminal history report of the Division of Criminal Justice Services should be made available to you.

Fourth, with respect to presentence reports, such reports may be made available by the court in which a sentence was handed down. Enclosed is §390.50 of the Criminal Procedure Law concerning access to presentence reports and memoranda.

Lastly, I have enclosed a copy of a pamphlet that explains the Freedom of Information Law. You may find the pamphlet particularly useful, for it contains model 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1893

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
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HOWARD F. MILLER
BASIL A. PATERSON
IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 24, 1981

Mr. Melvin M. Hurwitz
Deputy Executive Director
The State Insurance Fund
199 Church Street
New York, New York 10007

Dear Mr. Hurwitz:

I have received your submission under Chapter 677 of the Laws of 1980 in which it was indicated that the State Insurance Fund maintains systems of records within which the personal information is confidential. Therefore, you wrote that no response would be given under the legislation.

Your response is based upon your contention that:

> "[T]he Systems of Records we maintain are confidential and not subject to the Freedom of Information Act. The provisions of Section 98 of the Workers' Compensation Law prohibit certain disclosures without authority and making same a misdemeanor."

I disagree with your response, for the legislation in question is applicable even if information contained within a system of records is confidential. As I explained to you by telephone, the focal point of the legislation is not whether records are available, but whether records exist that may be used to identify individuals.

The key definition in Chapter 677 concerns the phrase "system of records" [see §2(e)]. Under that definition, a system of record includes:

> "...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."

Further, the definition of "record" [see §2(d)] is defined to mean "any information...in any physical form whatsoever." Consequently, even if information contained within a system of records is confidential, the reporting requirements described in §3 nonetheless apply.

Again, rights of access granted by the Freedom of Information Law and the capacity to deny under that Law are irrelevant to the reporting requirements imposed by Chapter 677. Further, nothing included within a notice of a system of records would identify a particular individual about whom information is maintained.

In order to comply with the legislation, it is respectfully requested that the State Insurance Fund complete notices of systems of records for each of its systems.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-
FOIL-AO-1894

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

February 25, 1981

Andrew J. Fisher
[redacted]

Dear Mr. Fisher:

I have received your letter of January 20. Please accept my apologies for the delay in response.

You have raised questions regarding the application of the Freedom of Information and Open Meetings Laws to the Faculty Student Association Board of Directors at the State University College at Fredonia.

It is noted that the issue has arisen in the past and that, in my opinion, there is no definitive answer that may be given. I have enclosed two letters for your review. The first, dated January 12, 1981, was prepared by this office and advised that, based upon the trend in case law, it is possible that a faculty student association might be considered a "public body" subject to the Open Meetings Law or an "agency" subject to the Freedom of Information Law. The second letter prepared by the Office of Counsel for the State University reached a different conclusion and found that a faculty student association could not be considered either a public body or an agency subject to the Open Meetings Law or the Freedom of Information Law.

You also questioned the exemption in the Open Meetings Law regarding "matters made confidential by federal or state law" that appears in §103(3) of the Law. You asked whether the exemption applies to discussions such as those concerning personnel matters, negotiations of union contracts and similar issues when a board enters into an executive session.

In my view, none of the subjects that you cited would qualify as matters that are deemed confidential by law.

It is noted that the Open Meetings Law provides two mechanisms under which a public body may conduct private discussions. The first involves executive sessions. The phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §97(3)]. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body before it may enter into an executive session, and paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion that may properly be considered in executive session. A personnel matter concerning a particular individual could likely be considered during an executive session pursuant to §100(1)(f) of the Open Meetings Law. Similarly, a discussion of collective bargaining negotiations could be conducted behind closed doors in an executive session under §100(1)(e) of the Law.

The other means by which a public body may conduct private discussions would involve an exemption under §103. If a matter is exempt from the Open Meetings Law, the Law simply does not apply. As you indicated, §103(3) exempts from the Open Meetings Law matters made confidential by state or federal law. From my perspective, to be considered "confidential", there must be specific statutory direction to the effect that a particular issue, or more likely specific records, are exempted from disclosure. For instance, under the federal Family Educational Rights and Privacy Act (20 USC §1232g), education records identifiable to a particular student are confidential unless the student consents to disclosure. Consequently, if a public body discusses the content of education records, it would be considering a matter made confidential by federal 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1895

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

February 25, 1981

Mr. Patrick A. Carney
80-C-676
135 State Street
Auburn, New York 13021

Dear Mr. Carney:

I have received your letter of January 26. Please accept my apologies for the delay in response.

You wrote that you are interested in obtaining your "prisoners record and health records" regarding your background. 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 in general, such as those in which you are interested, nor does it have the capacity to compel an agency to comply with the Freedom of Information Law.

Nevertheless, I would like to offer the following comments.

First, it is suggested that you review at your facility Part 5 of the regulations promulgated by the Department of Correctional Services. That area of the regulations concerns access to Department records and contains specific direction regarding the examination of records by inmates or his attorney (see attached §5.20).

Second, also enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject that may be particularly useful to you. In brief, the Freedom of Information Law states 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).

Third, in making a request, it is suggested that you "reasonably describe" the records in which you are interested in writing and direct your request to the facility superintendent or his designee.

Fourth, with regard to a request for medical records, it is recommended that you seek specific types of records rather than requesting all medical records pertaining to you. Further, having discussed the issue of access to medical records with officials of the Department of Correctional Services, I believe that factual information found within medical records, such as laboratory test results and similar information, are generally made available. Portions of medical records consisting of advice, such as diagnostic opinion, are generally deniable. In my view, such a position is consistent with §87(2)(g) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1896

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

February 25, 1981

Raetta M. Decker
Councilwoman
Town of Greenville
R.D. 4 Box 345
Middletown, NY 10940

Dear Ms. Decker:

I have received your letter of January 26.

Your question is whether, as a member of the Town Board of the Town of Greenville, you "have the right to audit the Fire Department books before negotiating a contract with the Fire Department". You have indicated that when the Town requested to inspect Fire Department records in order to determine whether increases sought by the Department are justified, you were informed by the Department that it is a private corporation and, therefore, "does not have to open its books to anyone". Your question is whether the Freedom of Information Law applies to volunteer fire companies. Further, although you brought the determination rendered in Westchester-Rockland Newspapers v. Kimball, [50 NY 2d 575 (1980)] to the attention of the Fire Company, it has continued to refuse to permit Town officials to inspect its records.

In my opinion, any person has the right to inspect and copy the financial records of a volunteer fire company. My opinion is based upon the holding in Westchester-Rockland Newspapers v. Kimball, supra, which was rendered by the state's highest court, the Court of Appeals, on July 3, 1980. It is emphasized that an opinion rendered by the Court of Appeals cannot be appealed further and that it is binding across the state. I have enclosed a copy of that decision for your review. In brief, the Court of Appeals found that, even though a volunteer fire company may be a not-for-profit corporation which exists separately from a municipality with which it maintains a contractual relationship, it is nonetheless subject to the Freedom of Information Law. It is

suggested that you review the decision closely and transmit it to the Fire Department in question. From my perspective, the decision leaves no room for interpretation as to whether a volunteer fire company is subject to the Freedom of Information Law; in short, its books and records are subject to the Law in the same manner and to the same extent as the records in possession of any unit of government in New York State. Consequently, I believe that the procedures to be followed would be the same as those followed generally with respect to requests made under the Freedom of Information Law.

With regard to your capacity to "audit" the books of the fire company, I am not sure whether an audit could officially be performed. Nevertheless, it is reiterated that the books of account are available and that, as such, any member of the public, as well as members of the Town Board, should have the capacity to review those records in order to arrive at their own findings and conclusions.

I hope that 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-1892

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

February 25, 1981

Page Lockhart
Staff Attorney
Mid-Hudson Senior Citizen Law Project
293 Wall Street - U.P.O. Box 3783
Kingston, New York 12401

Dear Ms. Lockhart:

I have received your letter of January 26. You wrote that you represent a senior citizen resident in Plattekill, whose property tax assessment was increased "without any indication on her property record card as to the reason therefore". You have asked the Committee to investigate the fact that the property record card does not show any reason for the increase.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. It has no capacity to engage in investigations generally, and further, the area of a potential investigation in this instance would be beyond the scope of the Committee's authority.

Nevertheless, I have contacted the State Division of Equalization and Assessment on your behalf in order to obtain additional information regarding the controversy. I was informed by an attorney for the Division that the property record card is essentially reflective of an assessor's work product. Moreover, I was also informed that there are no requirements that a reason for an increase be given in writing or that a record card must be marked to provide a rationale for an increase in an assessment.

It appears that the only recourse available would involve seeking review of an increase before a board of assessment review and, later, before a court.

I regret that I cannot be of further assistance. Should any 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-1898

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

February 25, 1981

Ms. Bernice C. Sweeting
[redacted]

Dear Ms. Sweeting:

I have received your letter of January 26. It appears that you are seeking a confidential report transmitted from Albany to an official of the Bureau of Child Welfare in Brooklyn. You stated further that you believe that under the United States Constitution you "have the right to be faced with [your] accusors". In all honesty, I am not sure that I can provide you with direction.

However, if the report in question concerns the provision of welfare or social services and identifies either an applicant for or a recipient of such services, the report would be required to be kept confidential under either §136 or §372 of the New York Social Services Law.

Nevertheless, it is suggested that you submit a request in writing to the records access officer of the appropriate agency in which you reasonably describe the records in which you are interested.

Enclosed is an explanatory pamphlet regarding the Freedom of Information Law that may be particularly useful to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1899

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

February 26, 1981

[redacted]
M.C.I. 075613 Bldg. 6
P.O. Box 158
Lowell, FL 32663

Dear [redacted]:

I have received your letter of January 26 in which you asked whether records pertaining to you that are in possession of the Department of Correctional Services are available. You also asked for information regarding the means by which you may obtain such records.

Enclosed for your consideration are copies of the New York Freedom of Information Law and the regulations developed by the Committee, which govern the procedural aspects of the Law and with which agencies must comply. In brief, the Freedom of Information Law states 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. The extent to which any of the grounds for denial might be applicable to the records that you are seeking is unknown to me.

In order to make a request, you should attempt to reasonably describe the records in which you are interested in writing, indicate that you are a former inmate and direct your request to the records access officer of the Department of Correctional Services, which is located at Building #2, State Campus, Albany, New York 12226. Also enclosed for your consideration is a pamphlet that explains the Freedom of Information Law which 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1900

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

February 26, 1981

Robert T. Brier
Public Information Officer
City of Troy
City Hall
Troy, NY 12180

Dear Mr. Brier:

I have received your letter of February 3, concerning a request which in your estimation, if fulfilled, "will entail almost a week's work by our city's comptroller".

In view of the scope of the request, which would involve hundreds of pages, you wrote that in your view the Freedom of Information Law is not intended "to serve a political activist to harass local government...and at considerable expense to its citizenry". You have asked in this regard where a reasonable request ends and harassment begins.

Although the issue has arisen in the past, there is no clear judicial guidance regarding the question of what might be considered "harassment". There is an old judicial determination which stated in essence that the dividing line between a reasonable request and harassment can be drawn only on a case by case basis [see e.g. Sorley v. Lister, 218 NYS 2d 215 (1961)]. However, in a recent judicial determination, it was held in a case in which a voluminous amount of information was sought that a defense based upon "a shortage of manpower by the agency from which disclosure is sought...would thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the Act" [see United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NY 2d 823 (1980)]. Consequently, based upon a recent decision, a shortage of staff would not constitute a sufficient basis for withholding records. Moreover, from my

perspective, the capacity of an agency to respond likely depends in great measure upon the manner in which its records are filed. While I am not suggesting that the City of Troy has an inefficient filing system, in some instances, it is possible that denials or delay might be the result of inadequate filing practices.

Nevertheless, I would like to offer the following suggestions. First, in cases in which great numbers of records have been requested, it has been suggested that the agency and the applicant might be able to agree to a schedule spread over a period of weeks or even months during which records would be made available on a piecemeal basis.

Secondly, in a situation in which copies of records are requested, an agency may request that the fees for photocopying be paid in advance. Section 89(3) of the Law states in part that an agency must reproduce records "[U]pon payment of, or offer to pay..." the requisite fees for photocopying. As such, while an applicant for records may inspect the records at no charge, I believe that an agency may require that the fees for records sought to be copied be paid in advance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1901

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

February 26, 1981

Corigan Sanoain
President
Quad Logistics, Inc.
3909 Witmer Road
Niagara Falls, NY 14305

Dear Mr. Sanoain:

I have received your letter of January 29 concerning access to information in possession of the City of Niagara Falls' Tax Complaint Board relative to your property.

You have indicated that you have had difficulties in gaining information in the past and you stated that "this Review Board and the Assessor's Office operate without guidelines and are covering up the inefficiencies of the entire Deparment". You wrote further that you would like a "decision" from this office indicating that your rights have been violated "with a demand the City clean up their act in this area".

It is noted at the outset that this office has neither the capacity to render a "decision", nor to direct a municipality to perform certain duties. The Committee on Public Access to Records has only the authority to advise with respect to the Freedom of Information and Open Meetings Laws.

Nevertheless, I would like to offer the following comments.

First, it has long been held that virtually all records used in the development of an assessment are available. In judicial determinations rendered as early as 1951, it was held that a taxpayer has the right to inspect indexing systems compiled by a city assessor regarding the means by which property has been valued [see e.g. Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); see also Sanchez v. Papontas, 303 NYS 2d 711 (1969)]. Consequently, it would appear that records prepared in conjunction with the assessment of your property would be available.

Second, it is emphasized that §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 are no records or insufficient documentation regarding the assessment of your property, there would be no requirement that records be created or compiled on your behalf. Further, having spoken with an attorney for the Division of Equalization and Assessment, I was informed that there is no requirement that a reason for an increase in an assessment be given in writing or that a property card be marked to indicate a rationale for an increase in an assessment.

Third, to the extent that the Review Board or the Assessor use guidelines in the development of assessments, such guidelines would be available, for they are reflective of the policy of the agency under §87(2)(g)(iii) of the Freedom of Information Law (see attached).

Lastly, if you continue to believe that the City is not carrying out its duties appropriately regarding assessment procedures, it is suggested that you write to the Division of Equalization and Assessment, which is located at Agency Building #4, Empire State Plaza, Albany, New York 12223. The Division could, for instance, inform you of procedures, to the extent that such procedures exist, which must be followed by an assessor or an assessment 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:ss

Enclosures

cc: Tax Complaint Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1902

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

February 26, 1981

Mr. William Randall
78-A-1777
Box 149
Attica, NY 14011

Dear Mr. Randall:

I have received your letter of January 28.

You have requested information regarding access to records relative to a superintendent of a New York State correctional facility as well as records reflective of the operating costs of a state correctional facility.

With respect to the superintendent of a facility, the nature and content of records sought would determine rights of access. In some instances, records pertaining to a public employee might if disclosed result in an unwarranted invasion of personal privacy and, therefore, be deniable under §87(2)(b) of the Freedom of Information Law (see attached). In other instances, records might be inter-agency or intra-agency, advisory in nature, and therefore, be deniable [see §87(2)(g)]. However, it has also been determined judicially that many records relative to public employees might be available. For instance, it has been held in several instances 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.

Second, with respect to the operating costs of a correctional facility, there may be numerous records indicating such costs. It is important to note that §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 are no compilations or totals regarding the cost of operating a particular facility, an agency need not create such a record on behalf of an applicant. However, if such records do exist, it would appear that they are available. Once again, I direct your attention to §87(2)(g) concerning inter-agency and intra-agency materials. That provision states that such materials may be withheld except to the extent that they contain statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations. It would appear that records reflective of the operating cost of a facility would consist of factual information that is available.

Enclosed is an explanatory pamphlet regarding the Freedom of Information Law that may be particularly useful to you, for it contains sample letters of request and appeal.

Lastly, you have requested a dozen copies of a pamphlet entitled "Representing You", which is published by the Department of State. I have contaced the Publications Bureau of the Department on your behalf and have learned that the pamphlet is in the process of being updated. I was informed further that the new edition of "Representing You" will likely be in print and available in the fall. It is suggested that you request the pamphlets in question from the Bureau of Publications in the fall.

I hope that 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-1903

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

February 26, 1981

Mr. Raymond Bonazzo
80-A-502
Box 149
Attica, NY 14011

Dear Mr. Bonazzo:

I have received your letter of January 30, as well as the correspondence appended to it.

You have asked for advice regarding a denial made under the Freedom of Information Law by the Assistant District Attorney of Westchester County. In brief, you have requested from the files of the District Attorney the names of members of surveillance teams that were employed in New York and in Pontiac, Michigan. The request was denied on the basis of §87(2)(e) of the Freedom of Information Law and unspecified provisions of the Criminal Procedure Law.

While I question the bases for withholding offered by the District Attorney, it appears that the information sought may have been justifiably withheld.

In citing §87(2)(e) of the Freedom of Information Law, the District Attorney wrote that the information sought could be withheld because it is contained in a "criminal investigative file". In my view, it is uncertain whether §87(2)(e) could be cited to withhold the records in question. That 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,"

If the investigation to which the records relate has been completed, disclosure would seemingly not interfere with an investigation. Similarly and for the same reason, disclosure would not likely deprive any person of a right to a fair trial. The records sought would not apparently identify a confidential source or be reflective of non-routine criminal investigative techniques or procedures. Consequently, it does not appear that §87(2)(e) is applicable.

Nevertheless, §87(2)(f) of the Freedom of Information Law states that an agency may withhold records the disclosure of which would "endanger the life or safety of any person". If indeed disclosure would endanger the life or safety of the individuals participating in the surveillance team, §87(2)(f) of the Freedom of Information Law could be cited as a basis for withholding.

With respect to the Criminal Procedure Law, I am unaware of any particular provision in that chapter that would require confidentiality under the circumstances.

At this juncture, I believe that you may appeal the denial to the District Attorney, for §89(4)(a) of the Freedom of Information Law states that an initial denial may be appealed to the head or governing body of an agency or whomever is designated to determine appeals by that person or body. If a denial is rendered on appeal, you may seek judicial review by initiating an Article 78 proceeding.

It is noted that, having reviewed your request directed to the District Attorney, you cited the federal Freedom of Information Act. Please be advised that the federal Act applies only to records in possession of federal agencies and therefore has no application to a request directed to a district attorney.

Lastly, enclosed is an explanatory pamphlet on the Freedom of Information Law which may be 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
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1904

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

February 27, 1981

Mr. Donald H. Ward
Helm, Shapiro, Ayers,
Anito & Aldrich, P.C.
111 Washington Avenue
Albany, NY 12210

Dear Mr. Ward:

I have received your letter of February 4 in which you requested a "determination" under the Freedom of Information Law.

It is noted at the outset that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law; it does not have the capacity to render a determination that is final, nor does it have the capacity to compel agencies to comply with the Law.

The question concerns a situation in which your client was the subject of a hearing held before the Department of Motor Vehicles. According to your letter, "the testimony at the hearing was recorded on a cassette tape by the administrative law judge". You wrote that it is your understanding that, following a hearing, the tapes are turned over to a private reporter service (in this case, HAN Reporters).

Upon request of a party, such as your client, HAN furnishes transcripts of the tapes upon payment of a fee of "approximately $1.25 per page". You have indicated that you believe that the stenographic service, which is separate from the state, "retains all payments for its own use and benefit."

You have requested to review the tapes without first having to purchase a transcript. In response to your request, the Department referred you to the reporter, who "flatly refused" the request. You have contended in your letter that, in your view, the tape recording should be made available under the Freedom of Information Law "for the price, perhaps, of copying the tape to an additional cassette."

I agree with your contention for the following reasons.

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 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 language quoted above, it is clear that a tape recording of a hearing constitutes a "record". The tape recording was produced by and for an agency, the Department of Motor Vehicles. Consequently, I believe that the tape recording is subject to the Freedom of Information Law and should be reproduced in accordance with its provisions.

Second, §87(1)(b)(iii) states that:

> "...the fees for copies of records ...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."

As such, I believe that the Department of Motor Vehicles may assess a fee based upon the actual cost of reproducing a tape recording. As you intimated, such a fee might be based upon the cost of purchasing an additional cassette.

It is also noted that in a decision in which questions arose regarding the requirement that a tape recording of a meeting be furnished, the court cited the regulations promulgated by the Committee and stated that an "agency may not include personnel salaries in assessing reproduction costs" [see Zaleski v. Hicksville Union Free School District, Sup. Ct., Nassau Cty., NYLJ, December 27, 1978; see also 21 NYCRR §1401.8(c)(3)].

Further, although the tape recording may have been forwarded to a private reporting firm, it is in my view nonetheless in the legal custody of the Department of Motor Vehicles. I do not believe that the state has relinquished legal custody of the record or that the record has become the property of the reporting firm. Consequently, it is reiterated that the tape recording, despite the possibility of its temporary transfer to a reporting firm, remains a "record" subject to the Freedom of Information Law that must be reproduced based upon the provisions regarding fees envisioned by the Law.

In sum, it is my opinion that a tape recording of a hearing conducted by a state agency is a "record" as defined by the Freedom of Information Law, and that the fee for reproducing a tape recording must be based upon the direction given in §87(1)(b)(iii) of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Commissioner Leslie Foscio

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1905

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

March 2, 1981

Ronald J.L. Jackson, Esq.
2 West 45th Street
Suite 607
New York, New York 10036

Dear Mr. Jackson:

I have received your letter of February 5 in which you requested "any guidelines" that may have been "proposed or promulgated" by the Committee regarding police department records. You wrote that you are particularly interested in guidance regarding the reports of crimes and actions taken by police officers in response to such reports. In addition, you have requested categories of information within systems of records maintained by the New York City Police Department.

With respect to your first area of inquiry, please be advised that the Committee does not have the authority to issue guidelines regarding police department records. The capacity of the Committee to regulate pertains only to the procedural implementation of the Law, and I have enclosed procedural regulations promulgated by the Committee for your consideration.

Nevertheless, numerous advisory opinions have been prepared concerning records of police departments. In this regard, also enclosed is the latest index to advisory opinions rendered by the Committee. If after having reviewed the index, you believe that there are particular opinions in which you may be interested, please identify them by number or key phrase and I will be happy to send them to you.

It is noted, however, that it has consistently been advised that a record in the nature of a police blotter is available. Although the phrase "police blotter" has never been specifically defined by statute or rule, it

has been held that a police blotter is a log or diary in which any event reported by or to a police department is recorded. The same decision held that the police blotter contains no investigative information but rather is a summary of events and occurrences that is accessible [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

Access to reports that ensue prepared by police officers would likely be determined by the language of §87(2)(e) of the Freedom of Information Law. The cited provision states that records compiled for law enforcement purposes may be withheld, but only under circumstances specified in subparagraphs (i) through (iv) of §87(2)(e).

Unless I am mistaken, your second area of inquiry concerning systems of records alludes to Chapter 677 of the Laws of 1980. However, that statute, which requires agencies to submit notices of systems of records from which personal information may be obtained, is applicable only to state agencies. It is not applicable to entities of local government, such as the New York City Police Department. Consequently, the Committee has not received any information regarding systems of records maintained by the Police Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1906

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

March 2, 1981

Henry F. Sobota
Associate Counsel
NYS School Boards Association
119 Washington Avenue
Albany, New York 12210

Dear Mr. Sobota:

As you are aware, I have received your letter of February 12 in which you requested an advisory opinion under the Freedom of Information Law.

The questions that you raised are found in a letter addressed to the Department of Labor on February 12. That letter represents the latest in a series of correspondence between the School Boards Association and the Department of Labor relative to the promulgation of SOSHA standards by the Department. In brief, your first area of request to the Department of Labor concerns portions of Title 29 of the Code of Federal Regulations after having redacted sections that might not be incorporated by reference in state regulations. The second request also concerns portions of the same regulations in which you requested that sections be redacted because they were not in effect on a particular date. The third request involves non-OSHA safety codes.

As I understand it, the problem is that legislation now requires state and local government facilities to comply with certain regulations found in the Code of Federal Regulations under the Occupational Safety and Health Act. However, you have been unable to learn which regulations will be applicable to state and local facilities subject to SOSHA. In essence, the focal point appears to involve the information regarding which regulations must be followed under SOSHA.

In my opinion, which is based upon both the Freedom of Information Law and the State Administrative Procedure Act (SAPA), the Department of Labor is required to furnish you with those portions of the regulations that you specified.

First, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" in writing the records in which he or she is interested. From my perspective, you have met the burden imposed by the cited provision of the Freedom of Information Law.

Second and perhaps more important is the direction given in SAPA. Section 202, entitled "Rule Making Procedure", concerns steps that must be taken by an agency prior to the adoption of rules. One of the requirements concerns notice, and paragraph (c) of §202(1) states in relevant part that "[T]he express terms of the proposed action shall be available to the public on the date such notice is first given pursuant to paragraph (a) of this subdivision". Further, subdivision (10) of §202 of SAPA states that:

> "[E]ach agency, upon request, either oral or written, in accordance with the Freedom of Information Law, contained in article six of the public officers law, shall provide to any person a copy of the express terms of any proposed or adopted rule, prior to publication of such rule in the official compilation of codes, rules and regulations of the state of New York".

In view of the provisions quoted above, I believe that an agency must provide a copy of the "express terms" of any proposed or adopted rule. Consequently, it appears that your request must be fulfilled in the form in which the records sought have been requested under both the Freedom of Information Law and the State Administrative Procedure Act.

Lastly, §89(3) of the Freedom of Information Law provides in part that, as a general rule, an agency need not create a record in response to a request. In this instance, I do not believe that the request would involve the preparation or creation of a record, for the records that you are seeking exist and comprise portions of a larger compendium of 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: Stuart Schrank

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-594
FOIL-AO-1907

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

March 3, 1981

Carolyn Seaman
[redacted]

Dear Ms. Seaman:

I have received your letter of February 5 in which you raised a series of questions regarding the implementation of the Freedom of Information Law by the Hamlin Fire District.

I would like to offer the following comments with respect to the statements made in your letter.

First, it is noted that fire districts and volunteer fire companies are agencies subject to the Freedom of Information Law. This conclusion was made clear by a decision rendered by the state's highest court, the Court of Appeals, in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. The decision concerned the status of a volunteer fire company under the Freedom of Information Law and found that, even though such a company may be a not-for-profit corporation that maintains a contractual relationship with a municipality, it is an "agency" that must comply with the Freedom of Information Law in all respects.

Second, in view of the decision cited in the previous paragraph, the records to which you made reference including minutes, treasurer's reports, budget documentation and annual reports, are in my opinion clearly available.

Third, and in a related area, §89(3) of the Freedom of Information Law requires that an agency make copies of available records upon request or upon payment of or offer to pay the requisite fees for photocopying.

Fourth, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for a denial of access. Section 89(3) of the Law states in part that an applicant for records may be required to submit a request in writing that reasonably describes the records in which he or she is interested. Consequently, any request made in writing that reasonably describes the records sought should be sufficient.

Fifth, the form attached to your letter indicates that an applicant is required to state the reason for his or her request. In this regard, the Committee has advised and the courts have held that accessible records are 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). Consequently, an agency cannot require that the reason for a request be provided as a condition precedent to gaining access to records.

Sixth, the form indicates that it must be completed and mailed or presented to the secretary-treasurer of the District "two weeks prior to the request". In my view, that requirement would violate the time limits required for response under the Freedom of Information Law and the regulations promulgated by the Committee.

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.

Seventh, you indicated that the commissioners of the fire district do not read aloud at meetings minutes or a treasurer's report. With respect to your comment, there is no provision of law of which I am aware that requires that minutes or a treasurer's report be read aloud in their entirety. However, it is reemphasized that those documents are available under the Freedom of Information Law.

Lastly, with respect to minutes, I direct your attention to the Open Meetings Law, a copy of which is attached. Under §101(3) of the Open Meetings Law, minutes of open meetings must be compiled and made available within two weeks of open meetings. Minutes reflective of action taken during an executive session must be compiled and made available within one week of the executive session to which they relate. The Committee has recognized that there may be situations in which a public body might not have the capacity to approve minutes within the time periods specified in the Open Meetings Law. Consequently, in order to comply with the Law, it has been suggested that unapproved minutes be marked as "unapproved", "draft", "non final", or "unofficial". By so doing, the public has the capacity to learn generally what transpired at a meeting, and at the same time, the members of a public body are given a measure of protection. Lastly, a copy of this opinion will be sent to the Hamlin Fire District. In addition, I will forward to the District each of the documents enclosed for 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

cc: Hamlin Fire District

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1908

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

March 3, 1981

Harley Doneburg
79-C-734
Box D
Albion, NY 14411

Dear Mr. Doneburg:

I have received your letter of February 6 in which you inquired with respect to the means by which you could obtain a "master index" from the Department of Correctional Services. You indicated that you believe that it is necessary to obtain such an index in order to seek certain records pertaining to yourself.

First, it is suggested that you renew your request and address it to the records access officer at the Department of Correctional Services, Agency Building #2, State Office Building Campus, Albany, New York 12226.

Second, it is noted that the index to which you made reference is likely the subject matter list required to be compiled under §87(3) of the Freedom of Information Law (see attached). The subject matter list is not an index, for it is not required to make reference to every record in possession of an agency. On the contrary, the subject matter list is merely required to make reference in reasonable detail to categories of records in possession of an agency. Consequently, it is in my view unlikely that the subject matter list prepared by the Department of Correctional Services would make specific reference to you or records that pertain particularly to you.

Third, to make a request, you may not need a master list or a subject matter list. The Freedom of Information Law merely requires that an applicant "reasonably describe" in writing records in which he or she is interested. Therefore, if, for example, you are interested in obtaining a particular area of medical records pertaining to you, a

request should attempt to specify to the extent possible the nature of the records sought.

Enclosed for your consideration is an explanatory pamphlet on the Freedom of Information Law which 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1909

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

March 4, 1981

Wayne Stevenson
[redacted]

Dear Mr. Stevenson:

I have received your letter in which you asked for an advisory opinion under the Freedom of Information Law.

You wrote that, as of February 5, 1981, you were asked to leave the parking lot of the Grand Union in Coxsackie by the police on four occasions. In each instance, you stated that the police indicated that "the management of the store signed a statement" to the effect that it did not want anyone in the parking lot after business hours. You indicated that you have discussed the matter with management on two occasions and were informed that no such statements had been offered to the police. After requesting to inspect statements from the police chief, you were informed that you could see them only after he arrested you.

In my opinion, if the statements exist, they are likely available in great measure if not in their entirety.

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 a police department, 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) (see attached).

From my perspective, there are only two grounds for denial that might be relevant to your inquiry.

The first is §87(2)(b), which states that an agency may withhold records or portions of records when disclosure would result in an "unwarranted invasion of personal privacy".

Under the circumstances, it is questionable whether disclosure would result in an unwarranted invasion of personal privacy, for you are familiar with and have in fact contacted the management of Grand Union, which, according to the police, submitted the statements in which you are interested. Further, even if disclosure would result in an unwarranted invasion of personal privacy, the Police Department could delete identifying details to protect privacy, while disclosing the remainder of the records.

The other relevant 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".

In my view, it is questionable whether the cited provision is applicable, for a statement made by Grand Union might not be considered a record compiled for law enforcement purposes. However, even if the statements could be characterized as records compiled for law enforcement purposes, it is in my view unlikely that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would arise. Since you are familiar with those who may have submitted statements, it is doubtful that disclosure would interfere with an investigation or deprive a person of a right to a fair trial. Similarly, there would appear to be no confidential informant that might be identified. It also appears that the procedures used by the Police Department with respect to any complaints were routine in nature.

It is also noted that it has been held judicially that police blotters are available. Although the phrase "police blotter" is not specifically defined by statute or regulation, it has been concluded judicially that a police blotter consists of a log or diary in which any event reported by or to a police department is recorded. Further, it was found that a police blotter contains no investigative information, but rather is merely a summary of events or occurrences that is accessible under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD 2d 808, (1977)].

Finally, there appears to be a question of fact with respect to whether or not statements have indeed been submitted to the police department. In this regard, I direct your attention to §89(3) of the Freedom of Information Law, which states in part that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". Consequently, you may request a certification in writing to the effect that the records exist and are in possession of the police department, or that the records sought are not maintained by the police department or cannot be found after having made a diligent search. Enclosed is an explanatory pamphlet regarding the Freedom of Information Law 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

Enclosure

cc: Mayor
Police Department

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1910

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

March 5, 1981

Mrs. Pearl Michaels
[redacted]

Dear Ms. Michaels:

I have received your letter of February 7, which was delivered to this office on February 23.

You have requested an advisory opinion with respect to "policy memorandum bulletins" sent to principals by Superintendent Arricale in District 19 in which "educational policy positions" and the implementation of those policies are prescribed. You apparently requested one such memo, which was denied on the ground that it was considered a "private communication to principals", and your question is whether the bulletins in question are available under the Freedom of Information Law.

In my opinion, based upon your description of the bulletins or memoranda, they are available to any person.

First, I do not believe that a superintendent or any other public official may characterize records prepared or used in the performance of one's official duties as "private communications". In this regard, §86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

In view of the definition of "record", it is clear that a communication from a superintendent to principals would constitute a "record" subject to rights of access granted by the Freedom of Information Law. In addition, it has been held judicially that even personal notes prepared in the performance of one's official duties constitute "records" subject to the Freedom of Information Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

Second, in my opinion, there is but one ground for denial in the Freedom of Information Law that might be applicable. However, I believe that the language of that ground for denial, due to its structure, requires that the records in question 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 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 statements of policy or determinations must be made available.

Under the circumstances, I believe that the records in question could be characterized as "intra-agency" materials. Nevertheless, as you have described them, they are reflective of both instructions to staff that affect the public and statements of policy. As such, I believe that they are accessible to the public.

Further, the legislative history concerning the enactment of amendments to the Freedom of Information Law bolsters my contentions. Specifically, in a letter transmitted to this office by the Assembly sponsor of the amendments to the Freedom of Information Law, it was stated that the intent of §87(2)(g) is to ensure "that any so-called 'secret law' of an agency be made available". It was emphasized in the communication from the sponsor that "records or portions thereof containing any statistical or factual information, policy, or determinations upon which an agency relies" were intended to 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:ss

cc: Frank Arricale

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1911

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

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GILBERT P. SMITH Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 5, 1981

Hon. Linda Winikow
Member of the Senate
706 Legislative Office Bldg.
Albany, New York 12247

Dear Senator Winikow:

I have received your request of February 12 and apologize for the delay in response.

The situation described in your letter concerns the efforts of Rockland County to gain access to records from the Department of Civil Service reflective of the amount of money that has been paid out for health benefits to its employees for a given calendar year. To date, the County has not received the information it seeks. It is your contention that the County's request is reasonable, and I agree.

As you are aware, I am familiar with the controversy that exists between Rockland County and the State Department of Civil Service. The focal point concerns information known as "insurance experience data". Over the course of years, several inquiries have been made regarding such data and, in order to give you some background regarding those inquiries, I have enclosed a series of advisory opinions rendered by this office, as well as a judicial determination concerning access to insurance experience data.

The first opinion on the subject was prepared at the request of an assemblyman in 1975. It is emphasized that, at the time, rights of access were determined by the original Freedom of Information Law enacted in 1974. Under that statute, rights of access were minimal in comparison to the existing statute, for the structure of that law was different

from that of the existing statute. Under the original Freedom of Information Law, rights of access were limited to those categories of records listed as accessible in §88 of the Law. The new Law reversed the structure of the original enactment and now states that all records are available, except those falling within one or more categories of deniable information [see §87(2)].

Further, in 1975, the Department of Civil Service based its denial in part upon the so-called "governmental privilege", which could be successfully asserted when an agency could demonstrate to a court that disclosure would, on balance, result in detriment to the public interest [see Cirale v. 80 Pine Street Corporation, 35 NY 2d 113 (1974)]. At this juncture, however, it appears that the Court of Appeals has all but abolished the governmental privilege, for it has held that the only bases for withholding are those found in §87(2) of the Freedom of Information Law [see Doolan v. Boces, 48 NY 2d 341 (1979)].

Since the issuance of the initial opinion on the subject in 1975, it was determined judicially that insurance experience data sought by a school district was required to be made available to the District by the Department of Civil Service (see attached, City School District of the City of Binghamton v. Civil Service Commission, Sup. Ct., Albany Cty., Sept. 15, 1976).

Since that time, however, for reasons unknown to me, the insurance carriers no longer submit insurance experience data to the Department of Civil Service. Although I attempted to offer a legal argument to the effect that the data in question might be subject to the Freedom of Information Law even though it is not in possession of the Department of Civil Service, that argument was apparently unsuccessful (see attached letter to Thomas E. Walsh, October 6, 1980). From my perspective, unless it could be concluded that the insurance experience data in possession of an insurance carrier is prepared for the Department of Civil Service, the data falls outside the scope of the Freedom of Information Law. Stated differently, since the insurance carrier is not a governmental entity subject to the Law, it is not required to provide access to its records. In a related sense, since the Department of Civil Service does not have custody of the records, it neither has records to make available nor the capacity to compel an insurance carrier to disclose.

I agree with the basic contention made in your letter that a municipality should have the capacity to know how and why its insurance premiums are devised. Under the circumstances, it appears that a municipality no longer has that opportunity, for the records are no longer maintained by a governmental entity subject to the Freedom of Information Law.

It is also emphasized that the inquiry made by Rockland County is not unique; other units of local government have tried unsuccessfully to gain access to the same information without success.

Perhaps a solution to the problem lies in legislation that would require an insurance carrier to furnish insurance experience data to Civil Service, which in turn would be required to furnish the information under the Freedom of Information Law to any person.

I regret that I cannot give you a more favorable response and would like to assure you that all that this office could have done has been attempted.

I hope that I have been of some assistance. If you would like to discuss the matter, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 1912

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

March 5, 1981

Robert P. Cole
[redacted]

Dear Mr. Cole:

I have received your card in which you requested a copy of the Committee's third annual report on the Freedom of Information Law and in which you raised quesions regarding your rights as a patient to receive medical reports from a hospital and physicians.

As requested, enclosed is a copy of the report to which you made reference.

With respect to access to medical records, it is noted at the outset that the Freedom of Information Law is applicable only to records in possession of governmental entities in New York. Therefore, the Law does not apply to records in possession of private hospitals or physicians.

Nevertheless, there are other provisions of Law which may be cited to enable the subject of medical records to gain either the direct or indirect access to records.

First, enclosed is a copy of §17 of the Public Health Law. The cited provision states in brief that, upon request of a competent patient, a physician or hospital may request and obtain from another physician or hospital records pertaining to a patient. Consequently, although you may not have direct rights of access to records pertaining to you from a hospital, the doctor or hospital of your choice could request and obtain your medical records.

Second, physicians and other persons in the health professions are licensed by the State Board of Regents. In this regard, the Board of Regents has adopted regulations

concerning unprofessional conduct by persons licensed in the medical professions. For instance, I have enclosed §29.2 of the regulations, which essentially states that unprofessional conduct includes a failure on the part of a physician to provide access to medical records, or at least a reasonable explanation of those records, to an adult patient.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1913

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 6, 1981

Thomas E. Walsh II
Assistant County Attorney
Office of the County Attorney
County Office Building
New City, NY 10956

Dear Mr. Walsh:

I have received your letter of February 9 in which you enclosed an opinion rendered by the Supreme Court, Albany County, in City School District of the City of Binghamton v. Civil Service Commission of the New York State Department of Civil Service.

I am familiar with the decision, but it is in my view questionable whether it continues to be applicable.

As you may be aware, the Department of Civil Service at the time of the suit in question maintained the records that you are seeking, which are generally characterized as "insurance experience data". Those records were found to be accessible under the Freedom of Information Law. However, since 1976, for reasons unknown to me, the Department of Civil Service altered its policy and no longer receives the records that had been in its possession and determined to be accessible in the Binghamton case.

Under the Freedom of Information Law, an agency is required to produce accessible records. The question in this instance is whether the information in question would constitute a "record" as defined by §86(4) of the Law. Since the information is no longer maintained by or in possession of the Department of Civil Service, but rather by an insurance carrier, it may fall outside the scope of the Law. As indicated to you, however, in a letter dated October 6, it is possible that a court would find that the information, while in possession of an insurance carrier, was nonetheless prepared for an agency. If such a conclusion could be reached, the data in question would constitute "records" subject to rights of access. However, the finding that a court might reach under the circumstances is in my view open to conjecture.

I believe that there is but one avenue by which a municipality, such as Rockland County, could establish a clear right to the data in question. Specifically, it is suggested that you might want to discuss the issue with local members of the State Legislature and inform them that municipalities need the information that you are seeking, that it is now apparently inaccessible, and that a clear right should be established by 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
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1914

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

March 9, 1981

Martha Cid
Neighbors East
The Post-Standard
Clinton Square
Syracuse, NY 13202

Dear Ms. Cid:

I have received your letter of February 9, in which you requested that the Committee advise the Superintendent of Tully Central School District that school board agendas should be made available if persons requesting such materials agree to pay copying and postage fees.

Several points should be offered with respect to your inquiry.

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, 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.

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 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 an agenda is a "record" subject to rights of access as soon as it exists.

Third, in terms of rights of access, I believe that the contents of an agenda are likely available in great measure, if not in toto. Section 87(2)(g)(i) of the Freedom of Information Law states that intra-agency materials consisting of statistical or factual information are available, unless a ground for denial is applicable. In my view, since an agenda generally represents a factual recitation of the subjects to be considered at a meeting, it is available under the Freedom of Information Law.

If, for example, an agenda contains reference to particular students or personnel and disclosure of the identities of those individuals would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)], the identifying details may be deleted, while the remainder could be made available.

Fourth, §89(3) of the Freedom of Information Law states that accessible records must be made available "upon payment of, or offer to pay..." the requisite fees for photocopying. As a rule, an agency may not charge a fee in excess of twenty-five cents for photocopies not in excess of nine by fourteen inches.

Although the Law does not make reference to fees for postage, it is in my view implicit that if an individual cannot personally go to the site where records are kept or personally review records, the records must be transmitted to the applicant if he or she is willing to pay the fees for photocopying and whatever fees for postage there might be. From my perspective, any other interpretation would defeat the purposes 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

cc: Superintendent William Raspeck

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1915

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

March 9, 1981

Daniel Yost
[redacted]

Dear Mr. Yost:

I have received your letter of February 9 concerning your inquiry relative to the names and addresses of fire departments located in New York State.

If, as you have indicated, you would not be using a list for commercial or fund-raising purposes, I would agree that it is likely available under the Freedom of Information Law.

However, as stated in my earlier letter, I am not sure that the Department of State maintains such a list. Further, the duty of this office involves providing advice under the Freedom of Information Law. It has neither the possession of records generally nor the capacity to compel an agency to comply with the Freedom of Information Law.

Nevertheless, I have forwarded copies of this response and your letter to the Division of Fire Prevention and Control, a unit of the Department of State, in order that it may respond directly to your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Frank McGarry
Division of Fire Prevention and Control

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1916

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

March 9, 1981

Roberta Van Patten
[redacted]

Dear Ms. Van Patten:

I have recently received your letter dated February 29. Your inquiry concerns your capacity to gain access to correspondence pertaining to you inserted into the personnel file of the New York Telephone Company.

In my opinion, it is unlikely that you have a right to inspect the contents of a personnel file in possession of a private sector employer, such as the New York Telephone Company.

The New York Freedom of Information Law is applicable only to records of units of government in New York. Similarly, the federal Freedom of Information Act is applicable only to records of federal agencies. Since the New York Telephone Company and other private employers are not governmental entities, they are not subject to the responsibilities to disclose imposed upon government by the Freedom of Information Law. Further, to the best of my knowledge, there is no comparable provision of law that would enable employees in New York to gain access to personnel records pertaining to them that are in possession of a private employer.

There is but one suggestion that I can offer. In some instances, collective bargaining organizations, unions, negotiate contracts that enable the subjects of personnel records to view their records. If you are or had been a member of a union, it is suggested that you attempt to learn whether your collective bargaining agreement conferred a right upon employees to inspect personnel records pertaining to them.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1917

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 10, 1981

Mr. Robert T. Brier
Public Information Officer
City of Troy
City Hall
Troy, New York 12180

Dear Mr. Brier:

As I indicated during our recent conversation, the Committee has received your letter of Febrary 9, as well as the correspondence attached to it.

Your question as Public Information Officer for the City of Troy concerns the propriety of a refusal by the Troy Citizen's Forum to file with your office information requested by the Mayor's Advisory Task Force on Community Development.

Although you advised me that the situation described in your letter is moot due to the dissolution of the Troy Citizen's Forum by a recent resolution of the Troy City Council, a response will be provided should a comparable situation arise in the future.

First, each agency in accordance with §87(2) of the Freedom of Information Law is required to make available all of its records for public inspection and copying except those records that fall within one or more grounds for denial appearing in paragraphs (a) through (h).

Second, §87(3) of the Freedom of Information Law requires the maintenance of three specific types of records including:

> "(a) a record of the final vote of each member in every agency proceeding in which the member votes;
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

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

Several of the areas of inquiry raised by the Mayor's Task Force concern the mandated areas of recordkeeping and therefore must be made available.

Third, based upon the facts you have presented, it appears that the Troy Citizen's Forum, which was created by resolution of the Troy City Council, performed a governmental function that, therefore, fell within the scope of the definition of "agency" set forth in §86(3) of the Freedom of Information Law. Consequently, to the extent that records exist, they are in my view subject to rights of access granted by the Freedom of Information Law.

Although the Troy Citizen's Forum alleged that the Task Force requesting the information was not a "legally created body", that factor is irrelevant to rights of access. An agency subject to the Freedom of Information Law has an affirmative duty to make its records available to any person at the location for public inspection designated by the public body, regardless of the status of any individual or group that might seek access to such records [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. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Attorney

PPB/RJF/jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1918

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

March 10, 1981

Jody Adams
[redacted]

Dear Ms. Adams:

I have received your letter of February 10 in which you requested a "written ruling" regarding your capacity to listen to and record the "personal" tape recordings of the Town Clerk of the Town of Riverhead.

It is noted at the outset that the Committee does not have the capacity to issue "rulings". On the contrary, the Committee is authorized to issue advisory opinions. However, as you are aware, the courts have cited the opinions of the Committee as the basis for judicial determinations with increasing frequency.

According to your letter, the Town Clerk has denied access to the tape recordings on the basis that the tapes are not "legally required", that she uses the tapes as the basis for the creation of minutes and that it may be troublesome to arrange for listenings or reproduction of an existing tape recording.

In my opinion, the tape recording that you are seeking is available.

I direct your attention initially to §86(4) of the Freedom of Information Law, which 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, since the tape recording was produced by the Town Clerk in the performance of her official duties, it is a "record" subject to rights of access granted by the Law. Moreover, even though there is no requirement that a tape recording of a meeting be made, if it exists, it falls within the definition and is subject to the Freedom of Information Law.

It is also noted that, in an analagous situation, it was held that personal notes kept by the Secretary to the Board of Regents used as the basis for the compilation of minutes are accessible [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. The contention that the notes constituted personal property was dismissed by the court, which found that the notes were "records" subject to the Law.

In terms of rights of access, as you are aware, the Law provides that 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). Under the circumstances, since the tape recording is reflective of deliberations during an open meeting, I do not believe that any of the grounds for denial could appropriately be cited.

Lastly, a decision rendered by the Supreme Court, Nassau County, concerning access to tape recordings of a school board meeting held that the tape recordings are available for listening and copying (see attached, Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978). The court emphasized that, despite the claims of the school district that the reproduction of the tape recordings might be burdensome, such contentions could not defeat rights of access.

With regard to the Freedom of Information Commission in Connecticut, I have contacted the Commission and have spoken with its director. From my perspective, although the Commission has the capacity to make determinations on appeal, it is questionable whether it performs more adequately than the New York Committee.

First, the budget of the Connecticut Commission is approximately $200,000 per year, which is more than three times the budget of the Committee. Connecticut is a small state relative to New York in terms of both size and population. If one were to multiply the cost of the Connecticut

function in relation to New York's physical size and population, the cost of carrying out a similar function would likely be more than a million dollars per year. The Committee cannot envision the Legislature appropriating such a sum, nor would the Committee recommend an appropriation of that magnitude.

Second, according to the director of the Connecticut Commission, requests for records are often routinely denied and thereafter appealed to the Commission. Due to the lack of incentive on the part of government to comply when a request is initially made, and due to efforts to "buy time" prior to disclosing records, the Connecticut Commission currently faces a backlog of nearly five months before it can render a determination. Consequently, an applicant for records in Connecticut may be forced to wait months before an initial determination reviewable by a court can be made. In New York, the process of requesting records and appealing a denial of access can take less than a month. If judicial review of a denial is sought, a special proceeding under Article 78 of the Civil Practice Law and Rules, which is a relatively expeditious way of commencing a lawsuit, may be initiated.

Finally, as requested, enclosed is a listing of the members of the Committee and their addresses.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Town Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1919

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

March 17, 1981

Mark Kriss
Attorney
150 State Street
Albany, NY 12207

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kriss:

As you are aware, I have received the materials that you forwarded to this office.

Your question, as an attorney representing the New York State Association of Counties, is whether the Association is subject to the Freedom of Information Law.

Based upon the Freedom of Information Law, the by-laws and the constitution of the Association, I do not believe that it is subject to the Freedom of Information Law.

First and perhaps most importantly, §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".

Although the duties of the Association involve the promotion of more efficient county government, I do not believe that it is a state or municipal office or a "governmental entity".

Second, the by-laws of the Association indicate that the Association is a not-for-profit corporation; it is financed by dues paid by member counties and its employees are compensated by means of action taken by its Board of Directors. In this regard, I do not believe that the employees of the Association could be considered public employees, for, while they have a relationship with government, they are not employed by government, but rather by a corporate board of directors. In addition, Article 7 of the Constitution indicates that the capacity of members to vote and affect the proceedings of the Association is contingent upon the payment of dues.

In sum, although the purpose of the Association is to enhance the workings of government, the Association is not in my view a governmental entity. Therefore, it is reiterated that the New York State Association of Counties is not in my opinion subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Edwin Crawford

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1920

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

March 18, 1981

Mr. Samuel Zolondek
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zolondek:

Thank you for your letter of February 14 and your interest in the Freedom of Information Law.

You have requested advice with regard to the manner in which a request should be directed to the NYC Board of Education under the Freedom of Information Law. In order to assist you, I have enclosed a copy of the Freedom of Information Law, regulations promulgated by the Committee, which govern the procedural aspects of the Law, a pamphlet explaining the Law and a pocket card for your convenience.

It is noted at the outset that 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 appearing in §87(2)(a) through (h) of the Law.

Section 89(3) of the Law requires that an applicant submit a written request to the person designated as the records access officer in which he or she "reasonably describes" the records sought. In your request, you should attempt to identify the record or records you wish to see with as much specificity as possible.

A sample request letter which can be used as a guide is found on page seven of the enclosed 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
Executive Director

BY: Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1921

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1981

Ann Piznak
Temporary Chairman
Access to Records Appeal Board
Town of Deerpark
Huguenot, New York 12746

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Piznak:

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

As requested, enclosed is a copy of the text of the Freedom of Information Law. In addition, 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 law, model regulations designed to assist government in complying, an explanatory pamphlet that may be useful to you, and an article that I prepared which seeks to provide a "common sense" view of the Freedom of Information and the Open Meetings Laws.

While I am in general agreement with the contentions expressed in your letter, I would like to offer the following comments.

First, with regard to police blotters, it is noted that the term "police blotter" is not, to the best of my knowledge, specifically defined in any statute or regulation; on the contrary, it is a term derived by means of custom and usage. However, based upon custom and usage, it has been judicially determined that a police blotter generally consists of 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)]. Further, the decision cited

above held that a police blotter contains no investigative information, but rather is merely a summary of events or occurrences that is available under the Freedom of Information Law.

The exact nature of the blotter or analagous document maintained by the Deerpark Police Department is unknown to me. However, it is important to point out that §87(2)(e) of the Freedom of Information Law permits an agency to 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, rights of access to many police department records must of necessity be determined on a case by case basis. Further, the question generally involves potentially harmful effects of disclosure.

Second, with respect to the procedural implementation of the Freedom of Information Law, §1401.2 of the Committee's regulations enable a governing body, in this instance the Town Board, to designate one or more records access officers. If, for example, the Town Clerk is the only designated records access officer, that person would be responsible for processing all requests made under the Freedom of Information Law within the appropriate time limits [see Freedom of Information Law, §89(3) and regulations, §1401.5]. However, if more than one records access officer has been designated perhaps by department, those individuals would have the duty of responding to requests with respect to records within their respective areas of responsibility.

I hope that 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: Police Chief
Town Clerk
Town Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1922

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

March 23, 1981

Michael A. DePietro
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DePietro:

I have received your letter of February 18 and apologize for the delay in response.

According to your letter, you directed a request for records under the Freedom of Information Law to the Clerk-Treasurer of the Village of Coxsackie on February 6. However, as of February 18, 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 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)].

It was intimated in your letter that the records in which you are interested generally consist of the Village's books of account, ledgers and similar financial information. If that is so, I believe that such records are accessible. Section 87(2)(g)(i) of the Freedom of Information Law requires that statistical or factual information found within intra-agency materials be made available. Further, §51 of the General Municipal Law has long granted access to:

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

You indicated in good faith that your request may have been motivated in part by political considerations. In my view, the purpose for which records are sought is irrelevant to 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, affirmed 51 AD 2d 673, 378 NYS 2d 165].

Lastly, if you believe that the books of the Village are not being kept in accordance with the law, all that I can suggest is that you contact the Department of Audit and Control again. Perhaps that Department could compel Village officials to comply with the appropriate statutes if those statutes are not currently being 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
Executive Director

RJF:ss

cc: Clerk-Treasurer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1923

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

March 23, 1981

Mr. Horton R. Shaw
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Shaw:

As you are aware, I have received your correspondence. You have requested an advisory opinion regarding a denial of access to records directed to Robert Douglas, Director of Interscholastic Athletics in Westchester County. You are seeking copies of criteria regarding ice hockey officials, criteria as applied to you, and rating sheets pertaining to you.

It is emphasized at the outset that your inquiry is not easily answered due to the nature of the organizations with which you and Mr. Douglas are associated. For example, the New York State Public High School Athletic Association is a not-for-profit corporation which is independent and not a governmental entity. Further, the Association apparently serves as an umbrella organization that oversees various regional athletic councils and associations, which have relationships, contractual and otherwise, with public schools and school districts. In addition, the duties of Mr. Douglas with respect to his possible responsibilities under the Freedom of Information Law are unclear, for he serves in a dual capacity as Director of Interscholastic Athletics and as an employee of a BOCES.

Specifically, you wrote that:

> "[M]r. Douglas is a salaried employee of a BOCES whose salary and office operations are monitored by the Athletic Advisory Committee of the Lower Hudson Council of Chief School Administrators who have strong input into BOCES consideration of his employee review.

> "According to a telephone conversation today with the present Superintendent of BOCES Southern Westchester No. 2, Dr. Richard Lerer (914--937--3820) the office 'had to be a school position' so it was put into BOCES and Mr. Douglas and his staff are 'public employees.' In fact, Dr. Lerer said that he felt that my statement that in certain Sections a non-school person was doing assigning in error."

If the assertions quoted above are accurate, it would appear that the records in which you are interested would be subject to the Freedom of Information Law. In this regard, I direct your attention to §86(3) of the Freedom of Information Law, which defines "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of 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."

I believe that a BOCES is clearly a governmental entity performing a governmental function and, therefore, is an "agency" subject to the Law.

Second, §86(4) of the Freedom of Information Law defines "record" to mean:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfiles, computer tapes or discs, rules, regulations or codes."

In view of the foregoing, all records "kept, held, filed, produced or reproduced by, with or for..." the BOCES would in my view be subject to rights granted by the Freedom of Information Law.

In good faith, I must inform you that I have engaged in a number of discussions with Dr. Sandra Scott, Associate Executive Secretary to NYSPHSAA. Dr. Scott contends that, although Mr. Douglas is employed by BOCES, the duties that he performs for BOCES are separate and distinct from those performed as director of Interscholastic Athletics. She contends further, that Mr. Douglas, as well as the individuals within his supervision, are essentially independent contractors. As such, I believe that there remains a question of fact that must be answered in order to determine whether the records at issue fall within the scope of the Freedom of Information Law.

As indicated earlier, if the records are "agency" records, they are in my view subject to the Freedom of Information Law; if they are not "agency" records, there would be no obligation to comply with the Freedom of Information Law.

It is noted that a decision was rendered by the state's highest court, the Court of Appeals, in which it was held that a volunteer fire company is an "agency" subject to the Freedom of Information Law [see Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. A volunteer fire company is a not-for-profit corporation that serves one or more municipalities by means of a contractual relationship. However, since a volunteer fire company performs what has traditionally been deemed a governmental function, it was found to be an "agency" despite its legal status as a not-for-profit corporation. Moreover, while it was argued that the Freedom of Information Law might apply to those records of a volunteer fire company reflective of its governmental duties, and not to those records that might relate to non-governmental activities (in this case, a lottery), the Court cited the broad statement of legislative intent appearing in §86(4) of the Freedom of Information Law, and determined that all of the volunteer fire company's records should be considered agency records subject to the Freedom of Information Law. Whether a similar conclusion would be reached in the controversy in which you are involved is conjectural.

If the records in question are indeed subject to the Freedom of Information Law, they would in my opinion be available in great measure. Of relevance would be §87(2)(g), which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials whichaare 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. Stated differently, 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 must be made available.

Under the circumstances and assuming that the records constitute "agency" records, the criteria would in my view constitute statements of policy that are available. Similarly, the ratings might constitute "statistical tabulations" that are available, even if they are merely advisory in nature [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

However, if, for example, rating sheets identify raters by name or by a school, it is possible that disclosure of those identifying details would constitute an "unwarranted invasion of personal privacy". In such a case, the statistical tabulations could be made available after having deleted identifying details pursuant to §87(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:jm

cc: Robert Douglas

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1924

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

March 23, 1981

John Pape
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pape:

Robert Freeman has requested me to review your letter and enclosed materials of January 15.

In order to assist you with your requests for personal information under the Freedom of Information Law, I am enclosing some materials which I hope will be helpful. The attachments include:

- an explanatory pamphlet on the Freedom of Information Law which may be particularly useful to you, for it contains sample letters of request and appeal;

- the Freedom of Information Law; and

- a pocket card for your convenience.

Although the Committee does not have jurisdiction to render an opinion in the areas of concern you have identified on your tape recordings and in the correspondence, it is possible that you are unaware of a new state law, entitled "Sealing of Records Pertaining to Treatment for Mental Illness" , which is found in Mental Hygiene Law, §33.14 , and which was enacted in 1980. I have taken the liberty of enclosing a copy of this new law for your review.

I am sorry that I was unable to return your telephone calls to this office on March 18; however, unsuccessful attempts to reach you were made for three days at the number you left in your message. If you would like to discuss the issues that you raised with me, please feel free to call or write.

I regret that I cannot be of greater assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1925

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

March 23, 1981

Mrs. Muriel Shuman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Shuman:

I have received your letter of February 18 and apologize for the delay in response.

Once again, you have indicated that a representative of the Clara Barton High School for Health Professions has indicated that the School is not permitted to transmit copies of records directly to former students.

In this regard, it is reiterated that the federal Family Educational Rights and Privacy Act is applicable to any educational agency or institution that receives funding through a program administered by the United States Department of Education. Therefore, if the School in question is subject to the Act, the records in which you are interested are likely available to you.

Although this office cannot provide direction that would enable you to seek a review of the denial by the School, it is suggested that you contact the United States Department of Education. Specifically, the individual at that Department with whom I have had numerous dealings and who is extremely helpful is Ms. Patricia Ballinger. It is suggested that you write to her at the United States Department of Education, 4512 Switzer Building, Washington, D.C. 20202. Ms. Ballinger can be reached by telephone at (202)245-0233.

I hope that 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-1926

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

March 25, 1981

Mr. Gerald A. Scotti
President
Mohawk Valley Community College
Professional Association
1101 Sherman Drive
Utica, New York 13501

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scotti:

I have received your letter of February 19 and apologize for the delay in response.

You have indicated that you were denied access to records by Mohawk Valley Community College and its President, Dr. George H. Robertson. Specifically, access was denied with respect to records reflective of the current salary of the president of Mohawk Valley Community College, the salary of Mr. Robert Gray, a professional negotiator under contract with the College, as well as the final and official report of the Middle States Accreditation Team.

In my opinion, based upon the facts that you have provided, the records in question are accessible under the Freedom of Information Law.

With respect to the salaries of public officials, §87(3)(b) of the Freedom of Information Law requires that each agency, which includes a community college, is required to 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 language quoted above, it is clear that the Community College is required to maintain a record indicating the names, public office addresses, titles and salaries of all employees, including the president of the institution.

Further, while it might be contended that disclosure of such information might constitute an invasion of personal privacy, several points should be offered. First, the courts have consistently held that public employees enjoy a lesser right to privacy than members of the public generally, for public employees have a greater duty to be accountable than any other identifiable group. Second, the Committee has advised and the courts have upheld the notion that records which are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible a 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, if records concerning public employees are irrelevant to the performance of their official duties, they may be withheld under §87(2)(b) as an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

From my perspective, the Legislature made specific reference to payroll information pertaining to public employees based upon the tacit finding that disclosure of such information would result in a permissible rather than an unwarranted invasion of personal privacy. As such, I believe that a record indicating the salary of the president of Mohawk Valley Community College, as well as any other employee of the College, must be made available.

With respect to the salary of Mr. Gray, a professional negotiator under contract with the College, if Mr. Gray is employed by the College as its employee, the same conclusion must be reached as in the case of the college president. However, if he is not considered an employee of the College, the contract between Mr. Gray and the College in my view must be made available to any person under the Freedom of Information Law.

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). Under the circumstances, I believe that once a contract has been signed, it is reflective of the policy of an agency as well as a final determination made by an agency. Moreover, I do not believe that any of the grounds for denial could justifiably be cited.

It is also important to note that in a situation in which a compilation of salaries and fringe benefit data reflective of particular aspects of collective bargaining agreements in a number of school districts as sought, such records were found to be available by the Court of Appeals, the state's highest court [see Doolan v. BOCES, 48 NY 2d 341 (1979)]. Further, the court rejected the contention that disclosure of such information would "impair present or imminent contract awards or collective bargaining negotiations" under §87(2)(c) of the Freedom of Information Law. In my view, based upon the language of the Court of Appeals' decision, a denial of the information that you have requested would be inconsistent with the holding in Doolan.

The accreditation report is in my view also available, for, in short, it does not fall within any of the grounds for denial listed in §87(2).

Lastly, the rules and regulations adopted by Mohawk Valley Community College require that an applicant for records complete a "form prescribed by the president of the college identifying and specifying with particularity the records which are requested." In my view, the regulations fail to comply with the direction provided by 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.

Section 89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing, but that the request make reference only to "a record reasonably described". In view of the foregoing, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for withholding or delaying access to records; on the contrary, any request made in writing that reasonably describes the records sought should suffice. In addition, it is clear that an applicant for a record need not identify the record sought with particularity; all that the Law requires is that a request "reasonably" describe the record sought.

In order to assist the administration of the Mohawk Valley Community College in complying with the Freedom of Information Law, copies of this opinion, regulations and model regulations designed to assist agencies in complying will be sent to John Harniman and President Robertson.

I hope that 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. George H. Robertson

Mr. John W. Harniman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1927

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

March 26, 1981

Neil C. Crandall
City Clerk
City of Hornell
108 Broadway
Hornell, NY 14843

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Crandall:

As you are aware, I have received your letter of February 19. Please accept my apologies for the delay in response.

You have asked for an opinion regarding access to the contents of a personnel file by the subject of a personnel file.

In my opinion, portions of a personnel file are likely accessible to the subject of the file, but other portions might justifiably be withheld.

It is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the City of Hornell, are accessible, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

From my perspective, there are but two grounds for denial that might be applicable.

The first and perhaps most relevant ground for denial 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 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 information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Under the circumstances, it would appear that most records contained within a personnel file would consist of "intra-agency" materials, i.e. records transmitted between or among officials within City government. However, to the extent that they contain factual information, such as test scores, attendance records, determinations regarding a particular public employee and similar information I believe that they would be available. On the other hand, to the extent that the materials are reflective of advice, recommendation, suggestion or impression, for instance, I believe that they would be deniable.

Further, since the Law enables an agency to withhold "records or portions thereof" falling within one or more of the grounds for denial, an agency in receipt of a request is obliged to review the records sought in their entirety to determine the extent to which the grounds for denial may be applicable, if at all.

The only other ground for denial which in my view might 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". Although the subject of personnel records could

not invade his or her own privacy, it is possible that records contained within a personnel file may identify others. For example, if a personnel file contains recommendations or letters of reference, it is possible that disclosure of the identities of those who prepared such documentation would result in an unwarranted invasion of personal privacy. If that is the case, identifying details might be deleted from such records in order to protect privacy; if the deletion of identifying details would not protect the identities of those individuals, the records might be withheld in their entirety.

Further, as we discussed, there are often provisions within collective bargaining agreements that permit public employees to inspect and copy virtually the entire contents of their personnel files. In such cases, the collective bargaining agreements would likely provide rights in excess of those granted by the Freedom of Information Law. It is suggested that when responding to requests for personnel records that any existing collective bargaining agreements be reviewed to determine whether those agreements provide rights of access in addition to those granted under the Freedom of Information Law.

Lastly, I realize that you withheld a response in order to obtain the advice of this office. However, it is important to point out that the Freedom of Information Law prescribes time limits for response to requests. 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 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 may be appealed 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: Philip Prunoske

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1928

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

March 26, 1981

William A. Gilchrist
Commissioner of Personnel
Department of Personnel
Orange County Government Center
Goshen, New York 10924

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gilchrist:

I have received your letter of February 19 and apologize for the delay in response.

You have asked whether the County is obligated to disclose the home address of an employee, first, when an attorney's office requests the home address to serve legal papers and, second, when you are "required to furnish full personnel information via a court order".

It is noted at the outset that, as a general rule, it is the Committee's view that the home address of a public employee need not be disclosed under the Freedom of Information Law.

I direct your attention initially to §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..."

It is emphasized that the language quoted above represents a change from the analagous language in the Freedom of Information Law as originally enacted in 1974. Under that statute, the payroll record provision required that an agency make available a listing by name, address, title and salary; no indication of which address, home or

or business, was specified. Several agencies that had disclosed home addresses contended that public employees were contacted and in some instances harassed at their homes due to the disclosure of home addresses. Consequently, one among a series of amendments recommended by the Committee that became effective on January 1, 1978, involved a clarification to the effect that the payroll listing should make reference to the public office address of public employees.

Moreover, §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". Several points should be offered with respect to the privacy of public employees. First, the courts have found that public employees enjoy a lesser degree of privacy than members of the public generally, for public employees have a duty to be more accountable than any other identifiable group. Second, the Committee has advised and the courts have upheld the notion that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such cases 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been advised by the Committee and held judicially that records pertaining to public employees that are irrelevant to the performance of their official duties may be withheld on the ground that disclosure would 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, the home address generally has no relevance to the performance of the official duties of a public employee. Therefore, it is my view that a record indicating the home address of a public employee may be withheld under the Freedom of Information Law on the ground that disclosure would constitute an "unwarranted invasion of personal privacy".

Based upon the foregoing, with respect to your first question, I do not believe that you would be required to disclose the home address of a public employee employed by the County to an attorney seeking to serve legal papers.

However, with respect to the second situation that you described concerning a court order, I believe that you have no choice but to comply with a court order. As you are aware, a failure to comply with a court order may result in a charge of contempt. Further, in a situation in which a court order is issued, such a situation would not be considered an inquiry made under the Freedom of Information Law, but rather a direction given by a court.

Lastly, enclosed is a copy of the advisory opinion that you requested in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-598
FOIL-AO-1929

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

March 27, 1981

Bernice McPhillips
McPhillips, Fitzgerald, Meyer
& McLenithan
Attorneys at Law
288 Glen Street-P.O. Box 309
Glens Falls, NY 12801

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. McPhillips:

I have received your letter of February 23 and apologize for the delay in response.

As the legal representative of the Board of Education of the Schuylerville Central School District, you have requested an advisory opinion regarding the receipt of "a special request for certain information". Specifically, a member of the news media has requested a copy of the minutes of an executive session held by the Board on February 12, 1981. During the executive session, a grievance hearing was conducted pursuant to the terms of a collective bargaining agreement between the District and its Teachers' Association. You have contended that the information in question might result in a grievance alleging a breach of non-compliance with the terms of the existing contract.

First, although I am unfamiliar with the specific terms of the contract between the Teachers' Association and the District, you have intimated that the contract may contain provisions that require that certain records be withheld. If that is the case, the contract is in my view 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 a 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.

Second, it is emphasized that the Freedom of Information Law is permissive. Stated differently, the Law generally states that certain categories of records may be withheld; nowhere in the Law does it state that such records must be withheld. The only instance in which records must be withheld would involve a situation in which the records are specifically exempted from disclosure by statute under §87(2)(a). For example, in the context of school district records, the federal Family Educational Rights and Privacy Act requires that education records identifiable to a particular student or students be kept confidential with respect to all but the parents of students under the age of eighteen. As such, a school district would be precluded from disclosing education records, unless the disclosures are made in accordance with the specific provisions of the act. Otherwise, even if a ground for denial might be applicable, an agency, such as a school district, would not be compelled to withhold, if, for example, it is determined that disclosure would be in the public interest.

Third, it is unclear whether minutes were required to have been kept or even whether they should have been kept. You wrote that a grievance hearing was conducted during an executive session. In this regard, it is not entirely clear whether a hearing constitutes a "meeting" in all cases. For instance, as you are aware, §103(1) of the Open Meetings Law exempts from the provisions of the Law quasi-judicial proceedings. I have no knowledge as to whether the hearing in question could have been considered quasi-judicial. If it was quasi-judicial, it would fall outside the scope of the Open Meetings Law and the general requirements of the Open Meetings Law would not have been applicable.

Further, it is questionable whether action may be taken by a board of education during an executive session.

With regard to minutes of executive session, §101(2) of the Open Meetings Law requires that:

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

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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

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

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present".

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

Fourth, from my perspective, whether or not minutes were required to have been kept is not determinative of issues regarding rights of access. Here I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 breadth of the definition quoted above, any records prepared by or in possession of the District would fall within the scope of rights of access granted by the Freedom of Information Law. Consequently, whether the records in question may be characterized as minutes or other types of documents is in my view of no moment; they are in any case subject to the Freedom of Information Law.

Fifth, 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).

In view of the foregoing, the question is whether the records fall within any of the grounds for denial. If, for example, a determination was made regarding the grievance, I believe that it would be available. 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..."

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. Based upon the foregoing, if the records in question contain statistical or factual information, instructions to staff that affect the public, or final statements of policy or determinations, they must in my view be made available.

The other ground for denial that might be applicable is §87(2)(c), which provides that an agency may withhold records or portions thereof when disclosure would "impair present or imminent contract awards or collective bargaining negotiations." Based upon the facts that you have provided, it does not appear that the records would have an effect upon present or imminent collective bargaining negotiations.

Further, it is noted that in United Federation of Teachers v. New York City Health and Hospitals Corporation [428 NYS 2d 823 (1980)], a court granted access to some 1,500 grievances and decisions rendered on grievances signed by nurses represented by a competing union. In addition, the agency could not meet its burden or proving that disclosure would impair imminent contract awards or collective bargaining negotiations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1930

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

March 27, 1981

Ms. Theresa D'Antonio
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. D'Antonio:

I have received your letter of February 19 as well as the correspondence attached to it.

Your inquiry describes a situation in which you requested records on February 2 and have not received a response as of the date of your letter.

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 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 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 also noted that §89(3) of the Law states that an agency may require that a request be made in writing in which the records sought are "reasonably described". However, §1401.5(a) of the regulations promulgated by the Committee, which goven the procedural aspects of the Freedom of Information Law and have the force and effect of law, states that:

> "[A]n agency may require that a request be made in writing or may make records available upon oral request."

As such, while an agency may require that a request be made in writing, it may accept oral requests. If the practice is to accept oral requests, I believe that the time limits for response described in the preceding paragraphs would be applicable.

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 the Board of Trustees of the Village of Piermont.

I hope that 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: Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1931

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

March 27, 1981

Carol Myers
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Myers:

I have received your letter of March 25 today in which you requested "backup material" regarding your right to obtain your daughter's school records and grades.

In this regard, enclosed is a copy of the rules and regulations promulgated by the then United States Department of Health, Education and Welfare (now the Department of Education) under the Family Educational Rights and Privacy Act. In brief, the Act states that all "education records" in possession of an educational institution pertaining to a particular student under the age of eighteen are available to the parents of the student. In addition, the records are confidential with respect to all but the parents, unless the parents waive confidentiality.

In regard to your capacity to tape record a meeting between yourself and school officials, it is suggested that you request to use a tape recorder, or at least inform School District officials of your intent to use a tape recorder.

It is noted that §250.00 of the Penal Law defines "mechanical overhearing of a conversation" to mean:

> "...the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment."

In view of the foregoing, I believe that if you use a tape recorder, you have essentially given consent and that, therefore, the use of a tape recorder would not constitute a violation of any 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

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1932
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 30, 1981

Thomas J. Gary
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gary:

I have finally received your correspondence. As we discussed during our telephone conversation, although I received several copies of correspondence from you in October, I never received with that correspondence your cover letter in which you requested assistance. That letter, which is dated October 25, was received by this office on March 26, 1981.

It appears that, having directed a request to the Town of Parishville in July of 1980, you have not yet received the records in which you are interested. It is noted, however, that, by letter dated July 30, Supervisor Wilson granted you the opportunity to inspect the records during the regular business hours of the Town, 9:00 a.m. through 3:00 p.m., Monday through Friday, at his office. Based upon the response from the Town Supervisor, I am not sure of the reason for the controversy.

From my perspective, although the Freedom of Information Law requires that an agency make accessible records available on request, there is no requirement that an agency, such as a town, deliver records to an applicant. The responsibility of an agency under §1401.4(a) of the regulations promulgated by the Committee is to "accept requests for public access to records and produce records during all hours they are regularly open for business". If an applicant's schedule is inconsistent with the regular

business hours of an agency, I believe that there are two options that the applicant may follow. First, the applicant might alter his or her own schedule to visit the agency's office during the agency's regular business hours. In the alternative, if a request is granted, the records should be copied and mailed to the applicant upon payment of the requisite fees for photocopying as well as postage. In short, an agency is not required to alter its regular business hours to accommodate the schedule of a particular applicant.

I agree that it might be appropriate for the Town of Parishville to review its existing procedures in an effort to update them in conjunction with the provisions of the amended Freedom of Information Law, effective January 1, 1978, and the regulations promulgated thereunder by the Committee. Enclosed for yourself and the Town Supervisor are copies of the Freedom of Information Law, regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, and model regulations designed to assist government in complying with 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

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Dean Wilson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1933

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

March 30, 1981

Mr. Anthony J. Lomio
Box 51
79-A-2461
Comstock, NY 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lomio:

I have received your letters of February 20 and March 20 and the materials attached to them. Please accept my apologies for the delay in response.

Your inquiry concerns your unsuccessful attempts in gaining access to various records relating to your arrest and conviction. Although you have apparently followed the advice given by the Committee on October 6, 1980, you have encountered difficulties in obtaining this information from several local and state agencies.

I would like to offer the following observations.

First, as stated in our earlier correspondence, the Freedom of Information Law is not applicable to the courts or court records. However, some of the records that you are seeking are likely available under §255 of the Judiciary Law. It is suggested that you renew your requests to the courts and that you provide as much identifying information as possible, including, for example, dates, file designations, index and docket numbers, etc.

Second, as indicated in the previous letter, the Freedom of Information Law is applicable to agencies, including the offices of districts attorney and the state police.

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)].

Third, if you are unsuccessful after having exhausted the appeal procedure described above, you may seek judicial review of the agency's final denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. When an agency denies access to records, it has the burden of proving that the record sought falls within one or more of the exceptions listed in §87(2) of the Freedom of Information Law. Strict attention should be given to the thirty day statute of limitation period of §89(4)(a), otherwise the Freedom of Information Law request procedure must be initiated again.

Further, as you have indicated in your correspondence, particular criminal and incarceration records may be available pursuant to statutes other than the Freedom of Information Law. Specifically, one letter you received from the Orange County Sheriff's Department states that the photocopies of jail records are available only by court order. Section 500-f of the Correction Law requires that daily records of the commitments and discharges of all prisoners constitute public records that must be kept on file permanently. In addition, case law has held that where a record is accessible to the public,

there is also a concomitant right to copy [see e.g., In re Becker, 200 AD 178, 192 NYS 754 (1922)]. Therefore, if records are available for inspection, copies should be produced upon request and payment of the requisite fees for photocopying.

Fourth, you may be unaware of the rules and regulations promulgated pursuant to the Correction Law, §29 (2), which set forth the procedure by which a person may request criminal history records compiled by the New York State Division of Criminal Justice Services. Further, the Department of Correctional Services maintains inmate records, which include some of the information you have been unable to obtain elsewhere. In particular, §5.20, "Examination of inmate record by subject or his attorney", may be of interest to you, and I have enclosed a copy for your review.

Lastly, it is emphasized that some of the records you are seeking may be confidential by statute. For example, minutes of grand jury proceedings are confidential without a court order [see Criminal Procedure Law, §190.25].

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Attorney

PPB:RJF:jm

cc: James S. Granan
Keith J. McLean

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1934

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

March 30, 1981

John Rafferty, Chief
Investigations Division
U.S. Office of Personnel Management
Eastern Region
Federal Building
26 Federal Plaza
New York, New York 10007

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rafferty:

As you are aware, I have received your letters of February 23 and March 12. Please accept my apologies for the delay in response.

As Chief of the Investigations Division of the United States Office of Personnel Management (OPM), you have raised questions regarding the denial of criminal history information in possession of the New York State Division of Criminal Justice Services (DCJS) that has been requested by the OPM.

It is noted at the outset that you requested criminal history information from DCJS through this office. In this regard, please be advised that the Committee on Public Access to Records has the authority only to advise with respect to the Freedom of Information Law; although the courts have cited the Committee's opinions with increasing frequency, the Committee has no authority to compel an agency to comply with the Law.

In terms of background, you wrote that:

> "[T]he OPM is charged with the responsibility for conducting investigations concerning the (1) basic fitness, and (2) clearance for access to classified

> or specially restricted information and material of applicants and employees in the Federal service, and of Federal contractor employees working in positions having an impact on the national security. The OPM also investigates persons suspected of violating Federal laws, regulations, and rules administed by the OPM.
>
> "The investigations program of the OPM is an authorized law enforcement activity. Criminal history information from State and Local law enforcement authorities is vital to each investigation conducted by the OPM, because of the need to establish whether the individuals being investigated are honest and law abiding as required by the statutes and Presidential Executive orders under which we conduct our investigations.
>
> "One of our primary authorities for conducting investigations is Presidential Executive Order 10450, as amended, which requires that each of our investigations include inquiries to Local law enforcment authorities. E.O. 10450 also establishes a standard for making security determinations which refer to criminal conduct."

Further, you recently sent a pamphlet entitled "The U.S. Office of Personnal Management: An Authorized User of State and Local Criminal History Information" (U.S. Government Printing Office: 1981- 720-035/5415), which details the OPM's program regarding the use of state and local criminal history information.

You also transmitted a copy of a response to your inquiry by Adam F. D'Alessandro, Deputy Commissioner of DCJS. Mr. D'Alessandro wrote in relevant part:

> "...that budgetary constraints dictated a policy of ensuring that we satisfied our statutory responsibilities first and that we undertook only those additional tasks permitted by available resources. In that regard the only non-

> statutory tasks that we are in a position to provide is to assist non-New York State criminal justice agencies in the conduct of criminal investigations. Even that service deleteriously impacts our ability to carry out our primary responsibilities.
>
> "We define criminal investigation as that investigation which is carried out as the result of a crime having been reported to a law enforcement agency. We do not consider the investigation of an applicant for employment to be a criminal investigation. Accordingly, I regret to inform you that we are unable at the present time to accede to your request for access to our files."

In my opinion, the criminal history information in which you are interested is available in great measure, if not in toto.

It is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as DCJS, are accessible, 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).

From my perspective, there are three grounds for denial that are relevant to your inquiry. However, in my view, only one ground for denial might justifiably be cited as a basis for withholding.

One ground for denial of possible relevance is §87(2)(g). That 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. 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, although criminal history information might properly be characterized as "intra-agency" material, it consists solely of factual information. Consequently, I do not believe that §87(2)(g) could be cited as a basis for withholding.

A second ground for denial of possible 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."

The areas of denial envisioned in subparagraphs (i) through (iv) of §87(2)(e) are based largely upon potentially harmful effects of disclosure. From my perspective, it is unlikely that disclosure of criminal history information to OPM would interfere with a law enforcement investigation, deprive a person of a right to a fair trial, identify a confidential source, or reveal non-routine criminal investigative techniques or procedures. Consequently, I do not believe that §87(2)(e) could be cited to justify a denial of access to the criminal history information sought by OPM.

Moreover, in judicial determinations rendered under both the original Freedom of Information Law and the extant statute, which became effective on January 1, 1978, it has been held that the "law enforcement purposes" exception may be cited only be a criminal law enforcement agency [see e.g., Young v. Town of Huntington, 388 NYS 2d 978 (1976); and Broughton v. Lewis, Sup. Ct., Albany Cty., (1978)]. In my view, although DCJS provides services to criminal law enforcement agencies, it is not itself a criminal law enforcement agency for it does not investigate under or otherwise enforce the criminal laws. Consequently, it is questionable whether DCJS could rely upon §87(2)(e) as a basis for withholding.

The third relevant ground for denial is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy."

In the past, it has been advised by this office that certain elements of the criminal history information maintained by DCJS must be made available to the public under the Freedom of Information Law. For instance, it has been contended by this office that conviction data must be made available to any person, and not only to criminal law enforcement agencies, for records of conviction are accessible from the courts that maintain possession of such records. If the conviction data is available as of right from a court, it is difficult to envision a rationale for withholding the same information when it is in the possession of a second government office, i.e., DCJS.

With respect to arrest data, I believe that there may be significant privacy considerations. For example, if an individual has been arrested but not convicted, disclosure of a record of arrest might cause hardship to the subject of the record. Consequently, perhaps disclosure would result in an unwarranted invasion of personal privacy. Further, records pertaining to charges that have been dismissed in favor of an accused are often sealed under §160.50 of the Criminal Procedure Law.

Assuming that the criminal history information that you are seeking has not been sealed, it is in my view subject to rights of access granted by the Freedom of Information Law in all respects. As intimated earlier, I believe that all conviction data is accessible, for the same information must be made available by courts that have possession of conviction records. With respect to arrest data, assuming that it exists, it might be available or denial depending upon privacy considerations.

It is noted that the functions, powers and duties of DCJS are described in §837 of the Executive Law. From my perspective, nothing in the Executive Law gives DCJS the capacity to deny access to all of its criminal history information. Section 837(8) of the Executive Law states that the Division shall have the power to:

> "[A]dopt appropriate measures to assure the security and privacy of identification and information data..."

The language quoted above does not, in my view, enable DCJS to withhold all criminal history information. Moreover, the language of §837(8) could not in my opinion be characterized as a statutory exemption from disclosure. While a review of the regulations promulgated by DCJS indicates that certain aspects of the regulations designate particular state and local government agencies that may receive criminal history information, those regulations do not in my view legally restrict access to criminal history information that may be requested by others. In addition, if regulations effectively impose a restriction upon access, I believe that they would be void to the extent that they conflict with rights of access granted by statutes, such as the Freedom of Information Law. As a general rule, in the absence of a specific statutory exemption precluding disclosure, regulations cannot in my view abridge or in anyway diminish rights granted by a statute [see e.g., Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405].

It is important to point out that the regulations established by DCJS impose a fee of a maximum of ten dollars for the search and production of criminal history information. Under the circumstances and assuming that at least portions of the information in which you are interested are available, I believe that DCJS may assess a fee of ten dollars as prescribed by its regulations.

I would like to offer two comments with regard to the statements made in the letter addressed to you by Deputy Commissioner D'Alessandro. First, it is inferred that it is not the statutory responsibility of DCJS to respond to requests such as yours, for requests are honored only with respect to designated state and local government agencies. In this regard, under the provisions of the Freedom of Information Law, I believe that DCJS has the statutory responsibility to respond to all requests, whether or not the records are available.

Second, it has been contended in the past that a shortage of manpower or funds can enable an agency to escape its responsibilities under the Freedom of Information Law. However, such arguments have been rejected. As stated in United Federation of Teachers v. New York City Health and Hospitals Corporation [428 NYS 2d 823 (1980)], a shortage of manpower to comply with a request is no defense for a denial of access, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law".

Lastly, your correspondence as well as a brochure that you transmitted to this office indicate that OPM requests criminal history information to conduct "personal security investigations" pursuant to acts of Congress, a presidential executive order, and federal agency regulations. The pamphlet also states that OPM uses the information based upon the direction given in LEAA regulations and the federal Privacy Act. Therefore, while I can appreciate the interest in the protection of privacy expressed by DCJS, it would appear that OPM seeks to use criminal history information in a manner consistent with any guidelines, rules or statutes under which DCJS performs it duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Commissioner Rogers
Deputy Commissioner D'Alessandro
Robert Schlanger, Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1935

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

March 30, 1981

Mr. Joseph R. Jones
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jones:

I have received your request for records today. Please note that the delay in receipt of your letter was due apparently to transmission of your letter initially to the State Department of Civil Service.

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, such as those in which you are interested, nor does it have the authority to compel agencies to comply with the Freedom of Information Law.

Since you are interested in obtaining materials relative to a civil service examination given to New York City police officers, it is suggested that you direct your requests to the State Department of Civil Service and the New York City Department of Personnel. In the case of the Department of Personnel, you should address your letter to the Records Access Officer, New York City Department of Personnel, 220 Church Street, New York, NY 10013.

It is noted that the Freedom of Information Law requires that an applicant "reasonably describe" the records in which he or she is interested. Therefore, it is suggested that you provide as much specificity as possible when you make your request and attempt to include, for example, dates of examinations, types of examinations, and similar information that will help the agency in locating the records in which you are interested.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the Law, and an explanatory pamphlet on the subject. 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1936

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

March 31, 1981

Charles M. Peale
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Peale:

I am in receipt of your letter of February 26 and apologize for the delay in response.

You have raised questions concerning the contents of your pre-sentence investigation report, and have requested the Committee's advice as to the best method of obtaining access to the report.

The Criminal Procedure Law, §390.50(1) (see attached) states in relevant part that "Any pre-sentence report or memorandum submitted to the court 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).

Additional research into the rules and regulations of the Department of Correctional Services indicates that inmate records compiled by the Department may include the pre-sentence report as defined by the Criminal Procedure Law, §390.30 (see attached). Further, §5.20 of the regulations permits examination of inmate records by the subject of the records or his or her attorney. However, §5.23, entitled "Confidential Records and Data", prohibits the release of information which is confidential pursuant to some other provision of law and permits the release of such information only in accordance with the specific law governing access to such records.

Under the circumstances, §400.10 of the Criminal Procedure Law (see attached) would appear to be applicable. That provision, in brief, states that a pre-sentence conference may be held in an open court or in chamber in order to "resolve any discrepancies between the pre-sentence report, or other information the court has received, and the defendant's pre-sentence memorandum submitted pursuant to §390.40..." (see attached). Consequently, it appears that any discrepancies in the pre-sentence report should have been brought to the attention of the court before the pronouncement of sentence.

The Freedom of Information Law does not provide additional rights of access, 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". As indicated earlier, one such exemption from disclosure is §390.50 of the Criminal Procedure Law regarding pre-sentence reports.

It is suggested that you apply for the pre-sentence report from the court in which you were sentenced. It might also be worthwhile to seek the aid of Prisoners' Legal Services or a similar organization.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Attorney

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1938

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

March 31, 1981

Ms. Harriet Schwartz
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Schwartz:

I have received your letter of February 23 and apologize for the delay in response.

Your inquiry concerns the authority for changing the classification of the Bedford Hills Correctional Facility from a medium security prison to a maximum security prison.

Having researched the matter for you, a regulation designating the change in status of the Facility in question was filed with the Department of State, which published state agencies' rules and regulations, on August 27, 1980. The regulation in question became effective on September 8, 1980.

It is noted that neither the State Legislature nor the Governor specifically acts with respect to rules promulgated by state agencies. Often rule making procedures are governed by the State Administrative Procedure Act. However, that Act specifically exempts the Department of Correctional Services from its provisions [see State Administrative Procedure Act, §102(1)]. In terms of the statutory basis for the change in regulations, the filing in possession of the Department of State indicates that §§70 and 112 of the Correction Law provide the Commissioner of Correctional Services the authority to promulgate regulations. Section 70 of the Correction Law is entitled "Establishment, use and designation of correctional facil-

ities". Section 112 of the Correction Law, entitled "Powers and duties of commissioner of correction relating to correctional facilities" states in subdivision (1) that:

> "[T]he commissioner of correction shall have the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof."

Based upon the foregoing, the Commissioner and the Department in my view clearly had the legal authority to promulgate regulations regarding a change in the classification of the Bedford Hills Correctional Facility.

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-1939

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

April 1, 1981

Charles D. Maurer
Attorney at Law
1415 Kellum Place
Garden City, NY 11530

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Maurer:

As you are aware, I have received your letter of February 26. Please accept my apologies for the delay in response.

You have requested an advisory opinion "concerning the release by the State Education Department of the report of a hearing panel in a situation where the charges against the employee were withdrawn after the report was issued but before it was implemented". You indicated further that advice might be rendered based upon the following hypothetical situation that you described as follows:

> "The teacher was charged pursuant to Section 3020-a of the Education Law. After the hearing, the panel, by a 2-1 majority, dismissed one of the two charges but found him guilty of the other charge. Dismissal was recommended. The teacher entered into an agreement with the Superintendent and Board of Education whereby the charges were withdrawn and the teacher remained on staff for a year, at which time he retired. A copy of the agreement was submitted to the State Education Department".

Your question is whether, under the circumstances of the hypothetical situation that you described, the hearing panel's report would be deniable under the Freedom of Information Law.

I am not sure there is any clear and unequivocal response that may be offered. However, it would appear that the hearing panel's report might be deniable 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. Stated differently, all records in possession of an agency, such as a school district or the Education 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 Law.

From my perspective, the most relevant ground for denial under the circumstances 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..."

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 policies or determinations must be made available. Based upon the hypothetical situation that you described, it would appear that the hearing panel's report would have constituted a final determination, but for the fact that an ensuing agreement was reached whereby the charges were withdrawn. If indeed the

agreement essentially replaced the hearing panel's report, the agreement would in my view constitute the final determination accessible under the Freedom of Information Law, and the hearing panel's report would not be reflective of a final determination. Therefore, it might fall within the scope of deniable intra-agency material under §87(2)(g).

Nevertheless, it is emphasized that the Freedom of Information Law is permissive. While an agency may withhold records falling within the grounds for denial, there is no general requirement that an agency must withhold those records. Therefore, while it is possible that the hearing panel's report may have been deniable under the Freedom of Information Law, there would in my view be no requirement that the report be withheld.

This point is in my opinion bolstered by the provisions of the Education Law and the interpretation of those provisions by the Commissioner of Education.

Specifically, in a tenure proceeding initiated under §3020-a of the Education Law, the last sentence of subdivision (4) entitled "Post hearing procedures", states that: "[I]f the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record". In my view, the substitution of an agreement for the report of the hearing panel would not constitute an "acquittal". As such, I do not believe that the expungement provisions described in §3020-a (4) of the Education Law would be applicable to the situation that you presented.

Moreover, in discussing the expungement provisions, in Matter of the Appeal of Gideon Hirsch (Decision No. 9583, January 4, 1978) the Commissioner of Education wrote that:

> "[I]t is clear from the language of this subdivision that charges must be expunged from an employee's record only where the employee has been acquitted after a hearing has been held concerning such charges. The language of the subdivision does not, in my opinion, require or imply that

> where charges have been brought against an employee and subsequently withdrawn, such charges and all references to them be expunged from the employee's record".

In view of the foregoing, even though charges may have been withdrawn, it appears that the records reflective of and related to the charges need not be expunged. Therefore, it is reiterated that if the records in question continue to exist, they may in my view be disclosed, even if it is possible that a ground for denial 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:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1940

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

April 1, 1981

Robert Cole
#75-a-4096
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cole:

I have received your letter of February 28. Please accept my apologies for the delay in response.

In brief, you wrote that you attempted to gain access to records, that you were denied, but that you prevailed after having initiated a proceeding in the Washington County Supreme Court. On January 16, you were transferred "on a punitive transfer" to the Clinton Correctional Facility. You have contended, based upon information and belief, that your transfer was due to the initiation of the judicial proceeding to which you made reference.

You have asked that the Committee investigate the matter, which you believe has resulted due to the legal assertion of your rights. You have also asked that this office forward to you "the actual reasons for this transfer".

First, I offer you congratulations for successfully asserting your rights under the Freedom of Information Law. If possible, I would appreciate a copy of the decision.

Second, the Committee does not have the authority to "investigate". On the contrary, the Committee has only the authority to provide advice with respect to the Freedom of Information Law. Further, opinions of the Committee are not binding upon an agency, and the Committee has no authority to compel an agency to comply with the Freedom of Information Law.

Third, it is suggested that you initiate a request for records reflective of the reasons for your transfer and direct the request to the records access officer at the Department of Correctional Services. It is possible that the information that you are seeking is found within your "inmate record," which is defined under §5.5(g) of the regulations promulgated by the Department to mean:

> "...a department record that pertains to an individual inmate. The documents and information contained in an inmate record include, but are not limited to, the commitment, the DCJS report, the presentence report as defined in CPL 390.30, the receiving blotter, personal history data, criminal history information, including correctional supervision history data, as defined in 28 C.F.R 20.3".

Lastly, it is suggested that you seek to enlist the aid of an attorney with Prisoners' Legal Services or a similar organization. Perhaps an attorney could help you in gaining access to the records in question and the official reasons for your transfer.

I hope that 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-1941

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

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 1, 1981

Robert E. Ganz, Esq.
Suite 432
100 State Street
Albany, New York 12207

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ganz:

As you are aware, I have received your letter of February 25 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have asked for a number of records from a series of state and local government agencies which relate to conditions at NL Industries, Inc., located in Colonie, New York. The records pertain to the use of radioactive products at that site. You have also raised specific questions regarding the applicability of the "law enforcement" exception to rights of access found in the Freedom of Information Law and contended that the records in question should be made available based upon the notion that any assertion of confidentiality has effectively been waived due to the publication of findings relating to NL Industries in the local media. You also wrote that litigation has been initiated by the Department of Environmental Conservation and that its action has not yet been terminated.

I would like to offer the following observations with respect to your inquiry.

First, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as those that you have identified, 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, the "law enforcement" exception to which you made specific reference is found within §87(2)(e) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> 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 is questionable whether the cited provision may be appropriately cited as a basis for withholding. In this regard, in judicial determinations rendered under both the Freedom of Information Law as originally enacted in 1974 and in its current form, which became effective on January 1, 1978, it has been held that the so-called "law enforcement" exception may properly be asserted only by a criminal law enforcement agency [see e.g., Young v. Town of Huntington, 388 NYS 2d 978 (1976); and Broughton v. Lewis, Sup. Ct., Albany Cty., (1978)]. In view of the determinations cited above, it is possible that none of the agencies to which you made reference may rely upon §87(2)(e) to withhold the documentation in question.

Further, even if the agencies in question have the capacity to rely upon §87(2)(e) as a general matter, many of the records in which you are interested may have been compiled not for law enforcement purposes, but rather in the ordinary course of business. From my perspective, even though records might relate to an enforcement proceeding, if they were compiled in the ordinary course of business, they could not be characterized as records compiled for law enforcement purposes.

In addition, if §87(2)(e) could be cited as a basis for withholding, it is questionable whether disclosure at this juncture would have any effect upon a proceeding. I believe that the language of the majority of the exceptions to rights of access found in the Freedom of Information Law are based upon potentially harmful effects of disclosure. This is particularly so with regard to §87(2)(e), which contains an operative verb with regard to each of the four descriptions of records compiled for law enforcement purposes that may be withheld. As such, under §87(2)(e), the questions are, in brief, whether records compiled for law enforcement purposes would if disclosed 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 this controversy, it is conjectural whether any of the harmful effects of disclosure envisioned by §87(2)(e) would indeed arise at this juncture.

Third, there are other exceptions to rights of access that might be relevant.

For instance, §87(2)(a) of the Freedom of Information Law states that an agency may not disclose records that are "specifically exempted from disclosure by state or federal statute". Since you mentioned that litigation has been commenced, it is possible that some of the records might be confidential under §3101 of the Civil Practice Law and Rules. By way of example, to the extent that the records that you are seeking constitute material prepared for litigation, I believe that such materials would be exempted from disclosure under §3101(d) of the Civil Practice Law and Rules and, therefore, under §87(2)(a) of the Freedom of Information Law. However, in my view, the cited provision of the Civil Practice Law and Rules would not be applicable if the records that you are seeking were prepared in the ordinary course of business.

Another possible ground for denial is §87(2)(g). However, that provision might also be cited as a basis for disclosing. 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 emphasized that the language quoted above contains what in effect is a double negative. Stated differently, 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 must be made available.

Several of the areas of your request likely involve statistical or factual information or final determinations made by an agency. From my perspective, those statistical or factual findings or final determinations would be accessible, unless another ground for denial is applicable.

Another possible ground for denial is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". The cited provision might be applicable, for example, with respect to records of the "body scans" of residents in the area of the NL Industries plant. However, as you suggested in your request, identifying details might be deleted to protect the privacy of the individuals who are the subjects of those records.

You asked whether "factual studies, reports, notes and memorandums" that have been "discussed in the local media" must be made available to you on the ground that disclosure to the media has resulted in a waiver of confidentiality.

The extent to which the materials in question have been disclosed to the news media in unknown to me. However, 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, if the records in which you are interested have been disclosed to other members of the public, I believe that your request should be treated in the same fashion.

Lastly, it is noted that the introductory language of §87(2) enables an agency to withhold records "or portions thereof" that fall within one or more grounds for denial

that follow. Consequently, I believe that an agency in receipt of a request is obliged to review the records sought in their entirety to determine which portions, if any, fall 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:jm

cc: Department of Enviromental Conservation
Department of Health
Department of Labor
Albany County Health Department
Albany County Sewer District
Colonie Pure Waters District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1942

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

April 1, 1981

William L. Matthes
Editor and Publisher
The Lookout
Grand Union Plaza
P.O. Box 205
Hopewell Junction, NY 12533

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Matthes:

I am in receipt of your letter of February 26 and apologize for the delay in response.

You have raised questions concerning the availability of records under the Freedom of Information Law that were presented by a panelist representing the Department of Environmental Conservation at a meeting held in the East Fishkill Town Hall. You have indicated that you were subject to "physical obstruction" when you attempted to photograph a file containing data regarding pollution by a second employee of the Department of Environmental Conservation.

First, based upon the situation you have described in your letter, it is not clear as to the exact nature of the records that you were unable to photograph.

Second, while an agency may accept and respond to verbal requests for records, §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee, permit an agency to require that a request be made in writing.

Further, it is emphasized that an agency is required to respond to requests and produce records only during its regular business hours (see regulations, §1401.4). Consequently, it is likely that you could have been required to

request an opportunity to photograph the records in question during the regular business hours of the agency that maintained custody of the records.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Attorney

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1943

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

April 2, 1981

Raymond Bonazzo
80-A-502
Box 149
Attica, NY 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bonazzo:

I have received your letter of February 28, as well as the correspondence appended thereto. Please accept my apologies for the delay in response.

You have asked for assistance regarding your efforts in gaining access to records from the Westchester County Sheriff's Department.

In all honesty, I do not believe that I can provide advice in addition to that given in my letter to you of February 26. Without having the opportunity to become familiar with the specific records that you are seeking, it is all but impossible to know whether the records fall within one or more of the exceptions to rights of access or whether the contentions expressed in your letter to Mr. Yasgur, the County Attorney, are accurate.

It is noted that §89(4)(a) of the Freedom of Information Law requires that copies of appeals and the determinations that follow be transmitted to the Committee. In this regard, having searched our files, it appears that copies of neither an appeal nor a determination have been forwarded to the Committee by the Office of the County Attorney.

Lastly, it is emphasized that §87(2) of the Law provides that an agency may withhold records "or portions thereof" that fall within one or more of the grounds for denial appearing in paragraphs (a) through (h) of the cited provision. Consequently, it is clear that an agency is obliged to review records sought in their entirety to determine which portions, if any, fall within 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:ss

cc: Mr. Samuel Yasgur, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1944

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

April 2, 1981

Mr. Anthony E. Schneider
Regular Democratic Club, Inc.
107-02 Crossbay Boulevard
Ozone Park, NY 11417

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schneider:

I have received your letter of March 25, in which you stated that Bennett Liebman, Associate Counsel to Lieutenant Governor Cuomo, suggested that you contact the Committee.

You indicated that you have written to the Insurance Department three times, but that you have received no response to your requests made under the Freedom of Information Law. Further, you also attached to your letter copies of court records indicating that records related to criminal charges initiated against you would be sealed due to the dismissal of the charges in your favor pursuant to §160.50 of the Criminal Procedure Law.

Without greater knowledge of the nature of the records in which you are interested, I regret that I cannot provide specific advice. However, I would like to offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Insurance Department, are available, except those records or portions of records that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, §89(3) of the Law requires that an applicant for records "reasonably describe" the records in which he or she is interested. Consequently, in making a request it is suggested that you provide as much identifying information as possible in order to enable the agency to locate the records.

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)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explantory pamphlet that may be particularly useful to you, for it contains model letters of request and appeal.

Lastly, I believe that the records access officer for the Insurance Department's New York City office is Nicholas Silletti. It is suggested that you direct your request to Mr. Silletti at the Insurance Department, Two World Trade Center, New York, New York 10047.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Bennett Liebman, Associate Counsel to the Lieutenant Governor

Nicholas Silletti, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1145

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

April 2, 1981

Ms. Margot L. Thomas
General Counsel
Division of Probation
Tower Building
Empire State Plaza
Albany, New York 12223

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Thomas:

As you are aware, I have received your letter of March 6 in which you requested an advisory opinion with respect to your interpretation of various provisions of law. It is noted that your inquiry involves the possible promulgation of regulations by the Division of Probation and the capacity to provide and deny access to records relative to adult probationers, persons in need of supervision and juvenile delinquents.

Having reviewed your letter, I agree in great measure with the contentions that you have expressed.

First, with respect to the authority of the Division to promulgate regulations on the subject, as you indicated, §243 of the Executive Law clearly permits the director to:

> "...adopt general rules which shall regulate methods and procedure in the administration of probation, including ...casework, record keeping...so as to secure the most effective application of the probation system and the most efficient enforcement of the probation

> laws throughout the state...(and) shall have access to all records" (of a probation department).

Second, I agree that presentence reports are confidential as a general matter under §390.50 of the Criminal Procedure Law. Consequently, I agree that those records would be deniable under §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute".

Third, I also concur with your contention that information containing "name identifiers" pertaining to juvenile delinquents and persons in need of supervision would be confidential at the originating source of such records (i.e., local probation departments) under §750 of the Family Court Act. As such, those records would also be deniable under §87(2)(a) of the Freedom of Information Law.

You also cited §166 of the Family Court Act as a statute that might exempt records from disclosure. From my perspective, it is questionable whether §166 could be given such a restrictive interpretation. The cited provision 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."

In my view, since §166 of the Family Court Act provides a family court with discretion to disclose or withhold records, it might not be considered a statute that specifically exempts records from disclosure.

Lastly, you also made reference to records reflective of youthful offender convictions. You wrote that you were of the opinion that those records would be exempt from disclosure under §87(2)(a) of the Freedom of Information Law when read in conjunction with §720.35 of the Criminal Procedure Law. While I agree with such a construction in certain circumstances, I would disagree in others. My contention is based upon an amendment of §720.15 of the Criminal Procedure Law. Subdivisions (1) and (2) of the cited provision state that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public. 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and with the defendant's consent, be conducted in private."

A new subdivision (3), however, states that:

> "3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action to be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

In view of the language of subdivision (3) of §720.15 of the Criminal Procedure Law, it would appear that the sealing provisions found in subdivision (1) would not be applicable if a person eligible for youthful offender status convicted of a felony.

I hope that 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-198

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

April 2, 1981

Joe A. Oliva
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Oliva:

I have received your letter of February 28. Please accept my apologies for the delay in response.

Having reviewed your letter and the materials attached to it, I am not sure that I can provide significant assistance to you. However, I would like to provide the following observations and comments.

First and perhaps most importantly, the Freedom of Information Law is an access to records law. Stated differently, the Freedom of Information Law is applicable with respect to existing records. As a general rule, §89(3) of the Law states that an agency need not create records in response to a request for information. Further, it is clear that the Law is not intended to be used as a vehicle by which members of the public may cross-examine public officials. Based upon your letters, it appears that in several instances you requested "information" which likely does not exist in the form of a record or records. If that is the case, the Freedom of Information Law would not be applicable.

Second, with respect to odometer readings, if indeed records reflective of odometer readings are created and submitted with respect to City vehicles, such records would in my view be available. Here 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. While inter-agency or intra-agency materials may be withheld, portions of such materials consistong of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations that must be made available.

Under the circumstances, records reflective of odometer readings would in my view constitute factual data that is available.

Third, with regard to procedures relative to the acknowledgment and treatment of requests in general, §87(1) of the Freedom of Information Law requires the governing body of a municipality, such as a city, to adopt procedural rules and regulations consistent with those promulgated by the Committee. I have enclosed the Committee's regulations for your consideration and suggest that you request a copy of the rules and regulations developed by the City pursuant to the Freedom of Information Law. Those regulations should designate by name or title the persons designated to respond initially to requests made under the Freedom of Information Law to appeals following a denial of access to records made under the Freedom of Information Law.

Lastly, with respect to your contentions regarding police brutality, in all honesty, I do not know which agency would have jurisdiction over such matters other than the City of New Rochelle itself.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1942

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

April 2, 1981

Henry H. Zygadlo
Superintendent of Schools
Indian River Central School District
Philadelphia, New York 13673

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zygadlo:

I have received your letter dated February 29. Please accept my apologies for the delay in response.

Your inquiry raises a series of questions regarding the implementation of the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley amendment".

It is emphasized at the outset that, although the Committee renders advice with respect to the Buckley amendment, the United States Department of Education is the agency charged with responsibility of implementing and overseeing the Act. Consequently, this office does not have possession of examples of policies adopted by school districts under the Buckley amendment. It is suggested, however, that you write to Ms. Pat Ballinger of the Department of Education. I have had numerous conversations with Ms. Ballinger and I am sure that she can provide you with the appropriate information. You may write to her at the Department of Education, 4512 Switzer Building, Washington, D.C. 20202. If you would like to telephone Ms. Ballinger, she can be reached at (202)245-0233.

With regard to a school district's responsibilities regarding the notification of parents and/or students regarding rights granted under the Buckley amendment, I have enclosed a copy of the regulations promulgated in

1976 by the then Department of Health, Education and Welfare. Further, I direct your attention to §99.5, entitled "Formulation of Institutional Policies and Procedures", which describes the responsibility of a school district regarding policies to be adopted under the Act.

It is also noted that §99.6 of the regulations requires that an educational agency give parents an annual notification of their rights based upon policies formulated under §99.5.

Lastly, I have prepared a number of advisory opinions that seek to interpret the requirements of the Buckley amendment. If you are interested in obtaining those opinions, please write or call this office and I will be happy to send them to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1948

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

April 3, 1981

Mrs. Pearl Michaels
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Michaels:

I have received your letter of March 2 and apologize for the delay in response.

Your inquiry once again pertains to rights of access to "pupil participation sheets" in possession of District #19.

Since I am not familiar with the contents of pupil participation sheets, I did indeed contact the Office of Counsel of the New York City Board of Education with regard to your earlier inquiry. At the time, I was advised by a representative of the Office of Counsel that such records should indeed be made available.

However, since that conversation, I have been informed that there was a degree of confusion regarding the status of pupil participation sheets. In all honesty, since I am unfamiliar with their contents, I could not advise with certainty that the records in question are available or deniable.

Further, based upon the title of the records in which you are interested, it is possible that they may identify students. If that is the case, the records may be confidential under the provisions of the federal Family Educational Rights and Privacy Act. That Act states in brief that any "education records" that identify one or more students are confidential to all but the parents of the students, unless the parents consent to disclosure.

The attorney with whom I spoke regarding the issue is Ms. Nancy Lederman. It is suggested that you contact Ms. Lederman directly in an attempt to resolve the controversy. She can be reached at 596-5894.

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: Nancy Lederman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-194

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 3, 1981

Thomas E. Walsh, II
Assistant County Attorney
Office of the County Attorney
County Office Building
New City, New York 10956

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Walsh:

I have received your letter of February 27. Please accept my apologies for the delay in response.

Once again, your letter concerns your incapacity to obtain insurance experience data regarding Rockland County from the New York State Department of Civil Service.

From my perspective, a meeting with the Committee to discuss the issue would at this juncture be of little or no value. As I have explained in earlier communications with you, if the Department of Civil Service does not maintain the records in which the County is interested, it cannot make the information available under the Freedom of Information Law. Consequently, it would appear that the issue does not deal with the implementation of the Freedom of Information Law by the Department of Civil Service, but rather with the question of whether the Department of Civil Service should maintain the information in question.

As you may be aware, Senator Linda Winikow, who represents Rockland County, has written to this office with respect to the controversy. I have provided her with an historical background regarding rights of access to insurance experience data and explained that the matter now appears to be outside the scope of the Freedom of Information Law in terms of its resolution.

I have enclosed a copy of my response to Senator Winikow for your consideration. As stated in that letter, I believe that the solution to the problem rests with the State Legislature.

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

cc: Linda Winikow

Anthony Costanzo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1950

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

April 3, 1981

John J. Mycek
School Board Attorney
The Greater Amsterdam School District
11 Liberty Street
Amsterdam, New York 12010

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mycek:

I have received your letter of March 3 and appreciate your interest in complying with the Freedom of Information Law. Please accept my apologies for the delay in response.

You have raised questions regarding rights of access to payroll records of municipal employees and, particularly, whether a school district would "be allowed to make photocopies of its payroll records including the names, deductions, etc., if requested by a citizen". You have also asked if a citizen is entitled to a payroll record concerning a designated individual.

I would like to offer several comments with respect to your questions.

First, §87(3)(b) of the Freedom of Information Law requires that each agency, such as a school district, must 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, it is clear that the items contained within the payroll record required to be compiled under the Freedom of Information Law are available to any person.

Second, with respect to other types of personal information contained within a payroll listing, such as deductions, the amount of withholding, social security numbers and information regarding garnishees, additional considerations should in my view be made.

As a rule, the courts have long held that public employees enjoy a lesser right to privacy than members of the public generally, for it has been determined that public employees have a duty to be more accountable than any other identifiable group. Further, there is a significant amount of case law concerning the degree to which records relative to public employees should be made available to the public under the Freedom of Information Law. 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 rather than an "unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b); also see 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been advised and held that records that are not relevant to the performance of a public employee's official duties are deniable 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, payroll records reflective of deductions claimed, withholding, social security numbers and similar information have no relevance to the manner in which a public employee performs his or her duties. Consequently, I believe that such information may be withheld.

Third, it is emphasized that the Freedom of Information Law defines "record" broadly in §86(4) of the Law to include any information in any physical form whatsoever in possession of an agency. Moreover, §89(3) of the Law requires an agency to provide copies of accessible records upon payment of the requisite fees. Therefore, in a situation in which a payroll listing might contain both accessible and

information, it is suggested that a photocopy be made and that the deniable information described above be deleted. By so doing, the accessible information would be made available, while the private details of a public employee's life would be protected.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1951

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 3, 1981

Mr. Sigismund L. Sapinski
Personnel Supervisor
General Foods Corporation
Food Products Division
Fulton, New York 13069

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sapinski:

I have received your letter of March 4. Please accept my apologies for the delay in response.

You have raised a series of questions regarding rights of access to records of employees in the private sector. Specifically, you have asked:

> "[W]hat legal right, if any, does any employee in the private sector have to inspect the Company's personnel files on him?
>
> "What legal right, if any, does the employee in the private sector have to be informed when documentation is being placed in his files?
>
> "What might be the circumstances where an employee might be forced to a law suite to get the inspection privilege?
>
> "What is the normal response which the judicial system has given such suits?"

With respect to the first question, is it emphasized that the Freedom of Information Law is applicable only to government records. Moreover, to the best of my knowledge, there is no analogous provision of law enacted in New York that is applicable to records in possession of the private sector. Consequently, as a general rule, I do not believe that an employee in the private sector has a right to inspect the personnel files pertaining to him or her in possession of a private employer.

With regard to the second question, I believe that the response must be similar. I am unaware of any provision of law that requires an employee in the private sector be informed when documentation is placed in personnel files pertaining to that person.

Your third question concerns the possible circumstances in which an employee might initiate a lawsuit to gain access to records. In all honesty, I am unaware of such circumstances. However, in instances in which a violation of the Human Rights Law is alleged, investigations might be made by a human rights agency in which personnel records might be disclosed.

Fourth, you have asked what the "normal response" of the judicial system is in regard to such suits. While I am familiar with judicial responses to challenges to denials of access made under the Freedom of Information Law concerning government records, I have no expertise or information regarding suits regarding access to records brought against the private sector.

Lastly, in some instances, it is possible that collective bargaining agreements between unions and management might contain provisions under which employees may gain the right to inspect and/or copy personnel records pertaining to them. To the best of my knowledge, such agreements generally represent the only vehicles by which employees in the private sector in New York may gain the capacity to view personnel records pertaining to them.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1952

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

April 6, 1981

Arthur H. Samuelson
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Samuelson:

As you are aware, I have received your letter concerning a request made under the Freedom of Information Law directed to the Dutchess County Sheriff.

In brief, following earlier correspondence with the Sheriff's office, on October 31, you filed a formal request for records pertaining to Camp Kinder-Ring. Since you did not receive a response to that inquiry, you wrote again to the Sheriff on January 27 requesting a clarification of the status of your request. To date, you have received no response.

First, it is emphasized that that the Freedom of Information Law and the regulations promulgated by the Committee require that responses to requests be given within prescribed 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 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, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a county sheriff's office, 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).

Third, the majority of the exceptions to rights of access are based upon potentially harmful effects of disclosure. For instance, §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.

Based upon the language quoted above, even though records may have been compiled for law enforcement purposes, it is possible, particularly in the case of old or historical records, that none of the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise.

Lastly, as noted earlier, the Freedom of Information Law enables an agency to withhold records or "portions thereof" that fall within one or more of the grounds for denial. Consequently, it is clear that the Legislature envisioned situations in which a single record might be both available and deniable in part. As such, it is also clear that an agency in receipt of a request is obliged to review the records sought in their entirety to determine the extent, if any, to which records may justifiably be withheld.

In order to assist the Sheriff in responding to your request, a copy of this opinion will be transmitted 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:ss

cc: Fred W. Scoralic, Sheriff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1953

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 7, 1981

Mr. Chad Skaggs
Assistant Professor,
Public Communications
S.I. Newhouse School of
Public Communications
215 University Place
Syracuse, New York 13210

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Professor Skaggs:

I have received your letter of March 10. Please accept my apologies for the delay in response.

Your letter concerns a report of legislation passed by the Assembly which, if enacted, would bar public disclosure of the residence address of a police officer, unless disclosure is ordered by a court.

As requested, enclosed is a copy of the legislation to which you alluded. I would like to offer the following observations with respect to the legislation.

First, the bill, if enacted, would amend the New York City Charter, and it is clear that it pertains only to New York City police officers.

Second, I am not sure that the legislation is necessary, for the home addresses and home telephone numbers of public employees may now in my view be withheld under the Freedom of Information Law.

The relevant provision of the Freedom of Information Law is §87(2)(b), which enables an agency, such as a police department, to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy".

As indicated during my presentation at Syracuse University, it is often difficult to determine questions relative to privacy, for subjective judgments must in some instances be made. For example, two equally reasonable persons might view a single record, but one might contend that disclosure would be offensive and result in an unwarranted invasion of personal privacy; the other might contend that disclosure would be innocuous and result in a permissible invasion of personal privacy.

Further, there is a significant number of judicial interpretations under the Freedom of Information Law concerning the privacy of public employees. It is noted initially that the courts have 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 group. In addition, the Committee has advised and the courts have upheld the notion that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would constitute 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been advised and held that records that are not relevant to the performance of one's official duties may be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

From my perspective, based upon the case law cited above, it appears that a court would find that the home addresses and the home telephone numbers of public employees, including police officers, would be deniable, for that type of information has no bearing upon the manner in which a public employee performs his or her duties, and that, therefore, disclosure would result in an unwarranted invasion of personal privacy.

It is also noted that §37(3)(b) of the Freedom of Information Law requires that each agency maintain a payroll record that identifies each employee by name, public office address, title and salary. Moreover, the provision cited above represents an alteration from the original law, which did not specify which address, home or business, was required to be disclosed. In cases in which home addresses of public employees were disclosed, there were complaints that such disclosures resulted in solicitation or even harrassment of public employees in their homes. For that reason, the existing provision specifies that the public office addresses of public employees be indicated on the payroll record.

Lastly, I thank you for your kind words regarding my presentation at Syracuse University. I must admit that I always enjoy speaking with students and faculty.

I hope that 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: Senator Flynn

Assemblyman Lentol

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1954

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

April 8, 1981

Mr. Alan Shank
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Shank:

I have received your letter of March 5 and the materials attached to it. Please accept my apologies for the delay in response.

Your inquiry concerns your unsuccessful attempts to gain access to records "pertaining to amounts of discretionary salary increases recommended by President Jakubauskas to the Chancellor." You have indicated that the State University College provided you with the names of the employees who were recommended for increased salary amounts; however, the dollar figures were deleted from the list you received. Subsequent to your appeal by President Jakubauskas, you were informed in writing by an assistant vice president of the State University College that the information you requested existed only in the form of working rosters and would not be finalized until approval by the Division of Budget and the Department of Audit and Control.

Since the Committee has only the capacity to advise, it does not have the authority to determine appeals or otherwise require compliance with the Freedom of Information Law. Nevertheless, I would like to offer the following observations.

In his letter of February 27, Kenneth G. Goode, Assistant Vice President of the State University College, wrote that "[T]he Freedom of Information Law does not require agencies to do research or prepare lists other than those currently in existence." In this regard, although the Freedom of Information Law does not generally require an agency to create a list which does not exist, §89(3) of the Law does require that an agency on request "shall certify that it does not have possession of such records or that such records cannot be found after diligent search." Consequently, it appears that an agency may be required to engage in research to determine whether it maintains the records sought.

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).

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 consist of statistical or factual tabulations or data, or are reflective of agency policy or determinations, they are in my opinion accessible. Prior to the approval of the budget recommendations that you are requesting, none of the records could likely be characterized as final determinations.

It is noted that two decisions rendered to date have dealt with budget information that may be somewhat analogous to the information you are seeking. In Dunlea v. Goldmark, [54 AD 2d 446, 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 [62 AD 2d 281], it was held that budget estimates submitted by agency heads to a County Executive were deniable. In Delaney, the court found that only "supporting" statistical or factual tabulations relative to a budget are accessible. In order to discern whether such tabulations are "supporting", the budget obviously must pass to make such a determination. Consequently, Delaney was distinguished from Dunlea on the basis that the information was sought in Delaney prior to the adoption of the budget, while it was sought after the adoption of the budget in Dunlea. Both decisions were handed down under the Freedom of Information Law originally enacted.

I disagree with the holding in Delaney for several reasons.

First, the amended Freedom of Information Law, as noted earlier, is based upon a presumption of access. Further, the new Law defines "record" to include any information in possession of an agency "in any physical form whatsoever" [§86(4)]. Therefore, the nature of the contents of records determines the extent to which records or portions thereof may be withheld. A distinction in terms of time cannot in my view justifiably be made under the new Law. For example, if a factual tabulation appears in a record, it is accessible, whether or not it relates to a proposed or an adopted budget. Its nature alone determines rights of access under §87(2)(g). Therefore, I believe that the distinction made in Delaney based upon the time of submission of the records sought would be irrelevant under the amended Freedom of Information Law.

Second, Delaney relied heavily upon 9 NYCRR 145.1 (2). Reliance upon that section of the New York Code of Rules and Regulations was in my view misplaced. The cited provision constituted a portion of the regulations adopted under the original Law by the State Division of Budget, which exempted "opinions, policy options and recommendations" from the coverage of the Freedom of Information Law. It may have been relevant to the Dunlea case, but it had no connection whatsoever to the controversy in Delaney. The Freedom of Information Law requires this Committee to promulgate regulations regarding the procedural aspects of the Law, and all agencies in the state must in turn adopt regulations no more restrictive than those promulgated by the Committee. The regulations adopted by the Division of Budget, however, pertained not only to procedures, but to rights of access as well. In this regard, it is my contention that an agency cannot adopt regulations more restrictive in terms of rights of access than a statute [see Zuckerman v. Board of Parole, 53 AD 2d 405]. If an agency could adopt regulations more restrictive than the statute, the statute would be of no effect. In short, 9 NYCRR 145.1(2) should in my opinion have had no relevance to the Delaney determination.

And third, the phrase "statistical or factual tabulations or data" is subject to conflicting interpretations. The phrases "factual tabulations" or "factual data" in my view would not result in substantial questions regarding their interpretation. But what constitutes "statistical tabulations" or "statistical data"? In my opinion, there must be a difference between "factual" tabulations or data and "statistical" tabulations or data, or the Legislature would not have included the word "statistical" within the Law. If the phrase "statistical tabulations or data" does not include items such as proposed budget estimates, the word "statistical" appearing in §87(2)(g)(i) would have no apparent meaning.

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 sub-

ject to conflicting interpretations, the courts have long held that in cases in which the specific language of a statute is unclear but the statute's legislative intent is clear, the statement of intent should be used as a guide to appropriate interpretation. Further, the rules of construction have long held that remedial legislation, such as the Freedom of Information Law, should be construed liberally.

I believe that the phrase "statistical or factual tabulations or data" should be construed broadly to include within its scope statistical or factual data contained within the salary increase recommendations made by the President of the State University College to the Chancellor. 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.

Lastly, Mr. Goode in his February 27 letter indicated that requests for lists under the Freedom of Information Law should be requested from the Governor's Office of Employee Relations and that appeals under the Law should be addressed to the University Counsel and Vice Chancellor for Legal Affairs, Sanford Levine, Esq. In this regard, I would like to offer two observations.

First, where two agencies maintain identical records, either agency is required to respond to a request under the Freedom of Information Law. The fact that an agency may not have created a record, but rather is a recipient of a record, is of no relevance. As such, even though the Office of Employee Relations may be the original source of particular records, if another agency maintains the same records, it is required to respond in accordance with the Freedom of Information Law.

Second, an appeal from a denial of access must be made in writing within thirty days of a denial to the person designated by the agency. Since it appears that your appeal of February 17 was not timely forwarded to Mr. Levine, it may be necessary for you to initiate your Freedom of Information Law request again in order to ensure that you have acted within the required periods for request and appeal.

In order to assist you in any further request and/or appeals, I am enclosing for your review a copy of the Freedom of Information Law, 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
Executive Director

BY Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

Encs.

cc: Kenneth G. Goode

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-601
FOIL-AO-1955

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

April 8, 1981

Mrs. Linda Campion
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Campion:

I have received your letter of March 5. Please accept my apologies for the delay in response.

You have raised questions regarding both the Freedom of Information and Open Meetings Laws. Enclosed for your consideration are copies of both statutes, as well as an explanatory pamphlet that may be useful to you.

It is noted at the outset that I have discussed your correspondence with Eileen O'Keefe, District Clerk of the Sachem Central School District. Based upon our conversation, it appears that the District has responded to your requests for information and that no controversy now exists. However, I would like to offer the following comments.

First, with respect to a School Board meeting held on February 10, you wrote that it was necessary to be carried up and down a full flight of stairs in your wheelchair in order to attend the meeting. Although Ms. O'Keefe informed me that the issue of access to the handicapped is now being considered, I would like to point out that §98(b) of the Open Meetings Law states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

The language quoted above makes clear that a public body is not required to alter an existing facility or construct a new facility in order to accommodate physically handicapped persons. However, it is also clear that "reasonable efforts" must be made to ensure that meetings are held in facilities that permit barrier-free access to handicapped persons.

Second, as indicated earlier, it is my understanding that the District has satisfied your requests for records relative to the issue concerning the bus stop. Ms. O'Keefe informed me that certain memoranda from the Superintendent to the staff and the Board that are advisory in nature were withheld. From my perspective, a denial on that basis would be appropriate.

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..."

Although inter-agency or intra-agency materials containing statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available, portions reflective of advice, suggestion, recommendation or opinion, for instance, may justifiably be withheld.

Under the circumstances, if indeed the memoranda were advisory in nature, it appears that a 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
Executive Director

RJF:ss
cc: Eileen O'Keefe
Cathie DeRocco

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1956

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

April 8, 1981

Mr. Daniel J. Roberts
Dinerstein & Lesser, P.C.
Suite 350
One Old Country Road
Carle Place, NY 11514

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Roberts:

I have received your letter of March 4. Please accept my apologies for the delay in response.

Your inquiry concerns your unsuccessful efforts to gain access to records in possession of the New York City Taxi and Limousine Commission. Specifically, you have requested guidelines, records, procedures and other documentation regarding:

"1. enforcement of the Rules Governing Paratransit Services Transporting the Handicapped ("Rules"),

2. issuance of summonses for alleged violations of the "Rules",

3. operation of the Taxi & Limousine Commission's hearings,

4. procedure that the Hearing Officer must follow,

5. final determination reached at the hearing,

6. procedure for taking an appeal from an adverse determination reached at the hearing,

7. the administrative review for said appeal."

In response to your inquiry, it was indicated that your request would be discussed with represenatives of the Office of Corporation Counsel. However, it was intimated that the request might be denied due to the recent initiation of a lawsuit in which you are representing a client against the Taxi and Limousine Commission.

Having reviewed the correspondence, unless I am mistaken, your request for records under the Freedom of Information Law is unrelated to the lawsuit. Consequently, I cannot envision any rationale for withholding on the basis that a lawsuit has been commenced. Further, even if the records sought do relate to the lawsuit, I believe that they would nonetheless be available under the Freedom of Information Law.

It is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Taxi and Limousine Commission, 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.

From my perspective, there is but one ground for denial that may be relevant. However, that provision may be cited as a basis for requiring disclosure. 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..."

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, 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, guidelines, procedures and policies would in my view be available, for they might constitute instructions to staff that affect the public that would be available under §87(2)(g)(ii), as well as final agency policies or determinations that would be accessible under §87(2)(g)(iii).

It is also important to point out that an agency cannot distinguish applicants in terms of rights of access granted by the Freedom of Information Law. The Committee has long 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 Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Moreover, in the decision cited above, the Appellate Division, 4th Department, granted access to records sought by a litigant and stated that thet fact that the applicant may be a litigant does not detract from that person's rights of access under the Law.

In view of the foregoing, it would appear that the records in which you are interested are available under the Freedom of Information Law.

Lastly, the Freedom of Information Law and the regulations promulgated thereunder by the Committee prescribe time limitations for responses to requests. 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 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 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 Committtee [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: James R. Slater
Jay Turoff, Chairman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1952

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

COMMITTEE MEMBERS
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 8, 1981

Hon. Kenneth P. LaValle
Member of the Senate
Room 805
Legislative Office Building
Albany, New York

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Senator LaValle:

Thank you for your letter of April 3. Your inquiry pertains to a situation in which one of your constituents has attempted without success to obtain genealogical records.

It is noted at the outset that rights of access to vital records, such as birth, death and marriage records, are not governed by the Freedom of Information Law. Access to birth and death records is governed by §§4173 and 4174 of the Public Health Law; access to marriage records is governed by §19 of the Domestic Relations Law. Each of the cited statutes provides that access may be granted upon a showing of a "proper purpose". Unfortunately, however, none of the statutes defines the scope of the phrase "proper purpose".

It is also noted that two sets of vital records are kept. The original records are maintained by the State Health Department in its Bureau of Vital Records. Duplicates are maintained by local registrars of vital records, such as town and city clerks.

Further, the regulations promulgated by the State Health Department provide limitations upon the disclosure of vital records sought for genealogical research based upon specific numbers of years that the records have been on file. Section 35.5(a) of the regulations states in part that:

> "(1) No information shall be issued from a record of birth unless a record has been on file for at least 75 years or more and the person to whom the record relates is known to the applicant to be deceased.
>
> (3) No information may be issued from a record of death unless the record has been on file for at least 50 years or more".

Section 35.5(b) states in part that:

> "...no information shall be issued from a record of marriage unless the record has been on file for at least 50 years and the parties to the marriage named in the record are known to the applicant to be deceased".

From my perspective, it is disputable whether the limitations on access imposed by the regulations quoted above are reasonable. For example, assuming that the limitations are based upon an intent to protect privacy, I question why a record of death should not be made available for 50 years following the death of the subject of the record. In my view, it is questionable whether any request for a death record for genealogical purposes should be denied. Moreover, I am unaware of any case law holding that a request for genealogical records constitutes other than a "proper purpose". If in fact a request for genealogical records is reflective of a proper purpose, it is possible that the regulations of the Health Department limiting access may be unreasonable.

In addition, this office has received numerous inquiries and complaints from persons seeking to gain access to genealogical records. The problem appears to be that the Health Department does not have the capacity to respond to requests quickly. Some have informed me that it may take upwards of six months to gain access to genealogical records.

It is also noted that the Public Health Law permits the Bureau of Vital Records to charge significant fees for copying and searching vital records. The fees for copying and search exceed those permitted by the Freedom of Information Law, but are valid due to their statutory basis. In my opinion, the fee structure within the Public Health Law should be reviewed to determine its sufficiency. For example, the Health Department is now permitted to charge $2.50 an hour for a search. In view of the cost of labor and technology, perhaps the fee should be raised. In any case, the substantial fees permitted to be charged by the Health Department should in my view enable the Bureau of Vital Records to become a cost effective operation. The problem that now exists, however, is that monies received for copying and searching are transmitted to the general state fund; they do not remain in the Health Department. Either a directive from the Division of the Budget or legislation could alter current practice by insuring that the proceeds of genealogical searches remain in the Health Department, or more specifically, in the Bureau of Vital Records.

I would like to point out, too, that a related proposal was made in the Committee's third annual report on the Freedom of Information Law. Specifically, the report stated that fees for copies of records produced upon request under the Freedom of Information Law are in most instances transferred to the general state fund by state agencies. Consequently, the state agencies that receive the greatest number of requests or which are most responsive to requests made under the Freedom of Information Law transmit, and therefore, lose the most money and may effectively be penalized for compliance. By enabling state agencies to keep or recirculate the monies acquired as fees for copying, agencies might defray the personnel costs of searching for records. In addition, such a step would help to remove any disincentives that might now exist relative to compliance with the Freedom of Information Law.

Based upon the foregoing, the Committee recommended that the State Finance Law be amended to enable state agencies to recirculate and use for agency purposes the monies acquired as fees under the Freedom of Information Law, as well as other appropriate statutes, such as the Public Health 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:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1959

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

April 10, 1981

Mr. James F. Gleason, Jr.
Assistant Business Manager
International Brotherhood
Electrical Workers
S-3564 California Road
Orchard Park, NY 14127

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gleason:

As you are aware, I have received your letter of March 5. Please accept my apologies for the delay in response.

Once again, your inquiry concerns a request directed to the City of Buffalo. Following an initial constructive denial of access, an appeal was directed to Joseph McNamara, Corporation Counsel, on February 10. As of the date of your letter, no response had been given.

I have contacted the Office of Corporation Counsel on your behalf and it appears that no response to your appeal has yet been made as of April 8. In this regard, §89(4)(a) of the Freedom of Information Law states 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 view of the foregoing, the time limit for response to an appeal was exceeded long ago. As such, it appears that the only legal step that remains would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

It is noted that a recent judicial determination found that a failure to respond to an appeal within the appropriate time limits enables an individual to initiate a proceeding under Article 78 of the Civil Practice Law and Rules. As stated in that decision:

> "If the court found otherwise, an agency could totally frustrate a request for information by merely refusing to designate a person within an agency to consider appeals or by requiring many appeals before many person or entities within the agency before a person could be said to have exhausted her/his administrative remedies" [see Floyd v. McGuire, Sup. Ct., New York Cty., March 19, 1981].

A copy of this opinion will be sent to the Office of Corporation Counsel. Perhaps it will have the effect of eliciting a determination from that office.

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: Joseph McNamara

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1960

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

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IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 10, 1981

Ms. Jodi L. Harter
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Harter:

I have received your letter of February 24 which was received by the Committee on Public Access to Records on March 9 after referral by the Department of Law. Please accept my apologies for the delay in response.

Your inquiry concerns your unsuccessful attempts to obtain copies of a background investigation report prepared by the Division of State Police in regard to your employment application for the position of a New York State Trooper. You have stated that the Director of Personnel for the State Police refused your request for the background investigation report, indicating that the information was confidential. You have asked the Committee to advise you of the law involved in regards to the withholding of this investigative material by the State Police.

In my opinion, the denial by the Division of State Police may have been appropriate in part. The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Relevant to your inquiry, §87(2)(b) provides that an agency may withhold records or portions thereof which if disclosed would constitute "an unwarranted invasion of personal privacy..." The cited provision makes reference to §89, which in subdivision (2)(b) lists examples of unwarranted invasions of personal privacy. It is noted that the examples are in my opinion merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy.

In terms of the request, I believe that the Division of State Police may withhold portions of records identifiable to you which if disclosed would constitute an unwarranted invasion of personal privacy with respect to others identified in the records. For example, if in its pre-employment check, the Division of State Police interviewed members of the public concerning you, the names, addresses, or other information which would identify them could in my opinion be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

However, §89(2)(c) states that:

> "[U]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:
>
> i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him".

Under the quoted provision, it would appear that you may inspect portions of records pertaining to yourself if the records are not otherwise deniable and if identifying details are deleted. Consequently, while the State Police

may have appropriate grounds for denial with respect to portions of the records sought, I believe that the remainder should be made available to you.

The Director of Personnel stated in his letter that "Our investigations are confidential, and therefore, no specific details may be supplied." In my view, a denial based upon the preceding could not properly be asserted. Section 87(2)(e) protects against disclosures which would in some way interfere with law enforcement activities. However, the cited provision states that the ability to deny pertains only to records "compiled for law enforcement purposes" which would interfere with "law enforcement investigations" if disclosed. I doubt that a pre-employment inquiry concerning an applicant for the position of state trooper would result in the compilation of records for law enforcement purposes. On the contrary, it would appear that such records would be obtained or compiled by the State Police in the ordinary course of business. In this regard, it is possible that records created by the Division of State Police might be deniable pursuant to §87(2)(g) of the Law, which provides that an agency may withhold inter-agency or intra-agency materials except to the extent that such materials consist of statistical or factual data, instructions to staff that affect the public or final agency policy or determinations. Stated differently, advice or impressions transmitted from one official of the Division of State Police to another would be deniable.

For your information, I am enclosing a copy of the Freedom of Information Law, regulations promulgated by the Committee, 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
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Attorney

RPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1961

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

April 10, 1981

Mr. Clayton F. Gaudette
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gaudette:

Thank you for your letter of March 6. Please accept my apologies for the delay in response.

You have asked the Committee on Public Access to Records to determine why you have not as yet received the minutes of a social security hearing which took place on April 19, 1979, despite repeated attempts on your part to contact various state and federal officials.

Among its various duties, the Committee on Public Access to Records issues advisory opinions regarding the New York State Freedom of Information and Open Meetings Laws. The Committee does not have the authority to render an opinion in regard to a matter concerning access to records of a federal agency, such as the U.S. Department of Health and Human Services. It appears from the statements made in your letter that the minutes of a hearing concerning social security that you are seeking access, would fall under the jurisdiction of the federal Freedom of Information Act.

However, on your behalf, I have contacted the North Country Legal Services, Inc. of Upper Jay, New York, in order to determine if they had received your previous request for the minutes. The woman with whom I spoke, Ms. Billie Yando, who was very helpful, advised me that your file contains a cassette recording of what appears to be the social security hearing of April 19, 1979. Additionally,

Ms. Yando indicated that correspondence in your file indicates that a written transcript of the social security hearing may be requested by writing to:

Harriet A. Simon
Member-Appeals Counsel
Department of Health, Education
and Welfare
Social Security Administration
P.O. Box 2518
Washington, DC 20013

Therefore, it would appear that there are two options you might consider.

First, you could obtain a copy of your transcript by writing to the above address and including your social security number and a check for $50.00, for Ms. Yando informed me that the cost per page would be $2.50.

Second, you could write the North Country Legal Services again and request a copy of the tape cassette it has in your file. Due to the expense involved in obtaining a written transcript from the Department of Health, Education and Welfare, it is suggested that you contact the North Country Legal Services, Inc. first and request the hearing cassette from that office. It is my impression that North Country Legal Services would supply you with the tape or a copy at a cost less than fifty dollars.

I hope that 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: Ms. Billie Yando

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1962

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

April 13, 1981

William L. Matthes
Editor and Publisher
The Lookout
Grand Union Plaza
Hopewell Junction, NY 12533

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Matthes:

Thank you for your thoughtful letter of April 4. Since there appears to be some confusion regarding my opinion to you dated April 11, I would like to attempt to clarify my remarks.

In reference to your comments, my letter of April 11 did not deal at all with the rights of access of records. Further, as a rule, it has been advised that accessible records should be made equally available to any person.

If you will review my letter, please note that my comments dealt only with the procedural regulations promulgated by the Committee, which state that an agency may restrict the inspection and copying of records available under the Freedom of Information Law to regular business hours. On the basis of the regulations, an agency may require an applicant for records to make a request on the day following a meeting, for instance, rather than during the meeting itself.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

PPB:RJF:ss

Pamela Petrie Baldasaro
Attorney

> "[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..."

Based upon the language quoted above, a public body may enter into an executive session only after having convened an open meeting, and only when the procedural steps described above have been followed.

Second, your letter characterized the basis for entry into executive session has "potential litigation". Here I direct your attention to §100(1)(d) of the Open Meetings Law, which states that a public body may enter into an executive session to discuss "proposed, pending or current litigation". From my perspective, a discussion of "potential litigation" may not constitute a sufficient basis for entry into an executive session. In short, virtually any topic of discussion could be the subject of potential litigation. Further, it has consistently been advised that in order to qualify as "proposed" litigation, there must be a real threat or imminence of litigation. Consequently, based upon the facts presented in your letter, it is in my view questionable whether an executive session was properly held.

Third, you requested and were denied access to minutes of executive session. Assuming that an executive session was properly convened, minutes of the executive session would be required to be made available only if action was taken during the executive session. Section 101(2) of the Open Meetings Law states that minutes reflective of the action taken during an executive session must be compiled and made available in accordance with the Freedom of Information Law within one week of the executive session. However, if no action was taken, minutes of the executive session need not have been compiled.

Lastly, if indeed there was a record of the discussion conducted during an executive session, that record is in my view subject to rights granted by the Freedom of Information Law, whether or not it may be characterized as minutes.

Section 86(4) of the Freedom of Information Law defines "record" broadly to include:

> "...any information kept, held, filed, produce 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".

Consequently, if a record exists, it would be subject to rights granted by the Freedom of Information Law.

Without additional information regarding the nature of the discussion or the issue, I could not conjecture as to rights of access to any existing records. However, enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings 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:jm

cc: Town Board

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1963

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

April 14, 1981

William A. Glass
Attorney at Law
143 Pike Street
P.O. Box 1108
Port Jervis, NY 12771

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Glass:

I have received your letter of March 6. I appreciate your interest in complying with the Freedom of Information Law and hope that you will accept my apologies for the delay in response.

Your inquiry concerns a request for complaint reports completed by members of the Town of Deerpark Police Department. You indicated further that:

> "The reports contain various items of information including the officers impression of witnesses and complainants, a statement of the investigation completed and a statement setting forth what further investigation is required. The report is used by other officers working on the same case to keep them informed as to what was done and what needs to be done. The reports are also used by the chief to better manage his manpower".

Further, the request concerns all reports filed in 1980.

You wrote that you have advised the designated records access officer to deny access based upon §87(2)(g) of the Freedom of Information Law and on the basis that the request "is so broad that it cannot be determined whether any specific exemption applies".

I would like to offer the following comments with respect to the request.

As you are aware, §89(3) of the Freedom of Information Law states that an agency may require that an applicant for records request the records in writing. Further, the cited provision states that a request must be reflective of records "reasonably described". In view of the breadth of the request, it is possible that the request may not have reasonably described the records sought. For instance, if hundreds of complaints have been filed, and you intimated during our telephone conversation that that is the case, it is suggested that the access officer contact the applicant and engage in efforts to have the applicant narrow his or her request. For example, a request might be narrowed in terms of a shorter period of time of filing, particular types of complaints or similar other qualifiers that may narrow the scope of the records requested.

Next, any one of five grounds for denial might possibly be cited to withhold some of the records or portions of the records.

One ground for denial of possible 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 or procedures.

From my perspective, the reports and related documents were likely compiled for law enforcement purposes. Further, if a complaint is still being investigated, disclosure might indeed interfere with an investigation. Stated differently, if disclosure would hamper the capacity of the Police Department to carry out its duties, it is likely that records or portions thereof may be withheld under §87(2)(e).

A related ground for denial is §87(2)(f), which states that an agency may withhold records or portions thereof when disclosure would "endanger the life or safety of any person". Although this exception rarely arises, it is possible that it might be applicable in the context of investigative records.

A third potentially relevant ground for denial, which you cited in your letter, is §87(2)(g). That 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 noted that the language quoted above contains what in effect is a double negative. While statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations found within inter-agency or intra-agency materials must be made available, portions of such materials consisting of advice, impression, suggestion, or recommendation, for example, may justifiably be withheld.

A fourth ground for denial that might appropriately be cited is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute an "unwarranted invasion of personal privacy". Depending upon the contents of records, it is possible that names or other identifying details pertaining to individuals might be withheld if indeed disclosure would constitute an unwarranted invasion of personal privacy.

Lastly, there may be references in the records in question to persons adjudicated as youthful offenders, or juvenile offenders, for instance. In those cases, it is possible that the records might be confidential under the Family Court Act or the Criminal Procedure Law. In addition, if a person was charged with a crime and the charge was dismissed in his or her favor, the records might be sealed under §160.50 of the Criminal Procedure Law. In each of the instances described above, the records would be exempted from disclosure by statute and therefore would be deniable under §87(2)(a) 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-1964

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

April 14, 1981

Mr. John J. Donohue
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Donohue:

I have received your letter of March 9. Please accept my apologies for the delay in response.

You have requested an advisory opinion regarding whether your committee, which apparently consists of members of local homeowner associations, has rights of access to resumes of applicants for the position of Town Assessor. You have indicated that you were advised by town officials that these resumes would not be available to the public.

I would like to offer several observations with respect to your inquiry.

First, there may be situations in which a single record may be both accessible and deniable in part. The introductory language of §87(2) of the Freedom of Information Law (see attached), states that all records of an agency are available, except that an agency may withhold "records or portions thereof" that fall within one or more grounds for denial that appear in the ensuing paragraphs of the Law.

Second, the ground for denial that is most relevant under the circumstances you described 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". The cited provision makes reference to subdivision (2) of §89 of the Law, which lists examples of unwarranted invasions of personal privacy. One of the examples is §89(2)(b)(i), which states that an unwarranted invasion of personal privacy includes the "disclosure of employment, medical or credit histories or personal references of applicants for employment".

Based upon the language quoted above, it is possible that disclosure of the names of applicants for the position in question would result in an unwarranted invasion of personal privacy.

Other aspects of a resume might also be deniable under the Freedom of Information Law.

For instance, a resume might contain a person's social security number, home address, home telephone number, marital status, military experience or similar information of a personal nature. I would conjecture that those types of items would have no relevance to the performance of one's official duties and may justifiably be deleted from a resume. Similarly, aspects of one's employment history might also be withheld on the ground that they are irrelevant to the performance of one's official duties.

However, if the position for which an individual is applying has specific requirements in terms of educational or work experience, it is possible that disclosure of those portions of a resume indicating those areas of educational or work experience that are required for placement in the position would be available on the ground that disclosure would result in a permissible invasion of personal privacy.

You have not indicated in your letter whether the position of town assessor must be filled from a civil service examination list. If that is the case, please note that where a civil service examination is given, an eligible list developed following that examination is available. Such a list identifies those individuals who passed a civil service examination as well as their scores. If the individuals whose resumes you are seeking to review were required to have taken a civil service examination for the position, the eligible list pertaining to that examination would identify those who passed and would be available.

For your information, I am enclosing a copy of the Freedom of Information Law, an explanatory pamphlet and a pocket card 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

BY Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1965

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

April 15, 1981

Katherine M. Garry
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Garry:

As you are aware, I have received your letter of March 8. Please accept my apologies for the delay in response.

Having reviewed your letter and the correspondence attached to it, the nature of records that you are seeking from the Rockville Centre School District is not stated. Consequently, I could not offer specific advice with respect to access to the records in which you are interested. However, I would like to offer the following comments and observations.

First, it appears that your requests have not been answered within the requisite periods of time prescribed by 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.

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.

Second, one of the problems appears to be an absence of communication between yourself and officials of the School District. In this regard, I direct your attention to §1401.2 of the regulations to which reference was made earlier. Specifically, according to the regulations, one of the duties of the designated records access officer is to "assist the requester in identifying requested records, if necessary" [§1401.2(b)(2)]. As such, if you are not entirely sure of the records in which you are interested or the means by which they may be characterized, you should seek the assistance of the records access officer.

Lastly, if you have questions regarding rights of access to particular records, please describe those records or the information contained within the records, and I will be pleased to provide direction.

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: Superintendent Leary

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-605
FOIL-AO-1966

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

April 15, 1981

Mr. Khalid Abdul Malik
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Malik:

I have received your letter of March 10. Please accept my apologies for the delay in response. You have requested an opinion with respect to your request made under the Freedom of Information Law that was directed to Local School Board #23.

Specifically, you wrote that, on March 2, you delivered a request to Local School Board #23. You were informed that you should visit the office on March 9 in order to obtain a determination regarding your request. At that time, you were informed by the Interim Acting Superintendent that he would not have the information that you requested and that he would not produce any of the records sought until he could speak with the Chairman of the Board of Education.

I would like to offer the following comments and observations with respect to the situation that you described and the nature of the records that you requested.

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 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)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

Second, I direct your attention once again to 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. Under §1401.2 of the regulations, the governing body, in this case the Board of Education, is required to designate one or more records access officers for the purpose of responding initially to requests. Section 1401.7 concerns the procedure by which an agency may deny access to records and the process by which a person denied access may appeal. It is specified in that provision that the records access officer shall not be the appeals officer [see §1401.7(b)]. Under the circumstances, if, for example, the Chairman of the Board of Education renders a determination on appeal following denials of access, I do not believe that the same individual should also make initial determinations in response to requests. If the records access officer and the appeals officer are the same person, the right to appeal would effectively be eliminated. Further, if that is the situation in the District from which the records have been requested, perhaps corrective action should be taken.

With respect to the records that you are seeking, your first area of request concerns copies of all minutes of resolutions of Local School Board #23 since February 1, 1978. In my view, those records are available under the Freedom of Information Law, for they represent determinations made by the Board that are accessible under §87(2)(g)(iii) of the Freedom of Information Law. In addition, I believe that they must also be compiled and made available under the Open Meetings Law, §101. Subdivision (1) of the cited provision 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."

Further, §101(3) of the Open Meetings Law requires that minutes of open meetings be compiled and made available within two weeks of such meetings.

Your second area of inquiry concerns minutes of meetings of the Executive Committee of the Local School Board #23 since June 1, 1977. Again, to the extent that such records exist, I believe that they must be made available. It is noted that a committee of a school board or other governing body is also subject to the Open Meetings Law, and, therefore, is required to create minutes [see attached Open Meetings Law, §97(2), definition of "public body"].

The third area of inquiry involves:

> "[A] list of all hired consultants, under the titles of Educational, Evaluation, Administrative or Artistic Performers under the employment of L.S.B. #23 since June 1, 1977, including copies of any forms filled out by said consultants and/or L.S.B. #23 that would detail:
>
> a. Length of time served (as consultants)
>
> b. Purpose and rationale for such employment

c. Rate of pay (including all time sheets)

d. All written authorization for consultants from whatever Personal Authority from L.S.B. #23

e. Whatever written descriptions underlining the nature of the consultant mentioned above."

It is noted that the Freedom of Information Law grants access to existing records. Section 89(3) of the Law states that an agency generally need not create records in response to a request. Therefore, if, for example, there is no list in existence reflective of hired consultants, the District would be under no obligation to create such a record on your behalf.

Nevertheless, I would conjecture that if indeed consultants have been hired, that the information in which you are interested might be contained within one or more among a group of records. For instance, checks, vouchers and similar financial records might indicate the length of time that a consultant serves as well as that person's rate of pay. A contract between the Board and a consultant might indicate the purpose and rationale for employment and the nature of duties to be performed. As such, if there is no single record containing the information that you have described, you might renew your request and qualify the types of records sought in accordance with the advice given above. Further, as noted earlier, I have enclosed an explanatory pamphlet regarding the Freedom of Information Law and the Open Meetings Law that contains a model letter of request which may be particularly useful to you.

Copies of this opinion, the Freedom of Information Law and the regulations will also be sent to Mr. Edwards and Mr. Boyland, in order that they may be given advice 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

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Mr. Carlos Edwards
Mr. William Boyland

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-610
FOIL-AO-1967

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

April 17, 1981

Barry P. Abisch
City Editor
The Daily Item
Westchester Rockland
Newspapers, Inc.
Port Chester, NY 10573

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Abisch:

I have received your letter of March 12. Please accept my apologies for the delay in response.

You have raised questions regarding rights of access to "agendas prepared in advance of three recent executive sessions held by the Harrison Board of Education". You have indicated further that the agendas are not distributed to the public, and in the case of one particular meeting, an executive session "was simply announced by the Board President, and the public was asked to leave".

In response to your questions and based upon the three agendas attached to your letter, I would like to offer the following observations.

First, there is no requirement of which I am aware concerning the creation of an agenda prior to a meeting. Nevertheless, as soon as an agenda exists, I believe that it constitutes a "record" subject to rights of access granted by the Freedom of Information Law.

It is emphasized 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 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 language quoted above, it is clear that any information "in any physical form whatsoever" in possession of or prepared for an agency, such as a school district, constitutes a "record" subject to the Law.

Further, based upon a review of the agendas that you attached, it appears that they merely cite in general terms the subjects intended for discussion during proposed executive sessions. If this observation is accurate, I believe that they are available. If, for example, the agendas concerning recommendations by the Committee on the Handicapped identified particular students, or if the sections concerning personnel identified specific individuals, those aspects of the agenda might justifiably be deleted due to provisions of federal law as well as the Freedom of Information Law insofar as it pertains to unwarranted invasions of personal privacy. However, that degree of detail does not appear in the agendas that you sent and, as a consequence, I believe that they are available under §87(2)(g) of the Freedom of Information Law.

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 noted that 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 policies or determinations must be made available.

Under the circumstances, I believe that the agendas could properly be characterized as "intra-agency materials". However, they appear to consist solely of factual information that would be available under §87(2)(g)(i).

Second, the agendas concern only those subjects intended to be discussed during an executive session. In my opinion, a public body, such as a school board, cannot, at least in a technical sense, schedule an executive session in advance of a meeting. Section 97(3) of the Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. Moreover, §100(1) of the Law prescribes a procedure that must be followed by a public body before it can enter into an executive session. In relevant part, §100(1) states that:

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

Based upon the language quoted above, an executive session cannot in my view be scheduled in advance, for three steps must be taken before an agency may convene an executive session. A motion to enter into an executive session must be made by a member of the public body during an open meeting; next, the motion must identify in general terms the subject or subjects to be considered during the executive session; and lastly, the motion must be carried by a majority vote of the total membership of a public body.

Finally, paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the areas of discussion that may be appropriately conducted during an executive session. From my perspective, it is questionable whether many of the items appearing on the agendas for executive session could properly be discussed during an executive session.

For instance, on the executive session agenda of February 11, item I makes reference to a "personnel report". Although the report might deal with one or more of the subjects appearing in §100(1)(f) of the Open Meetings Law and therefore may be proper for discussion in executive session, on the other hand, it is possible that the report may deal with personnel in general. If that was the case, an executive session would not in my view have been proper.

On the agenda of the February 4 executive session, item III makes reference to an audit report, musical instrument policy, and a milk price increase request. Item V makes reference to a college boards review course, and a superintendent's recommendation concerning an enrollment study. From my perspective, it does not appear that any of the grounds for executive session could have been cited to discuss those issues.

The agenda of March 11 makes reference to several areas which in my opinion represent questionable subjects for discussion in executive session. For instance, a plan for positions, discussions of contractual obligations, an enrollment study, the use of schools by the Red Cross, a baseball team's trip to Florida and a complaint concerning a baseball scoreboard would not in my opinion likely qualify as appropriate subjects for executive session.

In order to fully attempt to inform the Harrison Board of Education of this opinion and the provisions of the Open Meetings Law, copies of the opinion, the Law, and an explanatory pamphlet on the subject will be transmitted to the 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:ss

Enclosures

cc: Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1968

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

April 17, 1981

[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Rehr:

As you are aware, I have received your letter of March 12. Please accept my apologies for the delay in response.

Your letter summarizes a history of medical problems and your inquiry concerns your capacity to gain access to records pertaining to you from Meadowbrook Hospital, Pilgrim State Hospital and Montefiore Hospital. It is emphasized that the law concerning rights of access may differ with respect to each of the three hospitals that you identified, for Meadowbrook Hospital is, to the best of my knowledge, a county hospital; Pilgrim State Hospital is or had been a facility of the State Department of Mental Hygiene; and Montefiore is a private hospital. I would like to deal with each of the three separately.

It is also noted that you cited the Privacy Act of 1974 in your letter. The Privacy Act was passed by Congress and applies only to records in possession of federal agencies. As such, the Privacy Act is not applicable to the records in which you are interested. Further, the New York Freedom of Information Law applies only to records in possession of government in New York. As such, it would not apply to a private hospital, such as Montefiore.

With regard to Meadowbrook Hospital, which I believe is now known as the Nassau County Medical Center, I believe that those records are subject to the New York Freedom of

Information Law. In terms of the Law, it states in brief that all records in possession of an agency, such as a county, are accessible, 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 (see attached).

Under the circumstances, I believe that one ground for denial is particularly relevant to records in possession of the Nassau County Medical Center. 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..."

It is noted that 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 policies or determinations must be made available.

Under the circumstances, it would appear that factual information, such as laboratory test results, records reflective of medications administered to you and similar data would be available. However, records reflective of medical advice or diagnostic opinion would likely be deniable.

With regard to Pilgrim State Hospital, as noted earlier, I believe it is or was a facility of the State Department of Mental Hygiene. In this regard, it appears that the applicable provision of law would be §33.13 of the Mental Hygiene Law, a copy of which is attached. In brief, §33.13 states that clinical records concerning patients are confidential, even when requested by the subjects of the records. However, subdivision (c)(4) of §33.13 states that records may be released to any person

with the consent of the Commissioner of Mental Hygiene. In view of the foregoing, to obtain records pertaining to yourself in possession of Pilgrim State Hospital, it is suggested that you seek the consent of the Commissioner by writing to:

Office of Mental Health
44 Holland Avenue
Albany, NY 12229

With respect to Montefiore Hospital, since it is private, its records fall outside the scope of the Freedom of Information Law. However, as I explained to you during our telephone conversation, §17 of the Public Health Law, a copy of which is attached, states that a physician acting on behalf of a client may request and obtain records pertaining to a patient, such as yourself, from another doctor or hospital. Therefore, while you may not have direct rights of access to medical records in possession of Montefiore Hospital, the physician of your choice could request and obtain such records from the hospital.

Lastly, many of the records in which you are interested may no longer exist.

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

FOIL-AO-1969

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

April 17, 1981

William G. Ruger
County Attorney
Schuyler County
110 Ninth Street
P.O. Box 391
Watkins Glen, NY 14891

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ruger:

Thank you for your letter of March 10. Please accept my apologies for the delay in response.

Your inquiry concerns the availability of information under the Domestic Relations Law, §235. Specifically, you have requested advice as to whether a county clerk must supply the "names of parties to divorce actions pending and disposed of at our terms of Supreme Court" upon request by the news media.

I would like to offer the following observations.

First, §87(2)(a) of the Freedom of Information Law states that rights of access granted do not apply to information that is "specifically exempted by state or federal statute". In this regard, §235(1) of the Domestic Relations Law specifically exempts records reflective of the particulars of matrimonial actions or proceedings from disclosure, such as "pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony", except when disclosure is ordered by a court.

However, under §235(3) of the Domestic Relations Law, a county clerk or other municipal officer is required to issue a "certificate of dissolution" of a matrimonial action and certify to the "nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such actions". As such, I believe that any person requesting information regarding the disposition, judgment or order of a marriage must be furnished with a "certificate of dissolution" that contains the names of the parties to the action.

I agree that there are considerations relative to possible invasions of personal privacy with respect to the release of the names. Nevertheless, the Freedom of Information Law is a general statute which is in my view subordinate when a "special" statute provides specific direction to exempt from or require disclosure of particular records. In this instance, I believe that §235(3) of the Domestic Relations Law requires access to any applicant to the names of the parties by means of the "certificate of dissolution". It is noted that the matter has been disclosed on previous occasions with representatives of the Office of Court Administration and various county clerks, who concur with the foregoing interpretation 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

BY: 

Pamela Petrie Baldasaro
Attorney

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-609
FOIL-AO-1920

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

April 17, 1981

Rose E. Clarkson
Town Clerk
Town of Pawling
160 Maple Boulvevard
Pawling, NY 12564

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Clarkson:

I have received your letter of March 12 and appreciate your interest in complying with the Open Meetings Law. Please accept my apologies for the delay in response.

You have asked that I define "work sessions" and "executive sessions" and "advise if either or both are open to the public or press". You have also asked whether "intra or inter" agency meetings are open to the public or press.

First, the phrase "work session" has been considered by many to mean a gathering of a public body during which it merely discusses public business, but in which there is no intent to take action. In this regard, shortly after the enactment of the Open Meetings Law in 1977, it was contended that so-called "work sessions", "agenda sessions", "planning sessions" and similar gatherings during which there was no intent to take action fell outside the scope of the Open Meetings Law. However, in a case concerning the status of work sessions, the Court of Appeals, the state's highest court, held in essence that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which such a gathering may be characterized [see e.g., 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)].

Further, in a series of amendments to the Open Meetings Law that went into effect on October 1, 1979, the definition of "meeting" [see §97(1) of the Open Meetings Law] was altered to conform with the direction provided by the Court of Appeals. In view of the foregoing, I believe that it is clear that a work session is a meeting subject to the Open Meetings Law in all respects. In addition, in view of the case law and the definition of "meeting", it has been suggested that the phrase "work session" should no longer be used, for it is synonymous with "meeting".

Second, the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law describes the procedure that must be followed before a public body may enter into an executive session, and paragraphs (a) through (h) of the cited provision specify and limit the areas of discussion that may properly be considered during an executive session.

Third, you have raised a question regarding "intra or inter" agency meetings. In all honesty, I am not sure of the nature of meetings that you have identified. If, for example, you are referring to staff meetings, where no quorum of a public body is present, such gatherings would not be subject to the Open Meetings Law. In terms of its coverage, the Law applies only to meetings of a "public body", which is defined in §97(2) of the Law.

It is possible that you may be referring to the language of one of the grounds for denial appearing in the Freedom of Information Law. Specifically, §87(2)(g) of the Law states that an agency, such as a town, 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 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 policies or determinations must be made available.

Lastly, it is noted that neither the Freedom of Information Law nor the Open Meetings Law makes a distinction in terms of rights of access between the public and the news media. As such, if a proper executive session is convened, the public and the news media may be excluded. Conversely, if a meeting is open to the news media, presumably any member of the public would have the right to attend as well.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information Law, and an explanatory pamphlet that deals with both subjects 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-1971

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

April 21, 1981

Robert L. Brandofino
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brandofino:

Your letter addressed to the Department of State has been forwarded 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 an identification card to seek out government information. In this regard, I do not know of any requirement that an individual must obtain an identification card in New York. Further, under the New York Freedom of Information Law, accessible records are available to any person, without regard to that person's status or interest.

Enclosed for your consideration is a copy of the New York Freedom of Information Law, which is applicable to all units of state and local government in New York. In brief, the Law grants access to all records in possession of agencies, except those records that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Also enclosed is an explanatory pamphlet on the subject that 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

FOIL-AO-1972

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

April 21, 1981

Ms. Norma H. Fatone
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Fatone:

As you are aware, I have received your letter of March 17. Please accept my apologies for the delay in response.

Your inquiry concerns a situation in which you have contended that the Troy Citizens' Forum has acted in compliance with the Freedom of Information Law despite allegations to the contrary. Specifically, on January 30, the Citizens' Forum received a request for access to records from the Mayor's Advisory Task Force on Community Development. However, on February 5, the President of the Citizens' Forum filed all records of the Forum with the Troy Public Library.

Based upon the information that you have provided, it is in my view unlikely that any violation of the Freedom of Information Law was committed. First, as I understand the situation, the Citizens' Forum no longer exists. Second, you have brought to my attention a resolution enacted by the Troy Common Council which designated the Troy Public Library as an official repository of records for the City of Troy. In this situation, the records of the Citizens' Forum were, in apparent accordance with the resolution to which reference was made, deposited at the Troy Public Library. If my observations are accurate,

it would appear that the records in question were transmitted to the Library pursuant to the Common Council's resolution and that, consequently, no violation of the Freedom of Information Law occurred.

I hope that 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's Advisory Task Force

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1973

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

April 22, 1981

Bruce F. Godsave
Assistant Professor
State University College of
Arts and Science
Geneseo, NY 14454

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Professor Godsave:

As you are aware, your letter addressed to Attorney General Abrams has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law. Please accept my apologies for the delay in response.

You have requested advice with respect to the situation in which you believe your privacy has been invaded in relation to your situation. Specifically, in your letter to the Attorney General, you wrote that:

> "...each semester the faculty are mandated by Presidential Policy to distribute a data gathering instrument, referred to as the Course Instructor Evaluation (CIE), to all students in all courses taught by the respective faculty. Most faculty concur with this policy which actually was initiated by Faculty Senate. Faculty Senate is an elected representative body of faculty and students from campus.

> "What some of us feel is objectionable is the subsequent printing of these evaluations in the student newspaper and the placement of all the results for public inspection in the Library and other places around campus in an individually indentifiable form.
>
> "The faculty are human subjects in this research. None of us have been asked to sign a waiver to allow the publication of this statistical data."

I would like to offer the following observations with respect to the issues that you have raised.

First, the New York Freedom of Information Law includes within its scope of units of state and local government [see attached Freedom of Information Law, §86(3), definition of "agency"]. Since the State University and its component colleges, such as the State University College at Geneseo, are institutions of New York State government, they are "agencies" subject to the Freedom of Information Law in all respects.

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

Third, it is emphasized that the Freedom of Information Law is permissive. Stated differently, although an agency may withhold records falling within one or more of the exceptions to rights of access, there is no obligation to withhold, unless a statute specifically precludes an agency from disclosing. When an agency is precluded from disclosing, records would fall within the scope of §87(2)(a), which deals with records that are "specifically exempted from disclosure by state or federal statute". Under the circumstances, I do not believe that there is any statute enacted by either Congress or the State Legislature that would prohibit the Faculty Senate from disclosing the records at issue. As such, I believe that the records in question may be disclosed, even if a ground for denial might appropriately be cited.

Fourth, it is possible that the evaluations would be accessible as of right under the Freedom of Information Law, not withstanding possible invasions of privacy. In this regard, I direct your attention to §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". Although subjective judgments must often be made regarding the extent to which one's privacy might be invaded, the courts have provided significant direction, particularly with respect to the privacy of public employees. Under the Freedom of Information Law and other areas of law, the courts have 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, it has been held on several occasions that records that are relevant to the performance of public employees' official duties are available, for disclosure in such cases would constitute 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]. Contrarily, if information concerning a public employee is irrelevant to the performance of his or her official duties, a denial may be proper, for disclosure might indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977].

Under the circumstances, it might be contended that the evaluations are relevant to the performance of the official duties of the subjects of the evaluations. As such, it is not inconceivable that a court would direct that the records in question must be made available under the Freedom of Information Law on the ground that disclosure would constitute a permissible as opposed to an unwarranted invasion of privacy.

Lastly, New York State does not operate under an equivalent to the federal Privacy Act. As indicated in the correspondence attached to your letter, the federal Privacy Act applies only to records of federal agencies. Consequently, that Act is irrelevant with respect to records in possession of the State University College.

I hope that 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-1974

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

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 22, 1981

Robert E. Helm, Esq.
Helm, Shapiro, Ayers,
Anito & Aldrich, P.C.
111 Washington Avenue
Albany, New York 12210

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Helm:

As you are aware, I have received your letter of March 18. Please accept my apologies for the delay in response.

You have requested an advisory opinion with respect to a denial of access to records that you requested from the Department of Agriculture and Markets. The records sought involve tests conducted by the Department which led to allegations that milk cartons sold to schools by the Glen & Mohawk Milk Association were underfilled. Further, you indicated that the matter has been forwarded to the Attorney General for possible criminal investigation.

The records sought include "all written documentation of test results, description of methodology of testing; names of individuals conducting tests; and names of schools or other institutions or places from which product samples were taken with respect to..." tests and surveys conducted regarding particular periods of time. In addition, you requested a copy of a taped conversation between the Director of Quality Control for Glen & Mohawk and the Director of Weights & Measures for the Department of Audit and Control, correspondence between the Department and Glen & Mohawk relating to alleged underfilling of milk sold in schools and "all interior departmental correspondence and memoranda" reflective of conversations between officials of the Department and others relating to the allegations of underfilling of milk containers.

Your request was denied initially be Dennis Buckley pursuant to §87(2)(e) of the Freedom of Information Law, and the denial was affirmed on appeal by James Burnes. Mr. Burnes based the denial on §87(2)(e) and (g) of the Freedom of Information Law as well as §63(1) of the Executive Law.

You have contended that the records in question were compiled in the ordinary course of business and that, as a consequence, §87(2)(e)(i) would not be applicable. In addition, you wrote that even if the records were compiled for law enforcement purposes, disclosure would not at this juncture interfere with an investigation.

Before offering observations regarding the controversy, I would like to note that the case law is in apparent conflict and that, as a consequence, I do not believe that I can provide a definitive response.

First, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Department of Agriculture and Markets, 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).

Second, the introductory language of §87(2) makes clear that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. As such, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, the language of §87(2) in my view requires that an agency in receipt of a request review the records sought in their entirety to determine which portions, if any, fall within the scope of the grounds for denial.

Third, it appears that the major point of difference surrounds §87(2)(e)(i) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

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

The conflict that has arisen concerns the applicability of the language quoted above.

On the one hand, there have been judicial determinations rendered under both the original Freedom of Information Law and the existing Law, which became effective on January 1, 1978, which held that the "law enforcement purposes" exception may appropriately be invoked only by a criminal law enforcement agency [see e.g., Young v. Town Huntington, 368 NYS 2d 978 (1976); and Broughton v. Lewis, Sup. Ct., Albany Cty. (1978)]. While a violation of the Agriculture and Markets Law may result in a criminal penalty, it is in my opinion doubtful that the Department of Agriculture and Markets could be characterized as a criminal law enforcement agency.

On the other hand, the most recent judicial determination concerning this issue found that the "law enforcement purposes" exception may appropriately be asserted by any agency. Specifically, the court found that:

> "[T]here is no requirement in the FIL that the records be compiled or held by a law enforcement agency. The only requirement is that the records in the possession of a public agency were compiled for law enforcement purposes. On the basis of the undisputed affidavit of the Commissioner of Investigation, I find that the information sought by the interrogatories was compiled for law enforcement purposes and that, if disclosed, it would result in violating one or more of the conditions which are sought to be avoided by Pub.Off.L §87 (2)(e)," [City of New York v. Bus Top Shelters, Inc., 428 NYS 2d 784, 791 (1980)].

In view of the case law cited above, it is in my view unclear whether the Department of Agriculture and Markets may assert §87(2)(e) as a basis for withholding.

If it is assumed that §87(2)(e) could not be so cited, the tests, survey results and similar factual information would in my opinion likely be available [see Freedom of Information Law, §87(2)(g)(1)].

If, however, it is assumed that §87(2)(e) may appropriately be asserted by the Department of Agriculture and Markets, it is possible that some of the materials in which you are interested might justifiably be withheld. It is emphasized that, without greater familiarity with the records or the nature of the investigation that is being carried out, I could not conjecture as to the potential effects of disclosure, i.e. interference with a law enforcement investigation. Nevertheless, it is noted that an agency is obliged to prove that the harmful effects of disclosure described in §87(2)(e) would indeed arise in order to prevail [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979)].

In sum, do to the apparent conflict in the case law regarding the propriety of the assertion of §87(2)(e), it would be inappropriate to advise with certainty that the exception in question is applicable.

It is possible that another ground for denial, which was cited by Mr. Burnes, might be appropriate with regard to the internal correspondence, memoranda and notes that you requested. Specifically, Mr. Burnes cited §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 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 policy or determinations must be made available. Conversely, portions of inter-agency or intra-agency materials consisting of advice, impression, suggestions and the like would in my view be deniable under §87(2)(g).

Again, without having seen the records in which you are interested, I could not conjecture as to the extent to which the cited provision could appropriately be asserted.

One of the areas of request concerns a copy of a taped conversation between representatives of Glen & Mohawk and the Department of Agriculture and Markets. Presumably, since both individuals taped are familiar with the conversation, it is difficult to envision any basis for withholding the tape recording.

Lastly, one of the grounds for denial cited by both Mr. Buckley and Mr. Burnes is §63 of the Executive Law. Having reviewed subdivisions (1) and (3) of §63, which were cited respectively by Mr. Buckley and Mr. Burnes, it appears unlikely that either provision could be asserted to withhold the records in which you are interested. Nevertheless, it is possible that a different subdivision of §63 of the Executive Law might be applicable. Specifically, the last sentence of §63(8), which deals with inquiries made by the Attorney General, states that:

> "Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor."

If the provision quoted above is applicable to the controversy, it would appear that the records in question would be confidential. If that is the case, I believe that the records would 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." Again, however, due to my lack of familiarity with the investigation, I do not know that §63(8) of the Executive Law could be properly asserted.

I hope that 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: Dennis Buckley
James Burnes

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 612
FOIL-AO- 1975

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

April 22, 1981

Mr. Andrew Golebiowski
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Golebiowski:

Thank you for your letter of March 13. Please accept my apologies for the delay in response.

You have raised several questions regarding the implementation of the Open Meetings Law. Specifically, you have requested an advisory opinion as to whether the Law is applicable to a standing committee of the College Senate of the State University College at Buffalo. In your correspondence, you indicated that on several occasions you have been unable to attend meetings of the Curriculum Committee due to the fact that these Committee meetings are held in executive session and without notice. Furthermore, you have expressed concern that the Curriculum Committee is meeting in violation of the Law.

I would like to offer the following observations with respect to the issue that you raised,

Section 97(2) of the Open Meetings 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."

By analyzing the elements comprising this definition, it may in my opinion be concluded that the Curriculum Committee is a "public body" subject to the Open Meetings Law.

First, the Curriculum Committee is an entity that consists of two or more members.

Second, I believe that it is required to conduct its business by means of a quorum, whether or not there is any specific requirement concerning a quorum in the by-laws of the Committee or in the act that created it. 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 of similar body, a majority of the whole number of such persons or officiers, 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."

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Curriculum Committee must conduct its business by means of a quorum, §41 of the General Construction Law imposes such a requirement upon the Committee.

Third, the Committee in my opinion conducts public business.

And fourth, the Committee performs a governmental function for the State University College at Buffalo, a component of the State University of New York corporation created within the New York State Department of Education. With your correspondence you enclosed a copy of the by-laws of the College. Under Artice 3, §A entitled "College Senate", the College Senate is designated as the "official agency through which the faculty and students engage in the governance of the College." Eleven specific areas of concern are designated to be considered by the College Senate. Section E of the same article requires the creation of a standing committee for each of the eleven areas. The Committee you described is assigned to one of these areas, i.e. curriculum. Furthermore, §F requires the College Senate to charge the Curriculum Committee with a "mission" and provide a frame of reference within which the Committee must operate. As such, the activities required of the Curriculum Committee are reflective of the conduct of public business and the performance of a governmental function for the state.

Since each of the conditions precedent to a finding that the Curriculum Committee is a "public body" appear to have been met, I believe that it is a public body required to comply with the Open Meetings Law in all respects.

I would like to point out that the definition of "public body" discussed in the preceding paragraphs differs from the definition that appeared in the Open Meetings Law as originally enacted. Under the original statute, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I be-

lieve that the definition as amended clearly includes such advisory bodies within the scope of the Law. Moreover, this point was confirmed in a recent decision, which found that a mayor's advisory task force is subject to the Open Meetings Law based upon the rationale I have offered above [see Matter of Syracuse United Neighbors v. City of Syracuse, ___ AD 2d ___, (Fourth Department, Appellate Division, March 27, 1981)].

You have written that the State University Counsel, Sanford Levine, advised the College Senate President, Ann Egan, that "the College Senate is not a policy making body of the College, therefore it is not bound by the Open Meetings Law." However, Mr. Levine has apparently based his opinion in part upon the contention that a College Senate committee meeting is outside the scope of the Open Meetings Law, for it does not take formal action of make policy, but rather makes recommendations or acts in an advisory capacity. If those contentions form the basis of Mr. Levine's advice, I would respecfully disagree based upon the discussion of the scope of the definition of "public body" appearing in the preceding paragraphs.

If my contention that the Curriculum Committee is a public body is accurate, it would be required to comply with the notice provisions set forth in §99 of the Law. In brief, when a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours prior to a meeting. If a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time before the meeting.

Additionally, §101 of the Law requires that minutes be taken of all meetings held by public bodies. In the case of an open meeting, §101(1) requires that the minutes 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) of the Law, which concerns minutes of executive sessions, requires that such minutes consist of "a record or summary of the final determination of such action, and the date and vote thereon..." It is noted that a public body may vote during a properly convened executive session, so long as the vote does not pertain to the appropriation of public monies. Further, the Open Meetings Law requires that minutes of executive session be compiled only when action is taken.

In such cases, the minutes must be compiled and made available within one week of an executive session. Therefore, when action is taken regarding the adoption of procedures, the action must be noted in minutes, which are accessible.

It is also noted that the Freedom of Information Law requires that a voting record be compiled that identifies each member of a public body and the manner in which the member voted in every instance in which a vote is taken [see attached Freedom of Information Law, §87(3)(a)].

You indicated that the Curriculum Committee meets in private. In this regard, under the Open Meetings Law as originally enacted, the Court of Appeals rendered an expansive opinion with respect to the scope of the definition of "meeting". In its decision, the Court found in essence that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see e.g., 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" that now appears in §97(1) of the Law was in my view intended to conform to the decision rendered by the Court of Appeals. Therefore, in my opinion, it is clear that the committee meetings that you have described are subject to the Open Meetings Law, even if any recommendations made or action taken is subject to further review by the College Senate.

Further, "executive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. As such, an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. In addition, §100 sets forth a procedure that must be followed before a public body may discuss its business behind closed doors. 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..."

Similarly, since a motion to enter into an executive session must be made during an open meeting and carried by a majority of the total membership of a public body, an executive session cannot, at least in a technical sense, be scheduled in advance of a meeting.

Lastly, §100(1) states that an executive session may be convened only to discuss one or more among eight areas deemed appropriate for executive session that are listed in paragraphs (a) through (h) of the cited provision. Based upon your letter, it appears unlikely that any of the eight areas of discussion that may properly be conducted during an executive session would arise during a meeting of the Curriculum Committee. Consequently, it appears that the deliberations of the Committee must be conducted during open meetings in view of any person who seeks to attend.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Pamela Petrie Baldasaro

BY Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

Enc.

cc: Ann Egan
Robert Moisand

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-613
FOIL-AO-1976

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

April 23, 1981

John M. Donoghue
Van DeWater and Van DeWater
Counselors at Law
Mill & Garden Streets
P.O. Box 112
Poughkeepsie, NY 12602

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Donoghue:

I have received your letter of March 19. Please accept my apologies for the delay in response.

As Counsel to a number of political subdivisions, you indicated that a number of your clients have encountered difficulties regarding the interpretation of the Freedom of Information Law by various members of the news media with respect to the obligation to disclose personnel recommendations prior to meetings. Specifically, you wrote that:

> "...a question has been raised concerning the accessibility of portions of an agenda prepared prior to a meeting of a Board of Education which lists personnel actions including the hiring, termination, leaves of absence for medical and other reasons, transfers in salary and the acceptance of discipline and other proceedings by a Board of Education... In many cases, the mere authorization for hiring of a teacher who has not yet notified their current employer or, for that matter, fully accepted employment, creates potential liability for both the Board of Education and the individual. Other matters dealing with applications for leave are sometimes withdrawn prior to the actual Board meeting. A number of those applications deal with sensitive,

> personal, family issues. Similarly, in many situations, Board agendas have contained references to terminations and replacements, some of which were withdrawn prior to actions by the Boards of Education".

You have contended that the recommendations need not be made public prior to meetings of boards of education.

I am in general agreement with your contentions and would like to offer the following observations.

First, there is no requirement of which I am aware that a public body must create an agenda prior to a meeting. However, from my perspective, once an agenda exists, it constitutes a "record" subject to rights of access granted by the Freedom of Information Law. It is noted that §86(4) of the Freedom of Information Law defines "record" broadly to include "any information kept, held, filed, produced or reproduced, by with or for an agency...in any physical form whatsoever..." In view of the foregoing,it is clear that an agenda is a "record" that falls within the scope of the Freedom of Information Law.

I would like to point out that several boards have indicated that they maintain what may be considered to be two agendas. The first simply identifies the proposed areas of discussion in general terms and is distributed to the public and the news media in advance of meetings. The second consists of detailed materials transmitted to Board members for their review prior to meetings. Such a procedure is appropriate in the view of many, for the public and the media can be apprised in advance of the general nature of topics to be considered at a meeting, and concurrently, the members of the Board and the administration have the capacity to review prior to the meeting the specific information to be discussed.

Second, as you are aware, 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, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Third, I believe that there are two grounds for denial that may appropriately be cited with regard to much of the information that you described. Perhaps most 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 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. Conversely, portions of such materials reflective of advice, recommendation, suggestion, impression and the like would in my view be deniable. Consequently, records containing a recommendation, for example, that may be accepted or rejected by the Board would in my view likely be deniable [see e.g., McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), ___NY 2d ____ (aff'd w/no opinion].

A second ground for denial of 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". If, as you indicated, issues deal with "sensitive, personal, family issues", perhaps the identities of the subjects of the discussions might result in unwarranted invasions of personal privacy. In those circumstances, records or portions of records might justifiably be withheld.

It has been suggested that if an agenda makes reference to named individuals, copies of the agenda might be made available after having deleted identifying details to protect privacy. For instance, if one of the areas of discussion appearing in an agenda is characterized as

"personnel matters", and a number of names are listed thereafter with the recommendations made to the Board, perhaps that portion of the agenda indicating only that personnel matters would be discussed should be made available, while the remaining portions under that heading that identify individuals could be deleted.

In situations in which individuals have applied for positions, it has been advised that records containing the identities of those individuals generally need not be made available. As you intimated, if, for example, an individual who is now employed by a neighboring school district applies for a position, it is possible that disclosure of his or her identity could jeopardize that person's current position. In such cases, it is my feeling that disclosure would indeed result in an unwarranted invasion of personal privacy.

In other cases, the identities of applicants might be disclosed. For example, if a position for which a civil service examination is required is under consideration, an eligible list identifying passing candidates and their scores is generally available to any person.

Fourth, it would appear that many of the areas of discussion that you identified could be conducted appropriately during executive sessions. Section 100(1)(f) of the Open Meetings Law permits a public body to 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..."

With respect to discussions of hiring, termination, leaves of absence, medical leaves, disciplinary matters, family issues and similar discussions dealing with particular individuals, it would appear that each might deal with the employment history of a particular person and therefore would constitute an appropriate subject for executive session.

Fifth, as you are aware, §100(1) of the Open Meetings Law requires that a motion to enter into an executive session be made during an open meeting and that such a motion identify in general terms the subject or subjects to be considered. This office has consistently advised that when a particular individual is the subject of a discussion to be held in an executive session, the motion to enter into an executive session need not identify the individual. If the subject of an executive session were to be identified in a motion, disclosure might 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-1977

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

April 23, 1981

Ann Piznak, Temp. Chairman
Access to Records Appeals Board
Town of Deerpark
RD #3, Box 88
Huguenot, NY 12746

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Piznak:

I have received your letter of March 19. Please accept my apologies for the delay in response.

You have raised a number of questions concerning rights of access to records, and I will attempt to respond to each.

First, you wrote that the Town Clerk tape records all Town Board meetings and that the Clerk stated that she has the right to destroy the tapes at any time. You have asked whether the definition of "record" in §86(4) of the Freedom of Information Law requires the Clerk to retain all such tapes so that they may be made available to a requester.

In response to your question, it is important to point out that the Freedom of Information Law merely defines "record"; it does not deal in any way with the retention or disposal of records. Section 65(b) of the Public Officers Law states in brief that a unit of local government cannot destroy or otherwise dispose of records without the consent of the Commissioner of Education. In turn, the Commissioner has developed detailed schedules concerning the retention and disposal of particular records. Having contacted a representative of the Education Department on your behalf, I was informed that the retention period

for tape recordings of meetings is zero. Consequently, I believe that the Town Clerk may destroy the tapes at any time, unless a request for particular tapes has been made, in which case the tape recording would be made available and erased after any pending requests have been fulfilled.

Second, you have raised questions regarding complaint records prepared by the Police Department. In this regard, as you may be aware, the same question was raised in a letter by the attorney to whom you made reference, William A. Glass, and I have enclosed a copy of my response to Mr. Glass. In sum, I agree with Mr. Glass that there are several potential grounds for denial with respect to complaint records. However, as I indicated to him, the extent to which a ground for denial may properly be asserted depends upon the content of a particular record. For instance, it is possible that disclosure of a recent complaint under investigation would interfere with the investigation; similarly, a complaint might identify a juvenile or a rape victim under the age of eighteen. In those cases, the records would likely be confidential by statute. However, in other instances, there might be no harmful effects of disclosure and a complaint report might be available under the Freedom of Information Law in whole or in part. In short, I do not believe that a complaint report is deniable in every instance, but rather that each report requested must be considered individually due to its contents. Further, since §87(2) of the Law states that an agency may withhold "records or portions thereof" that fall within one or more categories of deniable records, it is possible that a single record may be accessible and deniable in part. In such a case, accessible portions might be made available after having deleted the deniable portions.

Third, you have asked whether the Freedom of Information Law restricts the number of records that may be inspected. Although the Law does not impose any restriction on the number of records that may be requested, §89(3) of the Law requires that a request reasonably describe the records sought. In cases in which a request is extremely broad, it is possible that it might not reasonably describe the records sought. For example, as stated in the response to Mr. Glass, if hundreds of complaints are filed during the course of a year, perhaps a request might be narrowed to reasonably describe particular types of complaints or other qualifying aspects of complaints that would narrow the request.

Fourth, you wrote that at a recent Town Board meeting, the Town Clerk was asked what questions she raised before Mr. Glass in connection with a request for complaint records. In response, the Town Clerk prohibited disclosure on the basis of the attorney-client privilege. I am in accord with the opinion expressed by the Town Clerk. It has long been held that municipal officials may engage in a privileged relationship with an attorney when communications are made within the scope of an attorney-client relationship. Since such a relationship is privileged under §4503 of the Civil Practice Law and Rules, records created pursuant to the relationship would in my view be deniable under §87(2)(a) of the Freedom of Information Law. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute".

Your fifth question deals with complaint reports and the protection of privacy of complainants or witnesses. In all honesty, I am not sure that I understand your question. However, it should be emphasized that §89(2) of the Law, which provides five examples of unwarranted invasions of privacy, is intended to provide guidance. From my perspective, the examples of unwarranted invasions of privacy appearing in the cited provision represent but five among conceivable dozens of unwarranted invasions of privacy. Further, questions concerning the extent to which privacy may be protected are often perplexing, for subjective judgments must of necessity be made. Stated differently, while one person might consider that disclosure of a particular record would constitute a permissible invasion of privacy, an equally reasonable person might view the same record and contend that disclosure would be offensive and therefore result in an unwarranted invasion of privacy.

Your sixth question concerns the possibility of my having responded to Mr. Glass. As indicated earlier, a copy of my response to him has been enclosed.

Lastly, you have asked whether lists of "all requests for records and the disposition of such" must be open to the public. In my view, it is possible that a court would consider that records reflective of the identities of those who have made requests under the Freedom of Information Law would be deniable on the ground that disclosure would result in an unwarranted invasion of personal privacy. The Committee has consistently advised and the courts have upheld

the notion that accessible records must be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165].

Consequently, the identity of an applicant for records is in my view irrelevant; what is relevant to an agency is the extent, if any, to which records 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:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1978

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

April 23, 1981

Mr. David C. Ranauro
Box 109, R.D. #6
Mutton Hill Road
Auburn, NY 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ranauro:

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

You have requested information concerning the types of information that are considered public and where they can be made available.

In this regard, I have enclosed several documents for your consideration, including the New York Freedom of Information Law, procedural regulations promulgated by the Committee, the Committee's most recent annual report on the subject, an explanatory pamphlet and a pocket guide to the Law.

Please note that the Freedom of Information Law is generally applicable to all units of state and local government in New York. Further, in brief, the Law provides 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),

I do not have a list of the offices from which you may obtain records under the Law. However, in accordance with the regulations promulgated by the Committee, each agency is required to designate one or more records access officers responsible for handling requests made under the Law. In order to make a request, it is suggested that you use the form of the sample letter found in the enclosed pamphlet.

If you are also interested in gaining access to records from federal agencies, it is noted that there is a counterpart to the New York Law, the federal Freedom of Information Act (5 U.S.C. §552). I have also enclosed a copy of that Act for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1979

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

April 24, 1981

Ms. Ann Piznak
Temp. Chairman
Access to Records Appeals Board
Town of Deerpark
Huguenot, New York 12746

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Piznak:

I have received your letter of March 19. Please accept my apologies for the delay in response.

You have stated a belief that since the enactment of the Freedom of Information Law, the publicity surrounding the implementation of the Law "has often proved unflattering and critical of officialdom." You have indicated further that, rather than complying with the Law, "antagonized officials" have withheld information by appointing agency officials as members of appeals bodies.

In this regard, you suggested that the Committee should attempt to seek legislation to exclude the heads of agencies and municipalities from serving as appeals officers and that the appeals persons should be "civilians". You have also suggested that the Committee should have the capacity to initiate litigation "on behalf of deserving Requesters".

I would like to offer the following observations with respect to your suggestions.

First, with all due respect, I believe that the Freedom of Information Law is working reasonably well. From this vantage point, the level of disclosure of government generally appears to increase with each year as more and more officials of government and members of the public become familiar with the Law.

Second, although in some instances perhaps a "civilian" might be an appropriate person to render decisions on appeal, and in fact some "civilians" have indeed been appointed appeals officers in various municipalities, often I believe that such a step would be inappropriate. Often requests may be of a highly technical or sensitive nature; they might deal with confidenital records. In such instances, I believe that the expertise of an agency official might be necessary to make a fair and appropriate determination.

Third, the Committee agrees that the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules may be costly and time consuming. In this regard, as you are likely aware, this office has prepared thousands of advisory opinions; it is my hope that many of those opinions are persuasive and that they have served to avoid the necessity of initiating litigation. Moreover, the Committee has recommended legislation that would enable a court to award a successful petitioner reasonable attorney fees under specified circumstances. I am hopeful that such legislation will be enacted this session of the Legislature.

Lastly, the Committee has recommended legislation that would enable it to commence legal proceedings on its own initiative or upon complaint under the Open Meetings Law, and a bill based upon the Committee's recommendation has been introduced.

In sum, although you may have encountered difficulties in your community, I would like to reiterate my belief that the Freedom of Information Law is working well and that more information is being disclosed by government with each passing year.

I hope that 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-1980

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

April 24, 1981

Ms. Rita Rech
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Rech:

I have received your letter of March 20 and appreciate your kind words. Please accept my apologies for the delay in response.

Your question is whether there is or should be some provision in the Freedom of Information Law

> "...that would require the 'requestor' to affirm what his/her interest in the particular documents and to what purpose the information would be used?"

In response to your question, the Freedom of Information Law does not distinguish among applicants or the reasons for which requests might be made. From my perspective, the only question that may be raised by an agency when a request is made concerns the extent, if any, to which the records sought fall within one or more of the grounds for denial found in §87(2)(a) through (h) of the Law. Moreover, since 1974 when the Freedom of Information Law was enacted, the Committee has advised that accessible records should be made equally available to any person, without regard to status or interest. That contention was confirmed judicially by the Appellate Division in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]."

I would like to add that questions have arisen with respect to rights of access to records sought by persons residing outside of a particular school district. These questions likely arose due to §2116 of the Education Law, which provides that school district records are open for inspection "by any qualified voter of the district". However, in Matter of Duncan [394 NYS 2d 363 (1977)], it was held that rights of access to school district records are not limited to qualified voters of the school district, but rather are extended to "any person" under the Freedom of Information Law.

In sum, as a general rule, I do not believe that rights of access to records are in any way contingent upon the purpose for which a request is made or the status or identity of an applicant.

I hope that I have been 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-1981

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

April 24, 1981

Phyllis Heller
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Heller:

Thank you for your letter of March 17, 1981. I apologize for the delay in response.

You have asked whether an income affidavit signed by a person living in cooperative limited dividend housing is accessible under the Freedom of Information Law.

I would like to offer the following observations with respect to the issue that you raised.

First, a cooperative limited dividend housing corporation under Article 4 of the Private Housing Finance Law is subject to supervision by the Commissioner of Housing and Community Renewal. In view of the situation you have described in your correspondence, it does not appear that a housing corporation is an "agency" subject to the Freedom of Information Law. Section 86(3) 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".

Second, 9 New York Code of Rules and Regulations (NYCRR) 1700.1 sets forth the scope and definition of the rules and regulations promulgated by the Commissioner relating to:

> "...private housing projects under the sponsorship of private enterprise and the ownership of limited dividend or limited profit housing companies, which in return for State and municipal financial aid or assistance and the grant of municipal tax exemption, voluntarily submit to public supervision during the period of time State or municipal assistance...remain in full force and effect..."

In this instance as well, the emphasis on the private status of a limited dividend housing entity would appear to exclude it from the definition of "agency" cited above, even though the activities of such housing entities are supervised by the commissioner of a unit of government.

Additionally, §1725-2.4 of the regulation, entitled "Disclosure of Information", requires that the personal information concerning tenants or cooperators to which members of a board of directors have access "should be held in the strictest confidence and should not be disclosed to any person, except insofar as it has a direct bearing in the business of the company, and except to persons duly authorized to receive such information".

Under the cited provision, it would appear that in your capacity as a newly appointed member of the Board of Directors you would have access to personal information regarding the residents of your private housing corporation when the information is directly related to the business of the housing corporation. If you continue to have difficulty in gaining access to these records in your capacity as a board member, it is suggested that you contact the Division of Housing and Community Renewal, which is located at:

> Two World Trade Center
> 60th Floor
> New York, NY 10047

The information phone number for that office is (212)288-4962.

For your information, I am enclosing a copy of the Freedom of Information Law and 9 NYCRR 1725-2 entitled "Responsibilities of Board of Directors" for your review.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Attorney

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-617
FOIL-AO-1952

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

April 27, 1981

Mr. Robert Napierala
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Napierala:

I have received your letter of March 25, Please accept my apologies for the delay in response.

Your inquiry concerns a situation in which, according to your letter, the Town Board of Newark Valley approved a motion to meet in executive session. The reason for the executive session was "involvement of potential litigation". Following the meeting, you directed a request to the Town Supervisor for minutes of the executive session, and you were denied access.

You have asked for assistance in gaining access to the minutes of the executive session.

First, it is unclear in your letter whether the Town Board convened its meeting as an executive session or whether the executive session was called after an open meeting had begun. In this regard, I would like to point out that the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Moreover, §100(1) describes a procedure that must be followed before a public body may enter into an executive session. Specifically, the cited provision states in relevant part that:

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1983

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

April 27, 1981

Paul E. Currie, Sr.
Chief of Police
Village of Mohawk Police Dept.
28 Columbia Street
P. O. Box 39
Mohawk, NY 13407

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Currie:

As you are aware, your letter of March 20 addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law. Please accept my apologies for the delay in response.

You have enclosed with your correspondence a copy of a "privacy notice" sent to the Mohawk Municipal Commission, which oversees the operation of the Village of Mohawk Police Department. The notice cites several federal laws and requests that the Commission withhold any information concerning the signee without his express written permission. You have indicated that such a request could interfere with access to information contained in the police blotter, accident reports and similar documents routinely prepared by or in possession of a police department.

I would like to make the following observations regarding the release of information by the Commission with regard to this privacy notice.

First, as you indicated, the person submitting this privacy notice cited federal law. In my view, those laws are not applicable, for the Village of Mohawk and its Police Department, as administered by the Mohawk Municipal Commission, do not fall within the jurisdiction of the federal statutes cited. Those statutes apply only to records of federal agencies.

Second, police blotters, conviction records, accident reports and various other records in possession of police departments are available under the New York Freedom of Information Law and other provisions of law [see e.g., Sheehan v. City of Binghamton, 59 AD 2d 808, (1977)].

Third, the Freedom of Information Law is permissive. Stated differently, although an agency may withhold certain information [see attached Freedom of Information Law, §87 (2)(a) through (h)], there is no general requirement that information be withheld, even if a ground for denial is applicable.

In view of the foregoing, it is my opinion that a privacy notice request would not restrict in any way the Police Department from releasing any information relative to the signee that would be found within a record that is available to the public under the Freedom of Information Law or other applicable 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

BY: 

Pamela Petrie Baldasaro
Attorney

PPB:RJF:ss

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1984

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

April 27, 1981

George D. Bernstein
Business Editor
Poughkeepsie Journal
P. O. Box 1231
85 Civic Center Plaza
Poughkeepsie, NY 12602

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bernstein:

I have received a copy of your letter and the correspondence attached to it. Please accept my apologies for the delay in response.

According to your letter, you requested a "Part 300 report filed by the Dutchess Bank and Trust Company in February of 1981" with the State Banking Department. The Part 300 report was submitted with respect to possible embezzlements from the bank.

In a letter addressed to you by Muriel Siebert, Superintendent of Banks, the report in question was denied following your appeal under §87(2)(b) of the Freedom of Information Law, which provides that an agency may withhold records when disclosure would constitute an "unwarranted invasion of personal privacy," and under §87(2)(e), which enables an agency to withhold records compiled for law enforcement purposes under circumstances described in the cited provision.

You have asked for an advisory opinion under the Freedom of Information Law regarding the propriety of the denial. Based upon a review of the Freedom of Information Law, applicable provisions of the Banking Law and the regulations promulgated thereunder, the Part 300 report in which you are interested is in my view likely available in part, if not in toto.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Specifically, the Law provides that all records of an agency, such as the Banking Department, 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).

I believe that there are three grounds for denial that may be relevant to rights of access to the Part 300 report.

The first ground for denial of relevance is §87(2)(a), which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". In this regard, over the course of years, I have engaged in discussions with various representatives of the Banking Department regarding the scope of §36(10) of the Banking Law. That provision states in brief that reports of examinations and investigations and related materials concerning or arising out of an examination or investigation of a bank are confidential and that such records shall not be made public unless "in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof..." In this case, the question is whether §36(10) includes within its scope reports filed under Part 300 of the regulations promulgated by the Superintendent.

In my opinion, §36(10) is inapplicable, for a review of Part 300 indicates that the statutory authority for its promulgation is §37(3) of the Banking Law. The cited provision states that:

> "[I]n addition to any reports expressly required by this chapter to be made, the superintendent may require any banking organization, licensed lender, licensed casher of checks, savings and loan bank of the state of New York, foreign banking corporation licensed to do business in this state, bank holding company and any non-banking subsidiary thereof,

> corporate affiliate of a corporate banking organization within the meaning of subdivision six of section thirty-six of this article and any non-banking subsidiary of a corporation which is an affiliate of a corporate banking organization within the meaning of subdivision six-a of section thirty-six of this article to make special reports to him at such times as he may prescribe".

The language quoted above contains no confidentiality requirement analagous to that found in §36(10). As such, it is my view that a Part 300 report could not be characterized as a record that is specifically exempted from disclosure by statute. Further, it is reiterated that the statutory basis for the submission of a Part 300 report is not §36 of the Banking Law, but rather §37(3), which imposes no requirement of confidentiality.

A second relevant ground for denial, as indicated in Superintendent Siebert's response to your appeal, 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". A review of Part 300 appears to indicate that a report filed by a bank under Part 300 would contain a minimal amount of what may be characterized as personal information. Section 300.2 of the regulations describes the content of such reports and states that each report shall include the following information:

> "(a) estimate of the amount of the loss;
>
> (b) name, address and position of every offender, if known;
>
> (c) statement as to insurance coverage; whether the matter has been reported to the insurance carrier and the name and address of such insurance carrier;

(d) statement, if the matter has not been reported to the insurance carrier, that the relevant contract(s) of insurance has been reviewed to make certain that such failure to report does not jeopardize all or any part of the insurance coverage;

(e) if the loss is covered by insurance and no claim has been made, the reasons therefor;

(f) statement as to whether the matter has been reported to the appropriate law enforcement authorities and the name and address of any such authority to whom a report has been submitted, and

(g) extent of reimbursement received, if any".

Based upon a review of the contents of a Part 300 report, it would appear that the only information found within the report that would have a bearing upon privacy would be the "name, address and position of every offender, if known".

If indeed the report contains reference to the identity of an offender, and if such offender has neither been charged nor convicted, I would concur that the portion of the report reflective of the name, address or position of an offender might justifiably be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy".

It is important to reemphasize at this juncture that the introductory language of §87(2) permits an agency to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. If, for example, the report makes reference to the name, address and position of an offender, those aspects of the report might be deleted to protect privacy; remaining aspects of the report, however, would be accessible, assuming that no other ground for denial could appropriately be cited. As such, it is possible that certain aspects of the report might be deleted to protect privacy while remaining portions might be accessible.

The last ground for denial of potential 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".

It is noted there is a conflict in case law regarding the applicability of §87(2)(e). In judicial determinations rendered under both the original Freedom of Information Law and its amended version, which became effective January 1, 1978, it was held that the "law enforcement purposes" exception could be cited 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)]. To the extent that I am familiar with the duties of the Banking Department, it appears doubtful that it could be characterized as a criminal law enforcement agency.

However, the most recent decision on the subject held that the law enforcement purposes exception may be cited where appropriate by any agency, such as an administrative agency, that has law enforcement functions other than criminal law enforcement functions [see e.g., New York, City of v. Bus TOP Shelters, Inc., 428 NYS 2d 784 (1980)].

If a court determined that §87(2)(e) could not be invoked by the Banking Department on the ground that it is not a criminal law enforcement agency, that provision could

not in my opinion be cited as a basis for withholding. Under such a circumstance, it would appear that the report in its entirety would be available, except to the extent that disclosure would result in an unwarranted invasion of personal privacy.

If, on the other hand,,§87(2)(e) could appropriately be cited as a basis for withholding, perhaps some of the information contained within the Part 300 report could be withheld. Nevertheless, it is emphasized that records compiled for law enforcement purposes may be withheld only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise. In the instant case, the extent to which disclosure would interfere with an investigation, deprive a person of a right to a fair trial, or identify a confidential source is questionable. Further, it appears that the Part 300 report constitutes a routine investigative technique and that, therefore, the report could not be withheld under §87(2)(e)(iv).

It is also noted that the burden of proof in a judicial proceeding initiated under the Freedom of Information Law rests upon the agency that has denied access. Moreover, the Court of Appeals has held that an agency cannot merely assert a ground for denial and prevail; on the contrary, the agency must demonstrate that the harmful effects of disclosure described in the ground 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)].

I hope that I have been 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: Superintendent Siebert
Karen Chanda

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1985

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

April 27, 1981

Mr. John Stahl
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stahl:

As you are aware, your letter addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, you have taken a civil service examination for a position with the Office of Court Administration (OCA). In this regard, you requested that OCA furnish you "with the names, position number..., the court, the date of appointment, of those who have been appointed from this register..." You have indicated that it is necessary to obtain the information, for you believe that an individual "whose name is at the bottom" of the eligible list may be or have been appointed to the position in question. You were denied access by OCA, which claimed a "blanket exemption" from the coverage of the Freedom of Information Law.

It is emphasized at the outset that I agree with the contention expressed in your letter that OCA is not a court, but rather the administrative arm of the court system. In fact, this office has prepared several advisory opinions to the effect that OCA is indeed an "agency" subject to the Freedom of Information Law in all respects, despite its claims to the contrary. Moreover, at least one judicial

determination held that OCA is subject to the Freedom of Information Law [see attached, Babigian v. Evans, 426 NYS 2d 688 (1980)].

Second, assuming that OCA is subject to the Freedom of Information Law, I believe that the information in which you are interested must be made available. As you may be aware, the names and scores of those who pass civil service examinations appear on an eligible list, which is and has long been available to the public. Further, if a particular individual has been appointed to the position in question, a record reflective of the date of appointment would in my opinion also be available by means of the payroll record required to be compiled under §87(3)(b) of the Freedom of Information Law. The cited provision requires that each agency must maintain:

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

In the alternative, if OCA continues to reject your request, it is suggested that the same information might be available from the State Department of Civil Service. As such, it is suggested that you direct a request, providing as much identifying information as possible, to the records access officer of the Department of Civil Service. The name and address of the Department's records access officer are as follows:

> Anthony J. Costanzo
> Records Access Officer
> Department of Civil Service
> Agency Building #1
> State Office Building Campus
> Albany, 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:ss
Enclosure
cc: Hon. Herbert V. Evans

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1986

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

April 27, 1981

Ms. Barbara J. Gilman
Chemung County Taxpayers Association
228 Sunset Circle
Horseheads, NY 14845

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Gilman;

Thank you for your letter of March 25. Please accept my apologies for the delay in response.

You have indicated that you have unsuccessfully attempted to obtain the addresses of residential properties found in a list prepared by the Soil Conservation Service of the United States Department of Agriculture. Specifically, an Assistant State Conservationist for Water Resources for the Department of Agriculture released to you a numerical list of properties flooded within a particular area; however, he would not release the address list of the residential and commercial properties on the basis that such release would be contrary to policy set by the Soil Conservation Service. Consequently, you have asked for advice regarding rights of access to the list of addresses of the properties.

I would like to offer the following observations in regard to the situation that you described.

First, as you are aware, the Committee on Public Access to Records issues advisory opinions regarding the New York State Freedom of Information Law and Open Meetings Law. The Committee does not have the authority to render an opinion concerning access to records of a federal agency, such as the United States Department of Agriculture. Because you are seeking records from a federal agency, rights

of access are determined by the federal Freedom of Information Act, rather than the New York Freedom of Information Law. Therefore, it is suggested that you contact the freedom of information officer of the United States Department of Agriculture. To obtain the name of the individual to whom a request should be directed, it is suggested that you contact the Federal Information Center, which may be reached in Syracuse at (315) 476-8545 and Buffalo at (716) 846-4010.

Second, you have indicated that a Draft Environmental Impact Statement contains list of properties in which you are interested. It is possible that the New York Department of Environmental Conservation maintains a copy of the draft statement. As such, you might contact the nearest regional office of the Department of Environmental Conservation to determine whether it has the information that you are seeking.

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

BY: Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1987

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

April 28, 1981

Barbara A. Boxer
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Boxer:

I have received your letter of March 29 and appreciate your kind comments. Please accept my apologies for the delay in response.

Notwithstanding the issuance of several advisory opinions concerning access to records in possession of the Elwood School District, you have indicated that you continue to have difficulty in gaining access to records from the District. Specifically, you wrote that the District has refused to provide photocopies of drawings and designs, test protocols and other related items. The refusal by the District is apparently based upon allegations that such materials cannot be photocopied due to copyright laws. You have asked for information regarding other possible courses of action that you may pursue.

I would like to offer the following comments with respect to your inquiry.

First, the agency charged with the duty of overseeing both the Family Educational Rights and Privacy Act and the Education of the Handicapped Act is the United States Department of Education. An individual employed by that Department with whom I have had numerous contacts and who is in my view extremely helpful is Ms. Patricia Ballinger. It is suggested that you explain your problems regarding access to records in a letter of complaint to Ms. Ballinger, whose address is U.S. Department of Education, 4512 Switzer Building, Washington, D.C. 20202. Ms. Ballinger can be reached by telephone at (202)245-0233.

It is also emphasized that the Family Educational Rights and Privacy Act contains penalties that may be imposed upon an educational agency that fails to comply with its provisions. Specifically, if an educational agency subject to the Act fails to comply, the Secretary of the Department of Education may terminate funding under federal programs administered by the Department in which the educational agency participates.

Further, I would like to reiterate points that had been made in previous advisory opinions.

First, although the Family Educational Rights and Privacy Act does not require that an educational agency make copies of education records, that Act when read in conjunction with the New York Freedom of Information Law requires that photocopies of accessible records be made on payment of or offer to pay the requisite fees for photocopying. Therefore, although the federal Act does not expressly require that photocopies be made, they must be made under the New York law.

Second, test records consisting of drawings and designs that are separate from the test questions are in my view clearly available for inspection under the federal Act. Consequently, I believe that they must be made available to you.

With regard to protocols, as indicated in previous correspondence, it is the position of the Department of Education that such documents constitute "education records" that must be made available to parents under the Act. In addition, the protocols are separate and distinct from testing materials, for they are created by school district officials. As such, I do not believe that they would fall within the scope of any copyright law.

Lastly, I am unaware of any opinions, judicial or otherwise, that construe the relationship between the federal acts to which reference was made earlier and the Copyright Act. However, I would conjecture that Ms. Ballinger would be aware of any such opinions and could advise accordingly. It is reiterated that the best course of action at this juncture would involve contacting Ms. Ballinger at the Department 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:ss

cc: Elwood School District

Ms. Patricia Ballinger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1988

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

April 28, 1981

Miss Easter Davenport
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Davenport:

I have received your letter of April 6. Please accept my apologies for the delay in response.

You wrote that, in 1979, you directed a complaint to the New York City Human Resources Administration. In January of this year, you were informed that the investigation had been completed. Following the receipt of that information, you directed a request to the Human Resources Administration for copies of records concerning the investigation. However, as of April 6, no response had yet been received.

It is noted at the outset that the Human Resources Administration is, to the best of my knowledge, the social services agency for the City of New York. Consequently, I believe that it is bound by the provisions of the New York State Social Services Law. In this regard, it is important to point out that there are several provisions within the Social Services Law that require confidentiality. For instance, §136 of the Social Services Law provides in general that any records identifiable to either an applicant for or a recipient of social services must be kept confidential. Having read your letter, it is unclear whether your complaint deals with an applicant for or a recipient of public assistance. Nevertheless, it is possible that some of the records that you are seeking may be confidential by statute.

Even if the records are confidential, however, the Freedom of Information Law requires that responses to requests be given within prescribed periods of time.

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 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1989

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

April 28, 1981

Mr. Ira Gordet
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gordet:

I have received your letter of April 1. Please accept my apologies for the delay in response.

You have asked for assistance regarding a response to a request for records directed to the New York City School Board. Specifically, according to the correspondence attached to your letter, your request was received by the Board of Education on March 11. However, the Deputy Records Access Officer wrote that it would take longer than five days to provide a response to your request and that "we anticipate a response on May 21, 1981."

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)].

Based upon the direction provided in the Law and the regulations, although the Board of Education may acknowledge the receipt of your request within the five business day period, I believe that it may take a maximum of ten additional days from the date of acknowledgment to determine to grant or deny access. If that period has elapsed, I believe that you may appeal the denial to the person or body designated to determine appeals.

A copy of this opinion will be sent to Ms. Bernstein.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to your.

I hope that 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: Ruth Bernstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1990

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

April 28, 1981

John B. Miller
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Miller:

I have received your letter of April 7 which arrived at this office on April 15. Please accept my apologies for the delay in response.

You have raised questions "concerning the City of Hornell's excessive charges for search and copying fees regarding public access to documents". Specifically, you requested from the City a copy of a fourteen page Civil Service Commission management review survey. According to your letter, the documents were found and made available within fifteen minutes. However, you were assessed a fee of one dollar per page for photocopying. As such, the fee assessed for the survey was fourteen dollars. You have expressed a belief that the fee of one dollar per page for photocopying is "utterly out-of-keeping with both the law and spirit of public access to records" and have asked for support in getting your money back and correcting the problen that you identified.

As a general rule, the Freedom of Information Law permits an agency to charge no more than twenty-five cents per photocopy. Section 87(1)(b)(iii) of the Freedom of Information Law (see attached) states that an agency, such as the City of Hornell, must adopt procedures concerning a number of subjects, including:

> "...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."

It is noted that an agency may assess a fee in excess of twenty-five cents per photocopy "when a different fee is otherwise prescribed by law". A problem that has arisen with respect to the quoted provision is that the term "law" may include not only acts passed by the State Legislature, but also ordinances and local laws. Therefore, if, for example, the fee of one dollar per photocopy is based upon an ordinance or local law adopted by the City of Hornell, that fee is valid and legal. However, if the fee is based on policy rather than any provision of law, I believe that the maximum fee that may be assessed is twenty-five cents per photocopy. If that is the case, I believe that you should be reimbursed at the rate of seventy-five cents per photocopy.

It is suggested that you attempt to determine the basis for the fee that has been imposed by requesting and reviewing any ordinances or local laws concerning fees for photocopies. Further, it is noted at this juncture that §1401.8 of the regulations promulgated by the Committee precludes an agency from assessing a search fee (see attached).

Lastly, I would like to point out that several agencies have passed local laws or ordinances that require payment of fees for photocopying in excess of twenty-five cents per photocopy. As a consequence, the Committee has recommended legislation, which, if enacted, would permit an agency to charge a fee in excess of twenty-five cents only when such a fee is prescribed by "statute", an act passed by the State Legislature. If the legislation is enacted, a unit of local government would be effectively precluded from adopting a fee in excess of twenty-five cents per photocopy. The legislation has been introduced in the Senate by Senator Flynn (S. 4680) and in the Assembly by Assemblymen Zimmer, Siegel and Schimminger, among others (A. 6694).

A copy of this opinion will be sent to the City Chamberlain.

I hope that 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: Thelma Pelych

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1991

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

April 28, 1981

Ms. Rita Cox
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Cox:

I have received your letter of March 26, 1981. Please accept my apologies for the delay in response.

You have requested advice regarding two issues raised in your letter. First, you asked whether "the Town of Islip is required to grant [you] access to those records... requested on January 19, 1981, if they are public record?" Second, "Is the Town of Islip required to block out any non-public entries in order to make its records available to [you]?" You have indicated that you have been requesting access to various payroll information since August 1980.

I would like to offer the following observations with regard to the issues you have raised.

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, such as a town, 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 (see attached). It is also emphasized that the Law is permissive. Stated differently, 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 "labor relations listing" and "employee listing" which you enclosed with your correspondence, I believe that social security numbers could have been withheld under 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 this regard, the Committee has advised and the courts have upheld the concept 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, the social security number of a town employee is not relevant to the manner in which he or she performs his or her official duties. Consequently, I believe that the social security numbers could have been withheld under the privacy provisions of the Freedom of Information Law.

After reviewing the other copies that you enclosed with your correspondence, it appears that the Town of Islip has offered the records which it was legally required to provide under the Freedom of Information Law. Section 87 (3)(b) of the Law requires in part 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..."

Ms. Shlimbaum, in her letter of February 26, advised you that the Town could make available a list of the "name, title and salary of every employee". However, you sought a list of employees with their "total 1980 earnings". 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 eight-seven and subdivision three of section eighty-eight".

Furthermore, Ms. Shlimbaum's letter offers access to weekly payroll records from which you would be able to compile the 1980 totel earnings in which you are interested.

In view of the foregoing, I believe that the Town has responded in accordance with the Freedom of Information Law, and that, if no list of employees that includes their total earnings exists, the Town is under no obligation to create such a list 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

BY:

Pamela Petrie Baldasaro
Assistant to the
Executive Director

RJF:ss
Enclosure
cc: Ms. Shlimbaum

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-618
FOIL-AO-1992

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

April 28, 1981

Stuart W. Lewis M.D.
Monad Medical Services, P.C.
1230 Dean Street
Brooklyn, NY 11216

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Lewis:

As you are aware, I have received your letter and the correspondence attached to it.

You have requested a "ruling" regarding a request for records that you directed to the Downstate Medical Center. In this regard, it is emphasized at the outset that the Committee does not have the authority to issue what may be characterized as "rulings"; on the contrary, the Committee has the authority to render advisory opinions under the Freedom of Information and Open Meetings Laws.

In terms of background, you requested records in possession of the Downstate Medical Center that pertain to you and which have a bearing upon your performance as a surgical resident in the Department of Surgery. You also requested statements appearing in records concerning your character or affecting your career, all evaluations and comments derived from the Residency Review Committee for a period of five years, minutes of meetings during which your performance, career and character may have been discussed, as well as correspondence with particular physicians within and outside of the Department of Surgery concerning you. You also requested documents "bearing upon the application by Dr. Robert Freund for appointment..." on your behalf to the faculty of the University and letters of referral or recommendation by Dr. Bernard Jaffe to any and all hospitals or agencies.

Your request was made under a variety of statutes, including the New York Freedom of Information Law, the Open Meetings Law, the federal Privacy Act and the federal Freedom of Information Act.

I would like to offer the following observations with regard to your inquiry.

First, you stated that the response to you by John Vigneau, Records Access Officer for the Downstate Medical Center, mistakenly characterized you as a member of the United University Professions collective bargaining unit and that, as such, rights of access to the contents of your personnel file were governed by the collective bargaining agreement between UUP and Downstate Medical Center. You wrote, however, that you have never been a member of UUP. In my view, rights of access under the Freedom of Information Law are not diminished by membership in a union, even if you were indeed a member. In brief, I do not believe that a collective bargaining agreement can serve to restrict rights of access to records granted by a statute enacted by the State Legislature.

Second, I must concur with the contention expressed by Mr. Vigneau that the federal acts to which you made reference are not applicable. As he indicated, the federal Privacy and Freedom of Information Acts apply only to records in possession of federal agencies. From my perspective, the most applicable provision of law is likely the New York Freedom of Information Law.

Third, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the State University and its components, are accessible, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Fourth, it would appear, as indicated in Mr. Vigneau's response, that the most relevant ground for denial in §87(2)(g) of the Freedom of Information Law. That 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 emphasized that 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. Conversely, portions of inter-agency or intra-agency materials consisting of advice, recommendation, suggestion or impression, for example, may justifiably be withheld.

Under the circumstances, without having reviewed the records, I could not conjecture with respect to the extent to which the materials in question are accessible or deniable under §87(2)(g). Nevertheless, it is important to point out that the introductory language of §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. As such, I believe that it is clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, I believe that the language quoted above imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, might justifiably be withheld under one or more of the grounds for denial.

Fifth, you mentioned that the material that you are seeking is "evidently final agency policy since the State University in the person of Dr. Haffner has stated that the University will uphold Dr. Jaffe in his position". If indeed a record is reflective of the policy of the University or final determination made by an agency, I would concur that such a record would be available under §87(2)(g)(iii) of the Freedom of Information Law. However, if the record is reflective of advice that may be accepted or rejected by an executive or governing body, it would likely be deniable [see McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), ___ NY 2d ___ (aff'd w/no opinion)].

Sixth, there is another provision of law which might be applicable. Specifically, I direct your attention to the federal Family Educational Rights and Privacy Act (20 USC §1232g), which commonly known as the Buckley Amendment. The Buckley Amendment, in brief, concerns access to student records by parents of students under the age of eighteen and students enrolled in post-secondary institutions of education who are over the age of eighteen. If the records that you have requested, such as recommendations and evaluations, pertain to you in your capacity as a student, I believe that such records would be subject to the Buckley Amendment. Further, that Act states essentially that any "education record" identifiable to a student, with certain exceptions, is accessible to the student, unless he or she has waived his or her rights of access. Often, as a matter of course, students waive their rights to records such as letters of recommendation in order to ensure that such documents will be written in a forthright and honest manner. Stated differently, if students could review letters of recommendation, a professor might not be candid in his or her remarks. Again, it is unclear whether the records in question fall within the scope of the Buckley Amendment, but it is possible that they might.

Lastly, reference was made in Mr. Vigneau's response to you concerning the application of the Open Meetings Law to general faculty meetings, meetings of the Residency Review Committee and any Department meetings that may have had a bearing upon you. Mr. Vigneau suggested that none of the bodies that you identified would be subject to the Open Meetings Law.

While I agree that the Open Meetings Law would not likely be applicable to Department meetings, it is possible that it would have been applicable with respect to faculty meetings and the meetings of the Residency Review Committee.

In this regard, §97(2) of the Open Meetings 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."

Based upon the letter sent to you by Mr. Vigneau, it appears that he implied that some of the entities to which you made reference are not required to conduct their business by means of a quorum. I would like to point out that §41 of the General Construction Law defines "quorum" to include any entity consisting of three or more public officers or persons that performs a governmental function collectively as a body. As such, if the entities to which you made reference do not operate under any specific quorum requirements, they may nonetheless be required to act by means of a quorum. Consequently, it is possible that they may be public bodies. However, without greater knowledge of the nature of the entities in question, I could not advise with certainty that they are subject to the Open Meetings Law.

It is also important to point out that a public body may enter into a closed or 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..." [§100 (1)(f)].

It would appear that discussions of performance could have been discussed during executive sessions. Moreover, under §101(2) of the Open Meetings Law, minutes of executive session must be compiled only when action is taken during an executive session. Therefore, if a public body merely discusses but takes no action, minutes of an executive session need not be compiled. In addition, minutes of executive session are available in accordance with the provisions of the Freedom of Information Law. Therefore, it is possible that some minutes or other records of meetings might be accessible or deniable, depending upon 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
Executive Director

RJF:jm

cc: John R. Vigneau

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1993

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

April 29, 1981

Mr. Gerald Scotti, President
Mohawk Valley Community College
Professional Association
1101 Sherman Drive
Utica, New York 13501

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scotti:

I have received your letter of April 8 and appreciate your kind words. Please accept my apologies for the delay in response.

You have requested an advisory opinion with respect to a denial of your request for records reflective of the "current salary and years of service to the College for the College Faculty/Staff and Administration".

In my opinion, the information in which you are interested is available.

First, it is noted that, as a general rule, an agency, such as Mohawk Valley Community College, is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. However, one of the exceptions to that rule is found in §87(3)(b) of the Law, which provides that each agency shall maintain:

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

Under the provision quoted above, it is clear that each agency must create and maintain on an ongoing basis a record reflective of the names, public office addresses, titles and salaries of all employees.

Although a separate record would not be required to be created with respect to administrative and faculty/staff positions, a review of the payroll records would provide you with the payroll information in which you are interested.

If there is no list indicating the number of years of service of employees, the College would not have to create such a list on your behalf. Nevertheless, if the information appears in other records, I believe that it would be available from those records. Further, a review of various payroll records, to the extent that they exist, would likely provide an indication of years of service.

Lastly, it is noted that the initial letter of denial dated March 9 by George H. Robertson, President of the College, indicated that the records in question could be withheld under §87(2)(c) of the Freedom of Information Law, which provides that an agency may withhold records when disclosure would "impair present or imminent contract awards or collective bargaining negotiations". In this regard, the state's highest court, the Court of Appeals, held that salary data and fringe benefit information regarding teachers and administrators in a number of school districts was available, notwithstanding a contention that the records could be withheld under §87(2)(c) [see Doolan v. BOCES, 48 NY 2d 341 (1979)]. In view of the Court of Appeals' decision, I do not believe that the basis for withholding offered by Mr. Robertson could be justified.

I hope that 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. Robertson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1994

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

April 29, 1981

Stephen A. Bazan
Water Commissioner
316 Grand Street
Amsterdam, NY 12010

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bazan:

I have received your letter of April 9, which again concerns your request, as Water Commissioner, for records in possession of the President of the Board of Water Commissioners of the City of Amsterdam.

According to your letter, you have made several efforts to gain access to a list of unmetered commercial property users of water in the City of Amsterdam. However, the President of the Commission, Mrs. Theresa Purtell, stated that she would:

> "...not release the list to you until it has been checked against the tax roll for accuracy by the office staff, consulting with Mr. Dybowski, who, because of his position was physically able to check each property against the survey which he recently completed".

In this regard, I feel that I must briefly reiterate the contentions expressed in my letter to you of April 7, and advise that the records in which you are interested are in my view available to you as Water Commissioner and to any person under the Freedom of Information Law.

First, unless I am unaware of a special provision in the by-laws of the Water Commission or the legislation that created it, the President of the Commission does not likely have any greater power or authority to any other commissioner. In short, I would conjecture that if the commissioners have but one vote, all commissioners enjoy equal authority with respect to the performance of the duties of the Commission.

Second, even though the list may not be completed, it is nonetheless a "record" as defined by §86(4) of the Freedom of Information Law. As such, the only question that arises involves the extent, if any, to which the records sought fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, from my perspective, §87(2)(g) of the Law, which directs that statistical or factual tabulations or data found within inter-agency or intra-agency materials be made available, is applicable under the circumstances. As I understand the situation, the records in question consist solely of what may be characterized as statistical or factual data, whether or not it has been checked for accuracy.

Fourth, in similar instances, it has been suggested that if records could not be considered "final" that they be marked as "non-final", "draft", or "subject to change", for instance. By so doing, the public, and in this case, you, as a commissioner, could become familiar with the records, but at the same time the Board would be given a measure of protection.

Lastly, it is reiterated that, based upon your letter and our conversations, you have requested the records in question in the performance of your duties as a Commissioner. Consequently, it would appear that you are seeking the information based upon a need to know in order to carry out your official duties. As indicated at the beginning of this opinion, I cannot envision how one commissioner has a greater need to know than any other or a greater right of access to records necessary for review in the performance of a commissioner's official duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Theresa Purtell

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1995

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

April 29, 1981

Mr. Steven Lashway
Box 149
78 B1702
Attica, NY 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lashway:

I have received your letter of April 9. Please accept my apologies for the delay in response.

According to your letter, you have unsuccessfully attempted to gain access to your "public health records". However, Dr. Ian Loudan, Director of Health Services of the Department of Correctional Services, denied your request. In addition, you requested the "master index" of the Department, but you were informed that it would cost five dollars under the Freedom of Information Law. You have asked whether you can obtain the index free of charge.

I would like to offer the following observations with respect to your questions.

First, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Department of Correctional Services, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Most relevant under the circumstances 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 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.

In the case of medical records, I believe that statistical or factual information, such as laboratory test results, x-rays and similar information must be made available. However, records reflective of advice, recommendation, impression and the like, such as diagnostic or psychological opinions may justifiably be withheld. It is also noted that I have discussed the matter of access to medical records by inmates with various representatives of the Department of Correctional Services who concur with the interpretation expressed above.

It is suggested that, under §5.20 of the regulations of the Department, you renew your request and direct it to the Facility Superintendent. If you are denied access, you may appeal to the Counsel, Department of Correctional Services, Building 2, State Office Building Campus, Albany, NY 12226.

With respect to your request for a master index, the Freedom of Information Law permits an agency to charge a fee of up to twenty-five cents per photocopy. Consequently, if you want copies of records, an agency may require you to pay the requisite fees. Further, there is no provision in the Freedom of Information Law concerning the waiver of fees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1996

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 29, 1981

Mr. Donald C, Hadley
Managing Editor
Finger Lakes Times
218 Genesee Street
Geneva, New York 14456

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hadley:

As you are aware, I have received your correspondence in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

You have contended that the policy of the Board of Education of the South Seneca Central School District adopted under the Freedom of Information Law is out of date and that changes in the Law have effectively superseded portions of the existing policy, and that a Memorandum of Understanding between the Superintendent of Schools and the high school principal, which has been denied, should be made available.

Upon review of the correspondence, I concur with your contentions.

With respect to the Memorandum of Understanding, the President of the Board of Education wrote that the Board's policy concerning the situation was adopted by the Board of Education in August of 1974. He wrote further that §1-b of the policy states that:

> "No staff personnel folders will be made available for public inspection, but information will be provided relative to salary, assignments, job description and history of employment in district."

Based upon that policy, the Memorandum of Understanding was denied.

First, it is emphasized that the original Freedom of Information Law enacted in 1974 was substantially altered by means of a series of amendments that became effective on January 1, 1978. Under the original Law, rights of access were granted only with respect to particular types of records enumerated in the Law as accessible. As such, if records sought did not conform to one or more of the categories of accessible records, an applicant had no rights. Conversely, the amended Freedom of Information Law is based upon a presumption of access. Rather than listing categories of accessible records, the current Law provides that all records of an agency, such as a school district, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Second, I do not believe that a "policy" adopted by an agency can have the effect of nullifying or superseding a statute enacted by the State Legislature, such as the Freedom of Information Law. Therefore, in my view, to the extent that the policy of the Board of Education conflicts with or abridges rights of access granted by the Freedom of Information Law, it is void.

Third, from my perspective, the Memorandum of Understanding would have been accessible under the original Freedom of Information Law and is accessible under the current Law. Section 88(1)(b) of the original Law granted access to:

> "those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data, or other materials constituting statistical or factual tabulations which led to the formulation thereof..."

Further, §88(1)(h) of that statute provided access to:

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

In my view, the Memorandum of Understanding could have been considered a statement of policy adopted by the agency or a final determination made or ratified by the governing body, the School Board. Therefore, I believe that the record in question would have been available under the original Law.

Under the current statute, most relevant under the circumstances 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 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.

In this case, it appears that the Memorandum of Understanding is reflective of factual information that would be available under §87(2)(g)(i), an instruction to staff that affects the public that would be available under §87(2)(g)(ii), and the final determination or policy made by the School Board that would be available under §87(2)(g)(iii). Therefore, I believe that §87(2)(g) directs that the record in question be made available.

Fourth, it would appear that §1-b of the Board's policy is intended to protect the privacy of personnel. In this regard, I would like to point out that a blanket exemption regarding the materials contained in personnel folders is in my view invalid. The Freedom of Information Law defines "record" in §86(4) to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..."

As such, any "record" in possession of the School District is subject to rights of access.

Moreover, in terms of the privacy of public employees, the courts have long held in essence that public employees enjoy a lesser right to privacy than the public in general, for public employees have a duty to be more accountable than any other group. In addition, the courts have found in brief that records identifiable to public employees that are relevant to the performance of their official duties are available, for disclosure in such cases would constitute 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; and Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 19810. In each of the cases cited above, the courts granted access to certain aspects of records that were or might have been placed within personnel folders. Consequently, it is clear that the mere placement of records within a personnel folder does not remove them from the scope of rights of access. On the contrary, as indicated by the courts, numerous records identifiable to "personnel" have been found to be accessible under the Freedom of Information Law.

Fifth, I would like to offer several additional comments regarding the policy adopted by the School Board.

Section 1-a states that "no records will be provided pertaining to negotiations other than the finalized copies of negotiated contracts." In this regard, §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..."

In view of the language quoted above, it is clear that not all records relating to negotiations may be withheld. Rather, only those records which if disclosed would "impair" negotiations may be withheld.

Section 1-c concerns the release of student records. Here, I would merely want to point out that access to student records is governed by the provisions of the federal Family Educational Rights and Privacy Act (20 USC §1232g).

Section 3 of the policy states that:

> "[T]he school may charge at the rate of $10 per hour for the time that is involved by the school employee in locating and assemblying the requested information. The school may also charge a fee of 25 cents per copy, when copies of records are required."

While §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy, the Freedom of Information Law does not permit the assessment of a fee for searching for records. Further, §1401.8 of the regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law, specifically preclude the assessment of a search fee.

The policy adopted by the Board is also lacking in other areas. For example, there are no provisions regarding the designation of a records access officer or appeals officer; there is no statement concerning the hours during which requests may be received; and there is no reference to a denial of access.

In short, I believe that the Board should likely review its policy and amend it in accordance with the current Freedom of Information Law and the regulations of the Committee. To aid the School Board in complying with the Freedom of Information Law and the regulations, copies of the Law, the regulations and model regulations, as well as this opinion will be transmitted to the Board. I believe that the model regulations may be of substantial help, for an agency may follow the model and comply by essentially filling in the appropriate blanks.

I hope that I have been 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: David L. Dresser
Harold Weibezahl
School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1997

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

April 30, 1981

Everrett R. McDuffie
77-A-5901
Otisville Correctional Facility
Post Office Box #8
Otisville, New York 10963

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McDuffie:

I have received your letter of April 24 in which you requested various records under the Freedom of Information Law.

Specifically, you explained that you are about to appear before the Board of Parole and that you are seeking records pertaining to you in possession of this Department. In addition, you indicated that you would like a master index of all records pertaining to you.

It is noted at the outset that the Committee on Public Access to Records, which is housed in the Department of State, is charged with the responsibility of advising with respect to the Freedom of Information Law. The Committee does not have possession of records in general, nor does it have possession of records pertaining to you.

It is suggested that you renew your request in accordance with the regulations of the Department of Correctional Services. Section 5.20(a) of those regulations states that "a present inmate shall direct his request to the facility superintendent or his designee". Consequently, it is recommended that you direct a request to your facility superintendent. If you are denied access to the records, you may appeal to the Counsel, Department of Correctional Services, Agency Building #2, State Office Building Campus, Albany, NY 12226.

I would like to point out that the Freedom of Information Law requires that an applicant reasonably describe the records in which or she is interested [see Freedom of Information Law, §89(3)]. Consequently, rather than requesting all records pertaining to you, I would advise that you attempt to narrow your request, reasonably describing the types or areas of records in which you are particularly interested.

Lastly, with respect to your request for a "master index", it appears that you may be referring to the subject matter list required to be compiled under §87(3)(c) of the Freedom of Information Law. In this regard, the subject matter list is not an index that identifies every record in possession of an agency, but rather a listing by subject matter, in reasonable detail, indicating the categories of records in possession of an agency.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee which govern the procedural implementation of the Freedom of Information Law, an explanatory pamphlet that may be useful to you, and applicable portions of the regulations of the Department of Correctional Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1948

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

April 30, 1981

Ms. A. Jean Knolle
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Knolle:

I have received your letter of April 8. Please accept my apologies for the delay in response.

Your inquiry concerns a denial of a request made under the Freedom of Information Law directed to the Spencerport Central School District. The denial involves a report on employee benefits for the proposed 1981/1982 budget. You have indicated, however, that during an open meeting of the Spencerport School Board that you attended, the employee benefit report was distributed to school board members. Further, the Superintendent discussed the employee benefit information with the Board while presenting it on an overhead projector. After the meeting, you were initially advised by the Superintendent that you would be given a copy of the report; however, after several phone calls and a request made under the Law, you were denied access.

I would like to offer the following observations with respect to the issues you raised.

First, it is noted that 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, 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 two grounds for denial may be relevant, §§87(2)(c) and (g). Section 87(2)(c) authorizes an agency to withhold records or portions thereof which "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 school district to award a contract, records may be withheld to that extent. Based upon the facts you have presented in your letter, it is not clear whether collective bargaining negotiations are ongoing. However, the discussion of the employee benefit information for the proposed 1981/1982 budget by the Superintendent with the Board at an open meeting would appear to indicate that collective bargaining negotiations were neither present nor imminent. Therefore, a claim of exemption under §87(2)(c) would not, in my opinion, likely be applicable.

Second, §87(2)(g) states in relevant part that any 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. 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 must be made available. To the extent that proposed employee benefits for the years 1981/1982 would constitute "statistical or factual tabulation or data", this information is in my opinion accessible [see e.g., Dunlea v. Goldmark, 54 AD 2d 446, aff'd w/no opinion 43 NY 2d 754 (1977)].

Third, §89(5) of the Law provides 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, if rights of access to records have been granted by other provisions of law or by means of judicial determination, nothing in the Freedom of Information Law could serve to defeat those rights. In this regard, two sections of the Education Law may be relevant. Section 1716 of the Education Law requires a Board of Education 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." In addition, §2116 of the Education Law requires that any records, books and papers of any officer of a school district must be made available for inspection and copying by any qualified voter of the district. As such, it is possible that the report in question might be accessible under the cited provisions of the Education Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:jm

Enc.

cc: Dr. James H. Faux

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-622
FOIL-AO-1999

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

April 30, 1981

David H. Kelsey
President
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kelsey:

As you are aware, I have received your letter of April 13. You have raised several questions regarding the implementation of the Open Meetings and Freedom of Information Laws by the Akron Central School District Board of Education.

First and likely most important is your contention that the members of the Board feel that they may convene an executive session "for just about any reason" if they believe that the business at hand concerns issues that would be best discussed by the Board acting alone. Your contention is based upon a policy adopted by the Board on January 31, 1974, entitled "Executive Session at Regular Meetings", which states that:

> "[A]ny Board member may call for an Executive Session when business involves personalities or issues that are best discussed by the Board acting alone as a corporate body. No legislative action will be taken in executive session nor will any discussion be recorded in the minutes".

It is emphasized that the statement of policy quoted above was adopted prior to the enactment of the Open Meetings Law. From my perspective, it is out of date and fails to reflect the obligations of the School Board under the Open Meetings Law.

In this regard, the Open Meetings Law provides that a public body may enter into an executive session only to discuss matters specified in §100(1)(a) through (h) of the Law. If a topic of discussion does not fall within one or more among the eight items listed in §100(1), discussion must be held open to the public. In view of the foregoing, it is clear that a public body may not enter into an executive session to discuss the subject matter of its choice.

In a related vein, it is also emphasized that a public body must follow a procedure prescribed in the Law before it may enter into an executive session. Specifically, the introductory language in §100(1) states that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, 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, it is clear that a public body must take three procedural steps during an open meeting before it may enter into an executive session. A motion to enter into an executive session must be made by a member of the Board during an open meeting; the motion must identify in general terms the subject or subjects to be considered; and the motion must be carried by a majority vote of the total membership of the Board.

Second, with respect to a specific question that you raised, based upon the information that you have provided, I would agree that a discussion of a minority report from members of an educational study council should not likely have been considered during an executive session. You wrote that the report likely dealt with "planning and advising on basic educational policy, curriculum review, and other matters related to the improvement of the District's educational programs". You also wrote that "[O]ne of its more specific annual duties is to plan the yearly conference day for teachers".

Here, I would like to point out that although a discussion of "teachers" might deal with "personnel" in general, that factor alone would not in my view justify an executive session. Perhaps the ground for executive session cited most often is §100(1)(f), which deals with "personnel", among other subjects. Although the scope of the cited provision as it appeared in the Open Meetings Law as originally enacted in 1977 was unclear, I believe that an amendment to the cited provision that went into effect on October 1, 1979, specifies its scope. 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).

In view of the language quoted above and the insertion of the word "particular" by means of an amendment, it is clear that a public body may not discuss in executive session matters that deal with personnel in general or matters on policy that indirectly or tangentially relates to "personnel".

Third, you wrote that it is common practice for the Board to enter into executive sessions to discuss grievances. Apparently, the School Board has justified those executive sessions on the basis of §100(1)(d), which permits an executive session to discuss "proposed, pending or current litigation". In my view, the term "litigation" involves a judicial contest, and I do not believe that the discussion of a grievance involves a judicial contest. As such, §100(1)(d) would not in my view be applicable as a basis for entry into an executive session.

However, it is possible that §100(1)(f), which was quoted earlier, might be cited appropriately to discuss a grievance behind closed doors, if, for instance, the grievance pertains to the employment history of a "particular person" or a matter leading to the discipline of a "particular person". If the grievance concerns personnel policy, it would appear that it must be discussed during an open meeting.

Fourth, you raised questions regarding an executive session held for the purpose of discussing the District's transportation policy. In addition, you indicated that discussion might be held during a "scheduled executive session".

In my view, based upon contentions expressed earlier, a discussion of the transportation policy would not constitute a ground for executive session. Further, as intimated earlier, in a technical sense, a public body can never schedule an executive session in advance. If a motion to enter into an executive session must be made during an open meeting and carried by a majority vote of the total membership, it cannot be known in advance whether a motion to enter into an executive session will indeed be carried.

Fifth, you asked whether the Board must reflect in its minutes "the general area or areas of the subject or subjects to be considered" in a motion for entry into an executive session. To reiterate, §100(1) requires that a motion to enter into an executive session include such information.

Sixth, you indicated that it is the policy of the District to refuse to provide copies of minutes on the ground that minutes are unapproved. In this regard, I direct your attention to §101(3) of the Open Meetings Law. In brief, the cited provision states that minutes of open meetings must be compiled and made available within two weeks of such meetings. The Committee anticipated that the direction provided by the cited provision might result in problems, for often public bodies do not meet within two weeks and therefore cannot approve minutes. Consequently, in a memorandum sent to all public bodies in the state (see attached), it was advised that minutes must be made available within the prescribed time limits and that if they have not been approved, they should be marked as such. By signifying that minutes are "unapproved", "draft", or "non-final" and making such minutes available, the public can learn generally what transpired at a meeting, and a public body is concurrently given a measure of protection.

Moreover, unapproved minutes would be subject to rights of access granted by the Freedom of Information Law. "Record" is defined in §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, as soon as a record exists, it is subject to rights of access granted by the Law.

Seventh, you asked whether the District is in violation of the Freedom of Information Law due to its failure to maintain a subject matter list. In response to your request for a subject matter list, you were informed that "all records of this School District are available to the public under the provisions of the Freedom of Information Law". I agree with your contention that such a statement would not be reflective of compliance with the Law. As a general rule, an agency is not required to create a record in response to a request. However, one of the exceptions to that rule is found in §87(3)(c), which requires 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".

Further, in my view, the subject matter list is intended to assist the public in determining the types of records maintained by an agency, thereby assisting the public in describing the records in which they may be interested.

And eighth, you have raised questions regarding public participation at Board meetings. According to your letter, on October 28, 1980, the Board adopted a policy regarding public participation which states that:

> "[V]isitors to regular and special meetings of the Board of Education shall be heard at the pleasure of the Board. Visitors, other than employee group representatives, may address the Board during the first half hour of any such meeting (8:00-8:30) without being on the agenda. (see attached "Regular Meeting Board of Education Akron Central School District October 28, 1980")

As you are aware, the Open Meetings Law is silent with respect to public participation. Therefore, the Committee has advised that a public body need not permit public participation. However, it has also been advised that if a public body determines to permit public participation at meetings, that its policy must be reasonable and treat all members of the public in the same fashion. The policy quoted above states that any visitor may be heard "other than employee group representatives". In my view, such a policy would be unreasonable, for it singles out and essentially discriminates against a particular group. Stated differently, if members of the public in general are permitted to address the Board, representatives of employee groups should in my view be accorded the same opportunity.

In order to aid the Board in complying with the Freedom of Information and Open Meetings Laws, copies of this opinion as well as the two statutes, regulations promulgated by the Committee, the memorandum regarding changes in the Open Meetings Law to which reference was made earlier, and an explanatory pamphlet will be sent to the Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

cc: Members of the School Board

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-621
FOIL-AO 2000

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

April 30, 1981

Mr. Glen Curtis
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Curtis:

I have received your letter of April 19 and appreciate your interest in complying with the Open Meetings and Freedom of Information Laws. Your inquiry concerns the Board of Directors of the Dunkirk Housing Authority.

Specifically, you wrote that:

> "[T]he Board of the Authority has for years, met in 'Executive Session' whenever necessary and only in the past year or so has the local media (as well as certain members of the public) demanded access to the matters discussed during these sessions. For the most part, the Board Chairman has denied these requests, citing the Freedom of Information Act prohibits the release of the material."

Further, you indicated that the local news media protests "the Board's meeting in closed 'workshop' sessions or so-called 'working meetings'". You also asked whether minutes of the workshop or working meetings should be kept and whether an agency, such as the Dunkirk Housing Authority, is required to designate a records access officer.

I would like to offer the following observations with respect to your questions.

First, it is emphasized that a public body cannot in my view meet in an executive session. Section 97(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) prescribes a procedure that must be followed by a public body before it can enter into an executive session. The cited provision 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..."

Based upon the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof, and that certain procedural steps must be taken during an open meeting before an executive session can be held. In addition, the ensuing paragraphs (a) through (h) specify and limit the areas of discussion that may be considered during an executive session. Consequently, a public body may not discuss the subject of its choice behind closed doors.

Second, I concur with your contention that gatherings characterized as "workshop sessions" or "working meetings" are subject to the provisions of the Open Meetings Law in all respects. It is noted that the courts have interpreted the definition of "meeting" expansively. 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 any gathering of a quorum of a public body is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized. Based upon the direction provided by the Court of Appeals and an amendment designed to confirm the Court's opinion [see §97

(1)], it has been suggested that phrases such as "workshops", "work sessions", "agenda sessions", "planning sessions" should no longer be used, for each of those phrases is synonymous with the term "meeting".

Third, with respect to minutes, I direct your attention to §101 of the Open Meetings Law. In brief, subdivision (1) provides the minimum requirements for the contents of minutes. In the context of your question, if a public body engages in motions, proposals, resolutions, or if the public body takes action, each of those items must be referenced within minutes, whether the gatherings during which those activities are conducted are denominated as meetings or "work sessions", for example.

Section 101(2) concerns minutes of executive sessions. That provision states that a record of any action taken during an executive session must be recorded in minutes. However, it is emphasized that if, for example, a public body merely deliberates behind closed doors, but takes no action, minutes need not be compiled.

Assuming that minutes or any other records are created with respect to deliberations conducted behind closed doors, such records would in my view be subject to rights of access granted by the Freedom of Information Law. Section 86(4) of that 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, to the extent that records exist, they are subject to rights of access.

Further, even though records or notes may be created with regard to discussions held during an executive session, that factor alone does not necessarily enable an agency to withhold the records. In short, §87(2) of the 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 paragraphs (a) through (h) of the cited provision. Therefore, while records created with respect to executive sessions might in some instances be withheld, in others they may be required to be available under the Freedom of Information Law.

Lastly, §87(1) of the Freedom of Information Law requires the Committee to promulgate regulations of a procedural nature. In turn, each agency subject to the Law is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee.

Section 1401.2(a) of the Committee's regulations requires in part that the:

> "...governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records."

In view of the foregoing, it is clear that each agency is required to designate a records access officer.

In this instance, it is unclear whether the Dunkirk Housing Authority performs its duties under the aegis of the governing body of the City of Dunkirk. If that is so, the governing body would be required to designate one or more records access officers responsible for dealing with requests directed to the Housing Authority. If, however, the Housing Authority is independent, its Board of Directors would be required to designate one or more records access officers.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee, the Open Meetings Law, which is attached to a memorandum that explains the amendments to the Law that went into effect on October 1, 1979, 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
Executive Director

RJF:jm
Encs.
cc: Dunkirk Housing Authority

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2001

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

May 1, 1981

Joseph G. Halloran, Director
Syosset Public Library
225 South Oyster Bay Road
Syosset, New York 11791

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Halloran:

Thank you for your letter of April 10. I apologize for the delay in response.

As the Director of the Syosset Public Library, you have been requested by the library trustee to seek advice from the Committee in two areas. Your first inquiry concerns access to an employer's copy of a W-2 form requested by a trustee or a citizen. The second inquiry deals with inspection of library personnel records by the trustees. Specifically, you asked whether a trustee, acting without a resolution of the Board, may inspect records that would not be available to the public under the Freedom of Information Law.

I would like to offer the following observations with regard to the two issues that you have raised.

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, such as a public library, 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 (see attached). It is also emphasized that the Law is permissive. Stated differently, 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 W-2 form, I believe that any identifiers such as a social security number, the number of deductions claimed, the amount of deductions, net earnings, or an employee identification number might be withheld under 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 this regard, the Committee has advised and the courts have upheld the concept 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); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. 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, information in the nature of the items described earlier is irrelevant to the manner in which a public employee performs his or her official duties. However, the name, title, public office address and salary are in my view relevant to one's official duties and, therefore, would be available. In situations in which a single record is accessible and deniable in part, an agency may delete those portions that may be withheld and provide access to the remainder.

You indicated that the Syosset Public Library maintains a computer printout of annual earnings, which is available for inspection. 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..."

Therefore, it would appear that the library made available the payroll information that it is required to provide under the Freedom of Information Law.

With respect to your second inquiry, there is little case law on the subject of library trustee's right of access to records that might not be available under the Freedom of Information Law. Consequently, 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, such as library trustees, seeking information to perform their duties. In Gorton v. Dow, 54 Misc. 2d, 509 (1967), the Nassau County Supreme Court held that a library trustee had an absolute right to investigate library records; those rights, however, may be limited by means of reasonable regulations. In Gorton, supra., trustees were required to review files during regular business hours, and it was found that "[I]t is fundamental that the board of trustees has the right to adopt regulations...and as long as such regulations do not impede, binder or unduly delay an inspection of records by a trustee, they must be honored" id. at 512.

It is also noted that, 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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive
Director

PPB:RJF:ss

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2002

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

May 4, 1981

Mr. Edgar Pauk
Legal Services for the Elderly
132 West 43rd Street, 3rd Floor
New York, New York 10036

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pauk:

I have received your letters of April 14 and April 22 and the correspondence attached to them.

You have indicated in your correspondence that you have been unsuccessful in obtaining from the New York State Employees' Retirement System (NYSERS) an index of all legal opinions which refer to the phrase "normally due" as set forth in §90(b) of the Retirement and Social Security Law. In response to your request, the records access officer for the NYSERS informed you that the System does not have a listing of the material you have requested but rather has possession of a "card index tray system which lists opinions under the cited statute." The drawers containing individual index cards of judicial decisions are exclusively located in the Albany office of the NYSERS. Mr. Nailor of that office has advised you that you may have access to the contents of that filing system and obtain copies of any decisions at a cost of twenty-five cents per page.

Although the Committee does not have the authority to expedite your appeal, I would like to offer the following observations.

Generally, the Freedom of Information Law does not require an agency to create a record in response to a request. In relevant part, §89(3) states 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, it appears that the NYSERS has compiled with the requirement of the Law. Although the System does not have an index reflective of all legal issues contained in its legal opinions, it has nevertheless offered to make the index of those opinions available for your review and inspection. Further, although §87(3)(c) of the Freedom of Information Law requires each agency to maintain a reasonably detailed list, by subject matter, of all of its records, it is not in my view required to index the opinions to which you referred. In a situation similar to that which you described, it was held that a subject matter list is required to make reference only to categories of records. Moreover, the Court specifically stated that the requirements of §87(3)(c) do not impose an obligation upon an agency to index its opinions [see D'Alessandro v. Unemployment Insurance Appeal Board, 56 AD 2d 962 (1980)].

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

BY: Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

cc: Marvin Nailor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2003

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

May 4, 1981

Almon M. Wood, Chairman
Board of Assessors
Town of Canisteo
6 South Main Street
Canisteo, New York 14823

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wood:

I have received your letter of April 17 and appreciate your interest in complying with the Freedom of Information Law.

As Chairman of the Board of Assessors of the Town of Canisteo, you have raised a series of questions regarding records prepared in the process of the revaluation of real property. You have also asked what information you may release to individuals other than the actual property owners before the tentative assessment roll is completed on or about June 1.

I would like to offer several observations with respect to your inquiries.

First, in my view, you may release virtually any records in your possession concerning the revaluation process. It is noted in this regard that the Freedom of Information Law is permissive. Stated differently, while the Law states that an agency may withhold certain records falling within the grounds for denial appearing in §87(2)(a) through (h), there is no obligation to deny access imposed upon an agency.

Further, it is possible that most, if not all of the records that you described are available now under the Freedom of Information Law to any person.

In this regard, it is noted that §86(4) of the Law defines "record" 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 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 any records in your possession, whether they are final, tentative or estimates, for instance, constitute "records" subject to rights of access granted by the Law.

You made reference to data cards that indicate specific information regarding each parcel of land. Here it is noted that data cards found within a "kardex" system were found to be available under the General Municipal Law some thirty years ago [see Sears Roebuck & Co. v. Hoyt, Sup. Ct., Jefferson Cty., 107 NY 2d 756 (Aug. 21, 1951)]. Specifically, the court in Sears found that the contents of the kardex system were available and stated that:

> "Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when built or when remodeled, as well as details as to any minor buildings. From date of installation of the Kardex system to the present time, it is admitted that the assessors placed thereon such information as they were able to obtain, either from the owners or from others."

In view of the foregoing, it is clear that the contents of the data cards that you described have long been available under §51 of the General Municipal Law. Moreover, §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. Consequently, the data cards in my view remain available under the Freedom of Information Law.

In a related vein, other cases rendered prior to the enactment of the Freedom of Information Law held that practically any records created in the assessment process are available, and an appellate court found that pencil-marked data cards used by municipal assessors to reappraise real property were accessible, even though the cards in that instance were prepared by a third party, a private contractor [see Sanchez v. Papontas, 303 NYS 2d 711 (1969)].

Lastly, even though the figures that have been derived may consist only of estimates and may be subject to change, it would appear that they may nonetheless be available. Section 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 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 and final agency policy or determinations must be made available.

Under the circumstances, the estimates and other data that you have described could be characterized as "intra-agency" materials. However, they would appear to consist of "statistical or factual tabulations or data" that would be available under §87(2)(g)(i) of the Freedom of Information Law.

If you see fit to do so, should estimates and similar non-final information be made available, you might want to mark or otherwise signify on the records that they are not final and subject to change. By so doing, the recipients of the information in question would know that the findings may be altered.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2004

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

May 4, 1981

L. Edwards
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Edwards:

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 New York Freedom of Information Law.

You have raised a series of questions regarding rights of access to records in possession of the New York State Human Rights Commission. In all honesty, I am not an expert with respect to the procedures of the Human Rights Commission, but I would like to offer the following observations.

First you raised questions regarding a complainant's rights of access to "all" information in a complaint file in possession of the Commission.

In this regard, I would like to point out initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Human Rights Commission, 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, you made specific reference to rights of access to administrative directives to attorneys, hearing examiners and appeal boards. I assume that you are referring

to directives of a general nature sent to all attorneys, hearing examiners and appeal boards, rather than those sent to single individuals working on particular cases. If my assumption is accurate, I believe that the directives would be 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 note that 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.

Under the circumstances, the communications to which you referred would constitute "intra-agency" materials. However, I believe that they would consist of instructions to staff that affect the public that would be available under §87(2)(g)(ii) and that such directives would be reflective of the policy of the agency that would be available under §87(2)(g)(iii).

Third, you raised questions concerning a complainant's rights to gain access to communications between the Human Rights Commission and respondents in a case. Here I direct your attention to two provisions. Section 297(8) of the Executive Law states that:

> "[N]o officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section".

Based upon the provision quoted above, it would appear that the communications to which you made reference might not be available, unless they are necessary to the conduct of a proceeding. However, §465.6(c) of the regulations promulgated by the Division of Human Rights states that:

> "[T]he complainant shall have an opportunity to rebut evidence submitted by or obtained from the respondent before any determination dismissing a complaint for no probable cause is made by the regional director".

Fourth, you questioned rights of access to records before and after the final disposition has been made in a case. Without being familiar with the contents of a file, I could not conjecture with respect to rights of access. However, as a general rule, the grounds for denial appearing in the Freedom of Information Law are based largely upon potentially harmful effects of disclosure. For instance, one of the grounds for denial permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. It is possible that the disclosure of records identifying a potential witness, for example, might justifiably be withheld prior to a hearing due to privacy considerations. However, if the witness appears during a hearing in the presence of a complainant, disclosure would not likely constitute an unwarranted invasion of personal privacy.

Fifth, in the case of a transcript of a public hearing, if indeed a hearing was open to the public, it would be difficult to envision a ground for denial. Consequently, in such a situation, I believe that a transcript, to the extent that it exists, would be available.

Sixth, in terms of procedure, §89(3) of the Freedom of Information Law requires that an applicant for records "reasonably describe" in writing the records in which he or she is interested. If the case in which you are involved is being processed by means of an appeal board in New York City, it is suggested that you direct your request to the New York City office.

Seventh, with respect to fees, §87(1)(b)(iii) provides that an agency may assess a fee of up to twenty-five cents per photocopy, unless a different fee is prescribed by another provision of law.

Lastly, you asked for "all other information" concerning a complainant's rights to view documents other than those that you identified in your letter.

I am unaware of any provisions other than those cited in the preceding paragraphs. However, I have enclosed the rules of practice adopted by the Division of Human Rights for your consideration. In addition, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee which govern the procedural aspects of the Freedom of Information Law, and an explanatory pamphlet that 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

cc: Office of Counsel
Division of Human Rights

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-200

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

May 4, 1981

Robert Cole
#75-a-4096
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cole:

I have received your letter of April 15. Thank you for sending a copy of the decision of the Washington County Supreme Court upholding your right of access to a copy of restrictions on your visitation privileges.

You have indicated that although the judgment requires that you receive a copy of restrictions, you received a Xerox copy containing one sentence, which you feel is inadequate in terms of an explanation of why restrictions were imposed. You wrote that the record given to you does not in your view fully comply with the court order.

As indicated in our letter of April, the Committee does not have any authority to investigate. However, I am enclosing for your review a copy of §5.50 of the regulations promulgated by the Department of Corrections, which allows an inmate to challenge the accuracy or completeness of information contained in the correctional supervision history portion of his or her records. If you believe that the information you received in accordance with the court order is not complete, you might want to consider the procedure available in this section.

It is also noted that the Freedom of Information Law does not generally require an agency to create a record in response to a request [see §89(3)]. Consequently, if, for example, there is no record in which the rationale for the restrictions exist, the Freedom of Information Law would not require that such a record be created 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2006

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

May 4, 1981

Joseph S. Oak
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Oak:

I have received your letter of April 20 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, on April 6, you pled guilty to a misdemeanor in a town justice court. You indicated that you removed some items from a friend's home and, in order to make restitution, repaid the complainant and her insurance company $100 each. Additionally, you claim to have signed a promissory note under coercive conditions payable to the complainant's insurance company under which you were obligated to reimburse the insurance company in the amount of $595. However, you believe that the value of the items you removed did not exceed $200. You have asked whether you are entitled to a list of the claimed items from the insurance company under the Freedom of Information Law.

I would like to make the following observations in regard to your situation.

First, the Freedom of Information Law is applicable only to agencies of government [see attached, Freedom of Information Law, §86(3)]. Since information that you seek is apparently in possession of an insurance company, the Freedom of Information Law is not applicable.

Second, it is possible that court records indicate a monetary amount in regard to the items you removed. Under §2019-a of the Uniform Justice Court Act, you may request a justice court to make available virtually all records concerning the proceeding in which you were involved.

Third, if you believe that you have received unfair or inappropriate treatment from the insurance company involved in repayment of the claim, perhaps you should contact the Consumer Services Division of the New York State Department of Insurance, which is located at the following address:

Consumer Services Division
New York State Insurance Department
Empire State Plaza
Agency Building 1
Albany, New York 12223

Fourth, you have requested the Committee to advise you as to your recourse in the matter of the promissory note. Since the Committee's jurisdiction is limited to rendering advice under the Freedom of Information Law and the Open Meetings Law, it is suggested that you might want to contact an attorney in the matter.

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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive
Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2001

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

May 5, 1981

Mr. Raymond Bonazzo
80-A-502
Box 149
Attica, NY 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bonazzo:

I have recently received the package of correspondence that you sent to the Committee.

You have asked, in short, whether there is a time limit during which the person designated to render appeals under the Freedom of Information Law must respond to appeals. You have indicated further that more than a month has transpired since you transmitted you appeal to the County Attorney.

First, as I have indicated to you in previous correspondence, the Committee has only the authority to advise. It has no power to compel an agency to comply with the Freedom of Information Law.

Second, with respect to the time limit for response to appeals, §89(4)(a) of the Freedom of Information Law states in relevant part 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."

Third, a recent judicial decision dealt with the requirements imposed upon agencies by §89(4)(a) of the Freedom of Information Law. In a situation in which a determination on appeal was not rendered within seven business days of the receipt of an appeal, a question arose concerning whether the appellant had exhausted his administrative remedies. In determining the issue, the court found that:

> "...the petitioner in this case exhausted his administrative remedies when he appealed to the Deputy Commissioner of Legal Matters. If the court found otherwise, an agency could totally frustrate a request for information by merely refusing to designate a person within an agency to consider appeals or by requiring many appeals before many persons or entitites within the agency before a person could be said to have exhausted her/his administrative remedies" (Matter of Floyd, Sup. Ct., NY County, NYLJ, April 10, 1981).

Consequently, if you have exhausted your administrative remedies, it would appear that you have the capacity to initiate a judicial challenge to a denial of access under Article 78 of the Civil Practive Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Samuel Yasgur

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2007

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

May 5, 1981

Mr. Raymond Bonazzo
80-A-502
Box 149
Attica, NY 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bonazzo:

I have recently received the package of correspondence that you sent to the Committee.

You have asked, in short, whether there is a time limit during which the person designated to render appeals under the Freedom of Information Law must respond to appeals. You have indicated further that more than a month has transpired since you transmitted you appeal to the County Attorney.

First, as I have indicated to you in previous correspondence, the Committee has only the authority to advise. It has no power to compel an agency to comply with the Freedom of Information Law.

Second, with respect to the time limit for response to appeals, §89(4)(a) of the Freedom of Information Law states in relevant part 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."

Third, a recent judicial decision dealt with the requirements imposed upon agencies by §89(4)(a) of the Freedom of Information Law. In a situation in which a determination on appeal was not rendered within seven business days of the receipt of an appeal, a question arose concerning whether the appellant had exhausted his administrative remedies. In determining the issue, the court found that:

> "...the petitioner in this case exhausted his administrative remedies when he appealed to the Deputy Commissioner of Legal Matters. If the court found otherwise, an agency could totally frustrate a request for information by merely refusing to designate a person within an agency to consider appeals or by requiring many appeals before many persons or entitites within the agency before a person could be said to have exhausted her/his administrative remedies" (Matter of Floyd, Sup. Ct., NY County, NYLJ, April 10, 1981).

Consequently, if you have exhausted your administrative remedies, it would appear that you have the capacity to initiate a judicial challenge to a denial of access under Article 78 of the Civil Practive Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Samuel Yasgur

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-625
FOIL-AO-2008

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

May 5, 1981

Robert J. Whalen
School Board Trustee
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Whalen:

I have received your letter of April 22 and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, you are a member of a school board which adopted a five dollar charge for school board minutes. Based upon your correspondence, it appears that the meetings are tape recorded but are never transcribed. In order to listen to and obtain a record of meetings, you have been required to pay a fee of five dollars. You have asked the Committee to advise you if this charge is legal.

It is emphasized at the outset that §101 of the Open Meetings Law requires that minutes of meetings be compiled. Specifically, subdivision (1) of §101 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."

Moreover, §87(3)(a) of the Freedom of Information Law requires that each agency shall maintain:

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

As such, a public body in my view has an affirmative duty to create minutes and voting records with respect to its meetings. Further, a tape recording of an entire meeting would not in my opinion constitute minutes as envisioned by the Open Meetings Law.

It is also noted that subdivision (3) of §101 of the Open Meetings Law 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.

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.

Second, an agency, such as a school board, in my view has the duty to make its records available to any person at the location for public inspection designated by the public body, regardless of the status of any individual or group that might seek access to such records [see e.g., Burke v. Yudelson, 368 NYS 2d 779; aff'd 51 AD 2d 673, 378 NYS 3d 165]. Therefore, minutes of school board meetings should be available to you upon request, regardless of your position as a member of the School Board.

Third, you indicated that the School Board has established a fee of five dollars to review the tape recordings of the meetings. Section 87(1)(b)(iii) of the Freedom of Information Law states in relevant part that:

> "the fees for copies of records... 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."

Additionally, a governmental unit cannot charge an applicant under the Freedom of Information Law for inspection, search or research time expended in gathering the requested information. Specifically, §1401.8 of the regulations promulgated by the Committee states that no fee can be charged for the search, inspection, or certification of any records.

It is noted that in a situation in which a copy of a tape recording was requested, the court held that personnel time and salaries would not be used as the basis for the assessment of a fee (see e.g., Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978).

Lastly, as a member of the School Board, it is questionable in my view whether you should be required to follow the same procedures as members of the public under the Freedom of Information Law [see e.g., Gustin v. Joiner, 406 NYS 2d 138 (1978)].

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.

For instance, some records may be exempted from disclosure by statutes that permit disclosure only under specified circumstances, (i.e., the federal Family Educational Rights and Privacy Act, 20 U.S.C. §1232g).

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2009

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

May 5, 1981

Leon Malman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Malman:

I have received your letter of April 21 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you recently requested records from the Town of Islip, but your application was denied "for the reason of 'confidential disclosure'". Based upon §89(4)(a) of the Public Officers Law, you transmitted an appeal to the Town Supervisor and the Town Board. However, following your appeal, you received a letter from the Town Attorney, who wrote that "no appeal lies with the Town Supervisor and Town Board in matters respecting public information". Further, having discussed the matter with the Town Attorney, he told you that your appeal should be directed to this office. You have contended that a determination on appeal is not rendered by the Committee and you have asked what procedure you should follow.

It is noted at the outset that I agree with your contention. While §89(4)(a) of the Freedom of Information Law requires that copies of appeals and the determinations that follow be transmitted to the Committee, the Committee itself does not make such determinations. In order to apprise town officials of the procedure to be followed, copies of this opinion will be transmitted to the Town Supervisor, the Town Attorney and the Town Board.

As you intimated, §89(4)(a) of the Freedom of Information Law describes the procedure by which a person denied access may appeal. Specifically, 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 view of the foregoing, it is clear that a determination on appeal must be rendered by the head or governing body of an agency or the designee of the head or governing body.

Further, according to the regulations promulgated by the Committee, which govern the procedural implementation of the Freedom of Information Law, "the governing body of a public corporation", such as a town, "shall be responsible for insuring compliance with the regulations..." [see attached regulations, §1401.2(a)]. In addition, §1401.7(a) of the regulations states that "the governing body of a public corporation...shall hear appeals or shall designate a person or body regarding a denial of access to records under the Freedom of Information Law". As such, it is clear that the Town Board is required to render determinations on appeal or designate a person or body to do so in its stead.

As you are aware, a recent judicial decision dealt with the requirements imposed upon agencies by §89(4)(a) of the Freedom of Information Law. In a situation in which a determination on appeal was not rendered within seven business days of the receipt of an appeal, a question arose concerning whether the appellant had exhausted his administrative remedies. In determining the issue, the court found that:

> "...the petitioner in this case exhausted his administrative remedies when he appealed to the Deputy Commissioner of Legal Matters. If the court found otherwise, an agency could totally frustrate a request for information by merely refusing to designate a person within an agency to consider appeals or by requiring many appeals before many personsor entities within the agency before a person could be said to have exhausted her/his administrative remedies" (Matter of Floyd, Sup. Ct., NY County, NYLJ, April 10, 1981).

Lastly, although I am not familiar with the record or records that you requested, I believe that the reason for the initial denial, i.e., that there would be a "confidential disclosure", is insufficient. In this regard, 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). Further, a mere assertion of confidentiality without more is in my view inadequate as a basis for withholding. While there had been a line of cases concerning the so-called "governmental privilege", it appears that the Court of Appeals effectively abolished the privilege. Specifically, in the past, if an agency could demonstrate to a court that disclosure would, on balance, result in detriment to the public interest, the governmental privilege would have been successfully asserted [see e.g., Cirale v. 80 Pine Street Corporation, 35 NY 2d 113 (1974)]. However, most recently, in Doolan v. BOCES, [48 NY 2d 341 (1979)], the Court of Appeals stated that rights of access to records are fixed by the Freedom of Information Law and apparently abolished the governmental privilege. Consequently, I do not believe that an assertion that records are "confidential" without more would constitute a sufficient basis for denying access to records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

cc: Town Board
Town Supervisor
Town Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2010

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

May 5, 1981

The Honorable I. W. Bianchi, Jr.
Member of the Assembly
Room 729
Legislative Office Building
Albany, New York 12248

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Assemblyman Bianchi:

I have received your letter of May 1 and appreciate your interest in compliance with the Freedom of Information Law.

Attached to your letter is correspondence from the editor of the Pennysaver News of Brookhaven concerning a fee sought to be imposed by the records access officer of the Long Island office of the Department of Transportation. Specifically, in response to a request for a memorandum in possession of the Department, Les Clarke of the Department wrote that the applicant would be required to include "payment of $15.00 to cover the minimum cost of extraction of data from our files" (emphasis added by Mr. Clarke).

You have contended that the search fee of fifteen dollars "violates the letter and spirit of the Freedom of Information Law."

I agree with your contention.

First, §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, unless a different fee is otherwise prescribed by law. Therefore, as a general rule, an agency cannot charge in excess of twenty-five cents per photocopy, except when another provision of law provides specific direction to the contrary.

Second, I have reviewed the regulations promulgated by the Department of Transportation under the Freedom of Information Law on your behalf. In this regard, §1.4(b) of the regulations states in relevant part that "[T]here shall be no fee charged for the inspection of records and searching for records." Based upon the regulations cited above, it appears that there is no basis for the fee sought to be imposed by Mr. Clarke.

And third, I have contacted Audrey Sternberg of the Department's Office of Counsel and informed her of the situation described in the correspondence. Ms. Sternberg agreed that no fee for searching for records may be imposed and stated that she would contact Mr. Clarke in an effort to remedy the situation.

In view of the foregoing, I trust that Mr. Adams will be assessed an appropriate fee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Adams
Les Clarke
Audrey Sternberg

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2[illegible]1

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

May 5, 1981

Mr. Les Clarke
Records Access Officer
Region 10 Office
New York State Department of Transportation
New York State Office Building
Hauppauge, New York 11787

Dear Mr. Clarke:

The ensuing advisory opinion has been prepared at the request of Charles S. Adams, editor of the Rennysaver News of Brookhaven.

According to the correspondence sent to this office by Mr. Adams, following his request directed to you as records access officer for the Long Island office of the Department of Transportation, you wrote that the applicant would be required to include "payment of $15.00 to cover the minimum cost of extraction of data from our files.

In my opinion, your request for a search fee is inappropriate.

First, §87(1)(b)(iii) of the Freedom of Information Law (see attached) states that an agency may assess a fee of up to twenty-five cents per photocopy, unless a different fee is otherwise prescribed by law. Therefore, as a general rule, an agency cannot charge in excess of twenty-five cents per photocopy, except when another provision of law provides specific direction to the contrary.

Second, I have reviewed the regulations promulgated by the Department of Transportation under the Freedom of Information Law. In this regard, §1.4(b) of the regulations states in relevant part that "[T]here shall be no

fee charged for the inspection of records and searching for records." Based upon the regulations cited above, it appears that there is no basis for the fee that you requested.

And third, I have contacted Audrey Sternberg of the Department's Office of Counsel and informed her of the situation described in the correspondence. Ms. Sternberg agreed that no fee for searching for records may be imposed.

In view of the foregoing, it is hoped that requests for fees for searching for records will no longer be made, and that the fees imposed under the Freedom of Information Law will be restricted to the amount envisioned by that statute.

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:jm

Enc.

cc: Charles Adams

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2012

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

May 7, 1981

Donald Loggins
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Loggins:

I have received your letter of April 22 in which you raised questions regarding both the New York Freedom of Information Law and the federal Family Educational Rights and Privacy Act.

Specifically, you have asked whether "a state run community college can deny access to and copies of students records..." under the cited statutes when "a student defaults on a government backed loan".

It is noted at the outset that the New York Freedom of Information Law is applicable to entities of state and local government in New York. Since community colleges are generally operated by counties, which are public corporations, they are in my view subject to the Freedom of Information Law.

The Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment", is applicable to any educational agency or institution that participates in a program funded by the United States Department of Education. Since a community college is governmental, it is in all likelihood subject to the Buckley Amendment.

In terms of rights of access, the Buckley Amendment provides that "education records" identifiable to an "eligible student", such as yourself, are available to you, with certain exceptions. In this regard, I have enclosed a copy of the regulations promulgated under the Buckley Amendment, which define the terms quoted above and will provide you with an indication of the scope of rights of access. From my perspective, a default on the part of the student with regard to a government loan would not constitute a valid basis for withholding records that would not otherwise be available as of right under the Buckley Amendment.

Lastly, it is noted that the Buckley Amendment does not require that an educational agency or institution make copies of records accessible for inspection under the Act. However, the New York Freedom of Information Law requires that copies of accessible records be made available upon payment of the requisite fees for photocopying. Consequently, when the Freedom of Information Law and the Buckley Amendment are read in conjunction with one another, I believe that records available for inspection under the Buckley Amendment would become available for copying under the provisions of 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

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2013

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

May 8, 1981

Mr. Michael Borden, Jr.
80 A 3841
Box 445 1G25
Fishkill, NY 12524

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Borden:

I have received your letter of April 24 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have attempted unsuccessfully to gain access to records from the Orange County Jail and the Orange County Court. You have indicated further that the records in which you are interested may be necessary to a judicial proceeding in which you are involved.

I would like to offer several observations with respect to your inquiry.

First, it is noted that the courts and court records fall outside the scope of the Freedom of Information Law. Nevertheless, as a general rule, most court records are available. Specifically, §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 transcipts 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, it is suggested that you renew your request for court records and direct it to the clerk of the appropriate court, citing §255 of the Judiciary Law.

Second, since Orange County is an "agency" subject to the Freedom of Information Law, records of the County jail are also subject to rights of access granted by the Law.

In this regard, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are accessible, 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.

You did not specify the types of records that you are seeking and, as a consequence, I cannot provide specific advice regarding rights of access to the records in question. However, it is suggested that you direct a request to the designated records access officer in which you reasonably describe the records in which you are interested, providing as much information as possible to assist County officials in locating the records in question. I have enclosed for your consideration copies of the Freedom of Information Law and an explanatory pamphlet on the subject which may be useful to you, for it contains sample letters of request and appeal.

Lastly, I believe that the County jail is required to maintain a record of commitments and discharges under §500-f of the Correction Law. The cited provision states that:

> "[E]ach keeper shall keep in a book to be proyided at the expense of the county a daily record of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The book containing such record shall be a public record, and shall be kept on file permanently in the office of the keeper".

It is possible that some of the information in which you are interested may be contained in the commitment book. If that is the case, it is recommended that you request copies of those portions of the commitment book pertaining 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-2014

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

May 8, 1981

Frank Cappelluzzo
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cappelluzzo:

I have received your letter dated April 14, which arrived at this office on May 6.

According to your letter, some time ago, you requested copies of "minutes and amount of money awarded" to you by the Workers' Compensation Board (case no. 07768733). However, as of the date of your correspondence, you had not yet received a response.

I would like to offer the following observations regarding your inquiry.

First, I believe that the records that you are seeking are available to you.

With respect to the determination of your claim, §20 of the Workers' Compensation Law states in part that, after a claim has been determined and filed, "[I]mmediately after such filing the chairman shall send to the parties a copy of the decision".

Assuming that your request for minutes involves the transcript of your hearing, it is my view that such a record must also be available. Specifically, §122 of the Workers' Compensation Law states that:

> "[A] copy of the testimony, evidence and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the board and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified. A copy of such transcript shall be furnished to any party upon payment of the fee for transcripts of similar minutes in the supreme court".

Second, it appears that the time limits responding to your request 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 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)(])].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

Lastly, I have contacted the Workers' Compensation Board on your behalf. It is suggested that you renew your request by writing to:

Ms. Diana Farrell
Workers' Compensation Board
Room 4023
2 World Trade Center
New York, NY 10047

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Ms. Diana Farrell

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2015

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

May 11, 1981

Catherine M. Thorpe
Village Clerk-Treasurer
Village of Watkins Glen
Municipal Offices
303 Franklin Street
Watkins Glen, NY 14891

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Thorpe:

I have received your letter of April 10, which was forwarded to the Committee on Public Access to Records by the office of the State Comptroller on April 28. I apologize for the delay in response.

As the Village Clerk-Treasurer of Watkins Glen, you have asked whether a village assessor's field book is available to the public under the Freedom of Information Law.

In my opinion, the records in which you are interested are available under the Freedom of Information Law.

First, it is emphasized that §86(4) (see attached) 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, microfilms, computer tapes or discs, rules, regulations or codes".

In view of the definition quoted above, it is clear that all records in possession of an agency are subject to rights of access.

Second, the Freedom of Information Law is based upon a presumption of access. All records 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 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 in question are available. 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 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 the Village of Watkins Glen with respect to the assessment process constitutes "statistical or factual" data that is accessible.

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, 32 AD 2d 948 (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.

Fourth, the Sanchez case is also cited in an opinion of Counsel of the State Board of Equalization and Assessment (SBEA), a copy of which is enclosed for your review. The SBEA opinion (4 Op. Counsel SBEA No. 25) states that an "assessors workbook" or "field book" is a public record which is available under the Freedom of Information Law, §51 of the General Municipal Law and case law.

Lastly, §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abrdige rights of access previously granted by means of statutory or decisional law. Since there is case law indicating that records analagous to those in which you are interested are accessible, in my opinion, assessor's "field book" 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2016

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

May 12, 1981

Mr. Charles Jones
77-A-4097
P.O. Box 8
Otisville, NY 10963

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jones:

I have received your letter of April 30 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you have requested the proper address from which you can obtain a "Master Index" of records on individual inmates. Apparently, you made a similar request to the Deputy Commissioner for Administrative Services, the records access officer for the Department of Corrections, who advised you that no such index exists.

In this regard, I would like to offer the following observations.

First, it appears that you may be confusing your request for a "master index" with the subject matter list required to be compiled under §87(3)(c) of the Freedom of Information Law. The subject matter list is not an index which identifies every record pertaining to a particular inmate, but is rather a listing by subject matter, in reasonable detail, indicating the categories of records in possession of an agency.

Second, it is suggested that you renew your request in accordance with §5.20 of the regulations promulgated by the Department of Correctional Services (see attached).

Section 5.20(a) of those regulations states that "a present inmate shall direct his request to the facility superintendent or his designee". Consequently, it is recommended that you direct a request to your facility superintendent. If you are denied access to the records, you may appeal to the Counsel of the Department of Correctional Services, whose address is set forth in §5.20(c).

Third, I would like to point out that the Freedom of Information Law requires that an applicant reasonably describe the records in which he or she is interested [see Freedom of Information Law, §89(3)]. Consequently, rather than requesting all records pertaining to you, I would advise that you attempt to narrow your request, reasonably describing the types or areas of records in which you are particularly interested.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee which govern the procedural implementation of the Freedom of Information Law, an explanatory pamphlet that may be useful to you, and applicable portions of the regulations of the Department of Correctional Services.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2017

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

May 12, 1981

Ms. Judy Ann Green
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Green:

I have received your letter of May 1 concerning the implementation of the Freedom of Information Law by the Village of Herkimer.

According to your letter, at a meeting of the Village Board of Trustees, a resident requested the job description and qualifications of a Village employee. In response, the Mayor informed those in attendance that such inquiries would be "promptly answered" upon submission of a written request directed to him. Following the meeting, you sent a request to the Mayor concerning the job description and qualifications of the Village Assessor. Subsequently, you were informed by the Village Administrator that your letter "was not an official request" and that you would be required "to go to the Village office and fill out a request form."

You have raised questions concerning the procedure described above and rights of access to the records in question.

I would like to offer the following observations regarding your inquiry.

First, although an agency, such as the Village of Herkimer, may use a form, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for denying

or delaying access to records. Section 89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing "reasonably describing" the records sought. Therefore, in my view, any request made in writing that reasonably describes the records sought should suffice.

Second, in terms of procedure, §89(1) of the Freedom of Information Law requires the Committee to promulgate regulations that govern the procedural aspects and implementation of the Law. In turn, §87(1) of the Law requires each agency to adopt regulations consistent with and no more restrictive than those promulgated by the Committee. Further, the regulations require the Board of Trustees to designate one or more "records access officers" responsible for "coordinating" an agency's response to requests for records made under the Freedom of Information Law.

Third, you mentioned delays in responses to requests. In this regard, the Freedom of Information Law and the regulations prescribes time limits for responses to requests. 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)].

Fourth, with respect to rights of access, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available for inspection and copying, 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, job descriptions of public employees are clearly available. 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. 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.

Under the circumstances, a job description would be characterized as "intra-agency" material. However, I believe that it is accessible, for it is reflective of factual information, the policy of an agency with regard to the duties inherent in the position, and it might be considered as instructions to staff that affect the public.

Lastly, with regard to the qualifications of the Assessor, it appears that you are interested in knowing whether the Assessor has taken and passed particular courses. In my view, if such records exist, they are available, even though they may pertain to a particular individual.

Section 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". However, the courts have generally found that public employees enjoy a lesser right to privacy than the public generally, for public employees are required to be more accountable than any other identifiable group. Moreover, the Committee has advised and the courts have upheld the notion that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such cases 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, records pertaining to public employees that are irrelevant to the performance of their official duties may be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977].

From my perspective, records indicating courses taken, whether a public employee has successfully completed such courses, and the expenditure of public monies for the courses would be available, for such records are relevant to the performance of the duties of the public employees involved. Further, a recent decision dealing with a similar issue found that such records are accessible, despite a contention that they were kept within personnel files [see Steinmetz, supra].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you. In addition, in order to aid the Village in fulfilling its responsibilities under the Freedom of Information Law, copies of the same materials, this opinion and model regulations will be sent to the Mayor. The model regulations may be used as a guide for units of government, which may comply with the Committee's regulations by essentially filling in the appropriate blanks on the model.

I hope that 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 Charles F. Patterson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2018

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

COMMITTEE MEMBERS
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 12, 1981

Mr. William Randall
78-A-1777
Box 149
Attica, NY 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Randall:

I have received your letter of May 2, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, on April 11, you appealed an initial denial of access to records by the State Board of Parole to Edward R. Hammock, Chairman of the Board. Copes of the appeal were sent to this office and to Mr. William K. Altschuller, Senior Attorney for the Board. Since more than seven business days have elapsed since the receipt of the appeal by the Board, you have asked whether the Committee would "follow up" or whether you may "go into Court on an Article 78".

First, as you are aware, 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 authority to advise. Nevertheless, a copy of this opinion will be sent to Chairman Hammock and Mr. Altschuller in an attempt to ensure compliance.

Second, a recent judicial determination dealt with a similar situation. Specifically, in Matter of Floyd (Sup. Ct., NY Cty., NYLJ, April 10, 1981), the court con-

sidered a situation in which no determination on appeal had been rendered within seven business days of the receipt of an appeal as required by §89(4)(a) of the Freedom of Information Law and found that the petitioner had exhausted his administrative remedies and could, therefore, initiate a proceeding under Article 78 of the Civil Practice Law and Rules. In so stating, it was held that:

> "[I]f the court found otherwise, an agency could totally frustrate a request for information by merely refusing to designate a person within an agency to consider appeals or by requiring many appeals before many person or entities within the agency before a person could be said to have exhausted her/his administrative remedies. Having exhausted his administrative remedies plaintiff nevertheless did not receive either the requested records or any explanation of any kind as required by the statute."

Moreover, in Matter of Floyd, supra, it was concluded that:

> "[T]he court expresses no opinion on whether the requested documents fall within one of the exceptions to the statute requiring that access be provided. The court finds only that a custodian's failure to respond in accordance with the statutory command will be deemed a decision that petitioner is entitled to his request."

Consequently, even though the court could not determine the merits of the request in terms of rights of access, it nonetheless granted the request due to the agency's failure to respond in accordance with §89(4)(a) of the Freedom of Information Law. I would likt to emphasize that the Floyd decision has been 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
cc: Edward R. Hammock

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2019

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

May 13, 1981

Karen S. Chanda-O'Neill
Legal Division
Banking Department
Two World Trade Center
New York, New York 10047

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Chanda-O'Neill:

Thank you for sending a copy of an appeal made under the Freedom of Information Law and Superintendent Siebert's determination thereon. You have asked for an advisory opinion regarding the determination.

In terms of background, the attorneys for ABC News requested records in possession of the Banking Department relative to cashers of checks licensed by the Department. The documents were requested in order to prepare a documentary for the "20/20" news program. In response to the request, several aspects of the check cashers' license application were withheld. Among those aspects of the applications that were withheld include, for instance, corporate financial information, the names of relatives who applied for a license, personal references, the previous employment of officers, directors and employees, parties having an interest in check cashing companies, the names of directors, shareholders and employees, and previous arrest records.

In brief, two grounds for denial were cited as the bases for withholding. Specifically, some aspects of the information requested were withheld pursuant to §87(2)(f) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof the disclosure of which would "endanger the life or safety of any

person". The second ground for denial is §87(2)(b), which enables an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

I am generally in accord with the determination rendered by Superintendent Siebert, and I would like to offer the following observations.

First, it is emphasized that an opinion of the Committee is advisory in nature. Consequently, the recipient of an opinion may accept or reject the advice rendered therein.

Second, under the circumstances, it is in my opinion possible that disclosure of certain items of the information requested if disclosed would "endanger the life or safety" of a person or persons. Specifically, if the amount of cash on hand, for example, kept by a licensed check casher is made known to the public, such information would represent a readily identifiable target of possible violent action taken against check cashers, such as robbery or theft. Similarly, it might justifiably be contended that the disclosure of corporate financial information as well as the identities of persons involved in the check cashing business would have the effect of posing a potential threat to the safety of such individuals.

With respect to privacy, the standard found within §87(2)(b) of the Law is flexible and of necessity involves the making of subjective judgments. In some instances, two equally reasonable people might view a single record, and one might contend that disclosure would be offensive and therefore result in an unwarranted invasion of personal privacy. However, a second person might contend that disclosure would be innocuous and therefore would constitute a permissible invasion of personal privacy.

It is noted also that §89(2)(b) of the Freedom of Information Law states that the Committee may:

> "...promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy..."

The Committee has not promulgated such guidelines for three reasons. First, there are thousands of records in possession of government in New York that contain information identifiable to particular individuals. Consequently, it would be all but impossible to promulgate guidelines regarding the deletion of identifying details with respect to such a volume of records. Second, as stated earlier, often subjective judgments regarding the extent to which one's privacy might be invaded by means of disclosure must be made. As such, the Committee does not believe that, as a general rule, it can or should impose its subjective judgments regarding privacy upon others. And third, often agency personnel are in the best position to gauge the effects of disclosure of particular records, for they are most familiar with records that they maintain and the clientele that they serve. In this instance, it would be inappropriate to conjecture as to the sufficiency of the claim by the Superintendent that disclosure would constitute an unwarranted invasion of personal privacy. Therefore, I could not disagree with the determination.

Lastly, with regard to information regarding arrests and convictions of persons involved in licensed check cashing establishments, I believe that records reflective of convictions must be made available. A record of a conviction is filed with the court of record and would be available upon request under §255 of the Judiciary Law. However, in the case of an arrest that has not resulted in a conviction, such records are often sealed under §160.50 of the Criminal Procedure Law. From my perspective, the intent of the cited provision is to protect the privacy of individuals who have been arrested but not convicted in order that records related to an arrest do not adversely affect such individuals' capacity to gain employment, seek a license or engage in other aspects of society.

I hope that 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: Rafael Pastor, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2020

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

May 13, 1981

Ms. Ellen F. Wagoner
Village Clerk
Village of Alexandria Bay
Alexandria Bay, NY 13607

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Wagoner:

I have received your letter of May 6 and thank you for your interest in complying with the Freedom of Information Law.

You have asked for a copy of the latest regulations on public access to records, as well as a sample of the form used to request information.

Enclosed for your consideration are regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law. In turn, each agency, such as a village, is required under §87(1) of the Freedom of Information Law to adopt regulations consistent with and no more restrictive than those promulgated by the Committee. In order to assist units of government in complying with the regulations, model regulations have been developed. I have enclosed a copy of the model, which can be used by an agency to comply with the Committee's regulations by essentially filling in the appropriate blanks.

With respect to the form used to make a request, the Committee has never prescribed a particular form upon which members of the public may request records. On the contrary, the Committee has advised that any request made in writing that reasonably describes the records sought [see Freedom of Information Law, §89(3)] should be sufficient. No form for a request has been developed because

of the time that it might take to make a request. For instance, if you request records that are located in Albany, you should not be required to write to Albany to request a form, have the agency here send it back to you, fill it out, and return it to the agency in Albany. In short, such a process would involve too much time and might delay the receipt of records accessible under the Freedom of Information Law. Consequently, it is reiterated that any request made in writing that reasonably describes the records requested by an applicant should be accepted.

Lastly, enclosed for your consideration is an explanatory pamphlet concerning the Freedom of Information and Open Meetings Laws 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.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2021

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

May 22, 1981

Harold D. Howarth, Manager
Records Center Operations
CBS Inc.
51 West 52nd Street
New York, New York 10019

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Howarth:

Your letter addressed to the New York State Education Department was forwarded to the Office of General Services, which in turn forwarded your letter to the Committee on Public Access to Records. The Committee is responsible for advising with respect to the New York Freedom of Information Law.

You requested a copy of New York State records retention requirements that are applicable to records in possession of the corporate sector.

Although there are provisions of law concerning records retention requirements that are applicable to agencies of both state and local government, there are, to the best of my knowledge, no similar legal requirements regarding the retention of records in possession of the corporate sector. Consequently, I believe that, as a general rule, a corporation in New York may keep or dispose of records to the extent that it sees fit to do so. Further, although several other states have enacted statutes concerning access to personnel records by employees and the retention of those records, no similar statute has yet been enacted 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2022

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

May 22, 1981

Ms. Judy Ann Green
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Green:

I have received your most recent letter in which you requested an advisory opinion under the Freedom of Information Law. Please note that although your first and second letters to the Committee were both dated May 1, the other letter, which was answered on May 12, was received by this office a week before the letter to which a response is now being given.

Once again, you have raised questions regarding the Freedom of Information Law, and I would like to offer the following observations.

First, according to your letter, you were informed by Village officials that you would be required to pay twenty-five cents for each sheet copied. You have asked whether, "since this is public information", you have to pay for the information to be copied. In this regard, §87(1)(b)(iii) of the Freedom of Information Law permits an agency, such as the Village of Herkimer, to assess a fee of up to twenty-five cents per photocopy. Consequently, you may be charged a fee of twenty-five cents for records for which you seek copies. However, it is noted that the Freedom of Information Law permits the public to inspect accessible records at no charge. Therefore, if you wish to review records without requesting copies, you may do so free of charge.

Second, you have asked whether you have the right to know the personal qualifications of your current tax assessor.

As indicated in my earlier letter to you, questions concerning rights of access to records reflective of the qualifications of public employees are determined in great measure by §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". As I pointed out in our previous correspondence, the courts have generally found that public employees enjoy a lesser right to privacy than the public generally, for public employees are required to be more accountable than any other identifiable group. Moreover, the Committee has advised and the courts have upheld the notion that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such cases 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, records pertaining to public employees that are irrelevant to the performance of their official duties may be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977].

The qualifications of a public employee may appear in several types of records. For instance, a resume might provide general background concerning an individual. However, if, for example, a resume contains reference to the age, sex, marital status, social security number, military experience or similar information regarding an individual, I believe that such information may be deleted under the privacy provisions described above. If the position in question requires that a certain level of education be attained, portions of a resume reflective of the attainment of that level of education would in my view be available, for such information would be relevant to the performance of the official duties of both the employee and the employer.

A second possible source of information regarding qualifications would be a job description. If the Village maintains a record indicating the job description of the assessor, such a record would in my view be available. A job description may also have been prepared by a civil service department. In such a case, that job description would also in my opinion be available. In addition, when a civil service examination is given, an eligible list is prepared which identifies those who passed and their scores. Therefore, if an examination was given, it is suggested that you request to inspect the appropriate eligible list.

Lastly, it is possible that there may be no specific qualifications for the position in question. Further, it may also be possible that there are no records in existence reflective of the qualifications of the person now holding the position of assessor. If no such records exist, the Village would not be required to create 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:ss

cc: Village Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-20[illegible]

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

May 22, 1981

Mr. Andrew C. Crogan, Jr.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Crogan:

As you are aware, I have received your letter in which you requested an advisory opinion regarding rights of access to student records.

According to your letter, the teachers' union at Bethlehem Central High School has intervened with respect to a situation in which you requested to inspect and/or copy test papers related to your daughter. Further, you also indicated that the test papers in question had been corrected and distributed to members of the class, including your daughter. Following the students' review of the test papers, they were returned to the teacher. In addition, the teacher who has withheld the records has, according to your letter, been requested by School District officials to return the papers, but he has not done so to date.

I would like to offer the following observations with respect to the situation that you have described.

First, as you intimated in your letter, rights of access to the records in question are governed by the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the Buckley Amendment. In brief, the Buckley Amendment provides that the "education records" identifiable to a particular student under the age of eighteen are available to the parents of the student, and confidential with regard to third parties.

It is noted that the term "education records" is defined broadly in the regulations promulgated by what was formerly known as the Department of Health, Education and Welfare and is now the U.S. Department of Education. In relevant part, the term "education record" is defined to mean:

> "...those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution."

Further, subdivision (b) states that the term does not include:

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

Under the circumstances, since the test papers were revealed to the students, the exception to the definition of education records would not apply. Stated differently, since your daughter reviewed her test papers, they are in my opinion "education records" that are available to you.

Second, the regulations to which reference was made earlier define "record" to mean:

> "...any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche."

Consequently, the test papers clearly constitute records subject to rights granted by the Act.

Third, although the Buckley Amendment does not confer a right to copy education records upon parents of students, the New York Freedom of Information Law, §89 (3), requires that an agency, such as a school district, provide copies of accessible records upon payment of or offer to pay the requisite fees for photocopying. Consequently, when the New York Freedom of Information Law is read in conjunction with the Buckley Amendment, a parent gains the right to copy education records pertaining to his or her children. It is noted that the relationship between the Buckley Amendment and the New York Freedom of Information Law has been discussed with officials of the U.S. Department of Education in Washington.

Lastly, you wrote that the teachers' union has intervened in an apparent attempt to preclude disclosure of the test papers. In this regard, I cannot envision how the union would have the standing or the capacity to affect your rights of access to records. Even if a contractual provision barred disclosure of certain records, such a provision would in my opinion be void to the extent that it conflicts with or otherwise abridges rights of access granted by a state or federal act passed by the State Legislature or 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

cc: Dr. Briggs McAndrew
Dr. Thomas Atkinson
Mr. Charles Gunner
Mr. Clifford LeMere

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-204

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

May 26, 1981

Robert B. Schwarz
Box 1864
SUNY, College at Purchase
Purchase, New York 10577

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schwarz:

I have received your letter of April 29 and I apologize for the delay in response.

You have asked whether income and expense statements for income producing property which are submitted by taxpayers for assessment review purposes are available under the Freedom of Information Law, or whether disclosure would result in an unwarranted invasion of personal privacy.

I would like to offer the following observations with regard to the question you raised.

First, the Freedom of Information Law is based upon a presumption of access. As you may be aware, all records of an agency, such as a unit of local government, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

As you intimated, an agency may deny access to records or portions of records when disclosure would result in an unwarranted invasion of personal privacy. With respect to the particular assessment records that you are seeking, disclosure of some of the personal income information might in my view result in such an invasion. While the Law is

generally intended to ensure that government is accountable, the privacy provisions seek to enable government to prevent disclosures of its records reflective of the personal details of individuals' lives. Therefore, the issue involves the extent to which disclosure of the income and expense statements would constitute an unwarranted invasion as opposed to a permissible invasion of privacy.

Second, as you have noted, records reflective of personal income or payment of state and federal income tax is deniable due to confidentiality provisions found within the Tax Law [see e.g., §697(3)]. Therefore, it would appear that the Legislature determined that disclosure of records concerning income would constitute an improper or unwarranted invasion of personal privacy.

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); Sanches v. Papontas, 32 AD 2d 948 (1969)]. In Sanches, 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. Therefore, I believe that records which identify property by block, lot, owner's name, address, selling price, etc., are available, so long as personally identifying income or tax information is deleted from such records.

Although there is an opinion of the State Board of Equalization and Assessment which states that applications for an aged exemption, (see Real Property Tax Law, §467) are public records (see 4 Op. Council SBEA No. 102), this Committee has previously advised that personal income information filed to obtain an aged exemption need not be made available in view of §87(2)(b) of the Freedom of Information Law. In addition, there is a lower court decision, the facts of which appear to be similar with those presented in your correspondence. In Kaufman Assoc. v. Levy [74 Misc. 2d 209 (1973)], it was held that income and expense statements filed in connection with an application

for review of a real estate tax evaluation were available for inspection. It should be noted, however, that this decision was rendered before the enactment of the Freedom of Information Law and was based on a New York City Charter provision found to be comparable to the provisions of General Municipal Law §51. It is unclear whether a court would now grant access to the income and expense statements in their entirety under the Freedom of Information Law without requiring the deletion of information which could constitute an unwarranted invasion of personal privacy.

Fourth, it is emphasized that this opinion is exactly that - an opinion. In dealing with privacy, an attempt to balance interests and subjective judgments must of necessity be made. Therefore, although one reasonable person might contend that disclosure of particular information would result in a permissible invasion of privacy, another equally reasonable person might feel that disclosure of the same information would result in an unwarranted invasion of privacy. As such, a final determination regarding the issues could in my opinion be finally rendered only by a court.

In sum, it is my view that you should have the capacity to gain access to either income and expense statements after personal identifiers have been deleted or assessment records containing names, addresses, etc., where personal income and state and federal income tax information has been deleted.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-632
FOIL-AO-2025

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

May 26, 1981

Mr. James Heary
Conboy, McKay, Bachman & Kendall
407 Sherman Street
Watertown, New York 13601

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Heary:

I have received your thoughtful letter of May 11 and appreciate your interest in complying with the Freedom of Information and Open Meetings Laws.

You have indicated that you are Counsel to the Jefferson County Industrial Development Agency (the "IDA") and that a number of questions have arisen with respect to access to its meetings and records, particularly with respect to the promotion of new industry in the County. You have contended that, for the IDA to function effectively, it must have the capacity to maintain the confidentiality of records that identify new industries with which discussions have been initiated.

With regard to your first area of inquiry, I would like to offer the following observations and comments.

It is noted at the outset that the IDA is in my view both an "agency" subject to the Freedom of Information Law and a "public body" subject to the Open Meetings Law.

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 of any one or more municipalities thereof, except the judiciary or the state legislature."

Since an industrial development agency is a "government 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.

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.

With respect to access to records, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the IDA 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.

Under the circumstances, I can envision three possible grounds for denial. However, in all honesty, the extent to which any of the grounds for denial might appropriately be asserted is questionable.

One ground for denial of potential relevance is §87(2)(c), which states that agency may withhold records or portions thereof which if disclosed would "impair present or imminent contract awards..." From my perspective, it is doubtful that the cited provision is applicable, because the situation that you described does not likely deal with a contract award.

A second ground for denial that may be relevant is §97(2)(d), which states that an agency may withhold trade secrets or other information maintained for the regulation of commercial enterprise when disclosure would cause substantial injury to the competitive position of the subject corporation.

In my view, it is possible that the cited provision may appropriately be cited with regard to at least some of the records with which you are dealing. Further, it is possible that even the disclosure of the identity of a corporation considering locating in Jefferson County might constitute a trade secret, for disclosure might give an advantage to competitors. Other information concerning the particulars of a corporation, such as its financial background and strengths and weaknesses might also if disclosed cause substantial injury to its competitive position.

It is noted that the standard found within §87(2)(d) is flexible and that it might be asserted properly in some cases and inapplicable in others, depending upon the nature of the corporation, its business and the factual circumstances of the situation.

A third potential 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..."

As the language of the statute indicates, §87(2)(g) is applicable to communications between agencies as well as those between representatives of a single agency. Consequently, letters, memoranda and similar information communicated among representatives of the IDA and its staff would constitute intra-agency materials. It is emphasized, however, that §87(2)(g) 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 must be made available. Conversely, portions of inter-agency or intra-agency materials that are reflective of advice, recommendations, suggestion, impression and the like might justifiably be withheld.

Your second question concerns the status of three advisory committees designated by the IDA to assist its members in their deliberations. You have indicated that the committees have no authority to act, but rather have only the authority to recommend. Since the committees are advisory, you wrote that you have suggested that their meetings are not subject to the Open Meetings Law.

With all due respect to your position, I must disagree.

Although the status of advisory committees was questionable under the Open Meetings Law as originally enacted, amendments to the Open Meetings Law that became effective on October 1, 1979, in my opinion make clear

that advisory committees are subject to the Law in all respects. In fact, the definition of "public body" quoted earlier now makes reference to "committee or subcommittee or other similar body" of a public body, such as the board of directors of an industrial development agency. Moreover, in the earlier discussion of the status of an industrial development agency under the Open Meetings Law, a rationale concerning the coverage of an industrial development agency board of directors was presented under the definition of "public body". I believe that the same rationale would apply to committees created by an industrial development agency. Consequently, I believe that the committees to which you made reference are subject to the Open Meetings Law.

Your last question concerns applications that must be filed with the IDA by a prospective industry. Your question is whether the applications are available to the public "on demand before the Agency has had an opportunity to act on them at one of its meetings" (emphasis yours).

In this regard, I would like to offer two points.

Under the Freedom of Information Law and the regulations promulgated by the Committee (see attached), which govern the procedural aspects of the Freedom of Information Law, an agency is required to respond to a request made in writing within prescribed time limits. Specifically, §89(3) 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 view of the foregoing, assuming that an agency acknowledges the receipt of a request on the fifth business day after receipt of a request, it may take up to fifteen business days to respond initially to a request.

It is important to point out, however, that any records in possession of an agency are subject to rights of access granted by the Freedom of Information Law as soon as they come into to possession of the agency [see definition of "record", §86(4)]. Consequently, if, for example, the IDA does not meet for a lengthy period of time, a determination to disclose or withhold may have to be made before the Board has an opportunity to meet.

Further, as indicated earlier, one of the grounds for denial in the Freedom of Information Law concerns trade secret information which if disclosed would cause substantial injury to the competitive position of a particular corporation. It is possible that certain aspects of the application might be withheld until a determination regarding the application has been made. For instance, the trade secret exception might be applicable with respect to the list of business suppliers, major customers, the types of markets served, the corporation's terms of sale as well as financial information. In addition, there are aspects of the application which if disclosed might constitute "an unwarranted invasion of personal privacy" and therefore be deniable under §87(2)(b) of the Freedom of Information Law. For instance, it is possible that disclosure would result in an unwarranted invasion of personal privacy with respect to the addresses, social security numbers and other business affiliations of officers and directors.

Lastly, it is possible that there may be a ground for executive session with respect to some of the deliberations of both the IDA and its committees.

For instance, §100(1)(f) of the Open Meetings Law permits a public body to 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..."

Although the language quoted above is cited most often with respect to matters concerning "personnel", it also applies to discussions dealing with a corporation. In my view, it is likely that many of the discussions of an industrial development agency deal with the financial or credit history of a particular corporation. Therefore, to that extent, an executive session could in my opinion justifiably be convened.

Another ground for denial that might conceivably be cited is §100(1)(h), which states that a public body may enter into an 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."

If, for example, the County is purchasing, selling, or leasing its real property, and if disclosure would substantially affect the value of the property, an executive session could in my opinion be convened.

I hope that 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-2026

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

May 28, 1981

Ms. Nancy Cestaro
c/o Fortunato
Rte. 1 Box 244
Belle Mead, NJ 08502

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Cestaro:

I have received your letter of May 18 and thank you for your kind words. You have raised questions concerning access to medical records pertaining to you in possession of private and corporation doctors in New York.

I would like to offer the following observations with respect to your inquiry.

It is emphasized at the outset that the Freedom of Information Law applies only to records in possession of government. Consequently, rights of access granted by the Freedom of Information Law would not be applicable to medical records in possession of private doctors and corporations.

Nevertheless, there are other provisions of law that might serve to provide direct or indirect access to medical records.

Enclosed for your consideration is a copy of §17 of the Public Health Law. That provision does not grant the subject of medical records direct access to such records. However, it does require that medical records requested on your behalf by the physician of your choice must be provided to that physician by other physicians or hospitals. Therefore, although you might not have direct access to medical records, they should be made available to the physician of your choice.

In addition, physicians and others in the health professions are licensed by the New York State Board of Regents. In this regard, the Board of Regents has developed regulations dealing with unprofessional conduct. One area of unprofessional conduct would involve a failure on the part of the physician to make available medical records or an explanation of their contents to a patient. I have enclosed a copy of the appropriate regulations.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2027

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

May 28, 1981

George Silberman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Silberman:

As you are aware, your letter addressed to Lieutenant Governor Cuomo has been forwarded to the Committee on Public Access to Records, of which the Lieutenant Governor is a member. The Committee is responsible for advising with respect to the Freedom of Information Law.

Your correspondence indicates that you requested information without success from the New York City Human Resources Administration. The information sought concerned the civil service title, salary, date of appointment and similar information regarding particular individuals. In response to your inquiry, Nathaniel Foxworth, Deputy Assistant Commissioner of the Human Resources Administration, stated that his office would "need more specific information. For instance, why this information is required and what reason the information is to be sent to you". You also indicated that your request was not answered within the requisite period of time.

I would like to offer the following observations with respect to your inquiry.

First, and perhaps most importantly, the Freedom of Information Law grants access to available records to any person. The Law does not distinguish among applicants for records, and as a general rule, the reason for requesting

records is irrelevant to rights of access. As the Committee has advised and the courts have held, records accessible under the Freedom of Information Law must be made equally available to any person, without regard to status or interest (see e.g., Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 563, 378 NYS 2d 165). Therefore, I do not believe that it is generally appropriate for an agency official to ask for reasons for making a request for records.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" in writing the records in which he or she is interested. Although Mr. Foxworth indicated that his office would need "more specific information", based upon your correspondence, it would appear that the information requested was indeed "reasonably described".

Third, the Freedom of Information Law does not generally require an agency to create a record in response to a request. Nevertheless, one of the exceptions to that rule is found in §87(3) of the Freedom of Information Law. Specifically, §87(3)(b) 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 provision quoted above, it would appear that much of the information in which you are interested should be found within the payroll record required to be compiled by the Human Resources Administration.

Lastly, as you intimated, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, require that requests be answered within specific periods 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)].

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 opinion, will be sent to Mr. Foxworth.

I hope that 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: Lieutenant Governor Cuomo
Mr. Foxworth

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2028

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

May 29, 1981

Mr. Joseph J. Jarent
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jarent:

I have recently received your letter of May 13 in which you requested records in possession of the State Insurance Department regarding a complaint that you directed to the Department.

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 those in which you are interested, nor does it have the authority to compel an agency, such as the Insurance Department, to comply with the Freedom of Information Law.

Nevertheless, I would like to offer the following observations and suggestions.

First, each agency subject to the Freedom of Information Law is required to designate one or more "records access officers" who are responsible for acting upon requests made under the Law. Consequently, if you do not obtain a response soon based upon Assemblyman Healey's inquiry, it is suggested that you initiate a new request and direct it to the "records access officer" at the Insurance Department, which is located at 2 World Trade Center, New York, NY 10047. It is also recommended that, if a request is made, you indicate on the outside of your envelope that you are making a freedom of information request. By so doing, you will likely ensure that the request will be forwarded to the appropriate person within the Insurance Department.

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 appearing in §87(2)(a) through (h) of the Law.

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 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, regulations promulgated by the Committee that govern the procedural implementation of the Law, and an explanatory pamphlet that may be useful to you. The pamphlet contains sample letters of request and appeal that may be particularly helpful.

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: Assemblyman Healey
Nathan Silver

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2029

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

June 1, 1981

Lowell J. Tooley
Village Manager
Village of Scarsdale
Village Hall
Scarsdale, NY 10583

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tooley:

I have received your letter of May 14 and appreciate your interest in compliance with the Freedom of Information Law.

You have raised a series of questions, and I will attempt to respond to each.

First, you have asked whether access may properly be denied with respect to a record "consisting of a memorandum from a village trustee to another village trustee". Further, a copy of the memorandum was sent to the mayor of the Village.

As I explained during our telephone conversation, one of the grounds for denial appearing in the Freedom of Information Law concerns inter-agency and intra-agency materials. 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..."

It is emphasized that 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 policies or determinations must be made available. Conversely, inter-agency or intra-agency materials that are reflective of advice, recommendation, suggestion, impression and the like would in my opinion be deniable.

Under the circumstances, a memorandum transmitted from one trustee to another could be characterized as "intra-agency" material. Therefore, to the extent that it consists of advice or recommendation, for example, it could in my view be appropriately denied.

Your second question is: "[N]ow that the Mayor has given me a copy of her copy of the memorandum and other Board members may have a copy, does the record become public?" In my opinion, the fact that the memorandum in question has been distributed to other board members and to yourself as Village Manager does not alter rights of access. In this regard, it is noted that the definition of "agency" includes a "public corporation", such as a village. Consequently, any communications within or among village officials or employees would constitute intra-agency materials. As such, the distribution of the memorandum within the agency, i.e. the Village, would not change the opinion given in the response to your first question.

Your third question is whether if, as records access officer, you do not have a copy of a record, to whom does one apply when seeking a record under the Freedom of Information Law. I believe that all of the components of village government, including the village board and its committees, should be considered as a single agency for the purpose of the Freedom of Information Law [see definition of "agency", Freedom of Information Law, §86(3)]. I would also like to direct your attention to the regulations promulgated by the Committee. In terms of background, §89(1)(b)(iii) of the Freedom of Information Law states that the Committee shall promulgate procedural regulations under the Freedom of Information Law. In turn, §87(1)(a) requires that:

> "[W]ithin sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on public access to records in conformity with the provisions of this article, pertaining to the administration of this article".

Consequently, it is clear that the governing body of a public corporation is required to promulgate regulations consistent with those developed by the Committee. Moreover, §1401.2(a) of the Committee's regulations state that:

> "[T]he governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The 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".

Subdivision (b) of the cited provision describes the responsibilities of a records access officer.

In view of the foregoing, I believe that a records access officer is generally responsible for locating records sought. Therefore, even if a records access officer does not have physical possession of records requested under the Law, he or she is required to locate the record and determine rights of access to the record.

Your fourth question indicates that no individual or body has been appointed to hear appeals and that, as a consequence, you informed an applicant to appeal to the Village Board of Trustees. From my perspective, your direction to the applicant was appropriate, for §89(4)(a) of the Freedom of Information Law states in relevant part 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..."

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated thereunder by the Committee, and model regulations. The model regulations were devised in order to assist units of government in complying with the Committee's regulations. In brief, the model enables an agency to comply with the regulations by filling in the appropriate blanks.

I hope that 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-2030

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

June 1, 1981

Bernard Sax
Assistant Corporation Counsel
City of Niagara Falls
Department of Law
City Hall, Main Street
Niagara Falls, New York 14302

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sax:

As you are aware, I have received your letter of May 15. You have raised questions concerning a request made under the Freedom of Information Law that focuses upon an examination for master electrician administered in March by the City of Niagara Falls.

It is noted initially there is but a single decision of which I am aware (Social Services Employees Union, Local 371 v. Cunningham, Sup. Ct., NY Cty., NYLJ, April 7, 1980) concerning access to the contents of examinations. I have enclosed a copy of that decision for your review.

Your letter concerns a request for six areas of records, each of which concern the examination identified earlier. You indicated that, in your view, all but two of the areas of the request (items 2 and 3) might properly be withheld.

In this regard, I would like to offer the following observations.

The first series of records requested involves "the examination papers and answer sheets of every person who took the city's master electrician test on March 30, 1981".

As you intimated, §87(2)(h) of the Freedom of Information Law would appear to be the most relevant provision with respect to the question raised. The cited provision states that an agency may withhold records or portions thereof that:

> "are examination questions or answers which are requested prior to the final administration of such questions".

Stated differently, if an examination question will be administered in the future, the question and answer may be withheld. Consequently, if indeed the examination questions will be given in the future, I believe that the questions and answers may justifiably be withheld.

The next area of inquiry in dispute concerns a request for "the names and addresses of any persons responsible for grading the examinations". Here, I believe that there are two provisions within the Freedom of Information Law that may be relevant. One such provision is §87(3)(b), which requires each agency, such as the City of Niagara Falls, to prepare a payroll record consisting of the name, public office address, title and salary of all employees of the agency. Based upon §87(3)(b), records reflective of the identities of employees of the City of Niagara Falls who are responsible for grading the examinations should in my view be made available.

The second relevant provision 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". Responses to questions concerning personal privacy may often be perplexing, for the standard in the Law is flexible and in some instances subjective judgments must of necessity be made. Nevertheless, there are several judicial determinations concerning the protection of privacy of public employees. As a rule, the courts have found that public employees enjoy a lesser degree of privacy than members of the public generally, for public employees are required to be more accountable than any other identifiable group. Further, several courts

have held in essence that records pertaining to public employees that are relevant to the performance of their official duties are available, for disclosure in such instances would constitute 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 209 (1977); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records identifying public employees that are not relevant to the performance of their official duties may justifiably be withheld (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Under the circumstances, I would conjecture that the identities of public employees or other persons responsible for grading the examinations would be available, for disclosure of the names would likely result in a permissible invasion of personal privacy. Disclosure of the home addresses, however, would likely result in an unwarranted invasion of personal privacy, for the home address of such individuals likely has little or no bearing upon the performance of one's official duties. In addition, the payroll record provision cited earlier, §87(3)(b), makes specific reference to the public office address of public employees. That provision represents a clarification of the analagous provision that appeared in the original Freedom of Information Law, which did not specify which address, home or business, should appear in the payroll record.

The next area of request involves "the names and addresses of each and every person who took the city's master electrician examination on March 30, 1981", and the last area of request, which is related to the preceding request, concerns "any and all records of scores given to every person who took the examination on that date". With respect to the two requests, I would like to offer an analogy. When a civil service examination is given, a list of those who took the examination is withheld to protect privacy. However, after the results of the test are known, an "eligible list" is created, which identifies those who passed by name, address and score. The reason for withholding a list of those who took an exam is based

upon the idea that a comparison of that list to the eligible list would identify those who failed, which might be embarrassing to some, particularly in a small community. Based upon an analogy between the civil service examination and the situation that you have described, I would suggest that the names and addresses of the persons who took the examination might justifiably be withheld. However, a record reflective of the identities and their scores of those who passed should likely be made available.

In a related vein, I would conjecture that those who passed the examination are granted a license or permit. From my perspective, the issuance of a license is intended to enable the public to know that a particular individual is qualified to engage in a certain area of endeavor, i.e. master electrician. In my view, if a license, permit or the equivalent is granted to those who passed an examination, records containing the identities of such individuals must be made available. To reiterate, however, I believe that records identifying those who failed the examination might justifiably be withheld under the privacy provisions of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

cc: Thomas P. Cleary

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2031

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

June 1, 1981

Mr. Carmelo Feliciano
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Feliciano:

I have received your letter of May 15 in which you requested information concerning the means by which you may obtain records pertaining to you.

Specifically, you have indicated that you are interested in obtaining transcripts of judicial proceedings and other information concerning proceedings in which you are involved.

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 may be useful to you.

In brief, the Freedom of Information Law states 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 Freedom of Information Law.

In order to make a request, you should address a request in writing, reasonably describing the records in which you are interested, to the "records access officer" of the agency maintaining possession of the records.

It is emphasized that the Freedom of Information Law does not include within its scope the courts or court records. Nevertheless, as a general rule, court records must be made available by the clerk of the court maintaining custody of the records. I have enclosed for your consideration a copy of §255 of the Judiciary Law, which states in brief that a clerk of the court must search for and provide access to records in his possession upon payment of the appropriate fees. Consequently, it is suggested that you direct your request to the clerks of the courts that have custody of the records in which you are interested.

It is also suggested that you seek the aid of an organization such as Prisoners' Legal Services, which may be able to expedite the process 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 634
FOIL-AO-2032

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

June 2, 1981

Ms. Bette Segal
Director
Tri-State Regional Planning
Commission
One World Trade Center
New York, New York 10048

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Segal:

As you are aware, I have received your letter in which you requested an advisory opinion under both the Freedom of Information and Open Meetings Laws.

Your inquiry concerns the status of a community development corporation created by a village. Specifically, you have asked whether the meetings of the community development corporation board of directors are subject to the Open Meetings Law and whether the names of its members must be disclosed under the Freedom of Information Law.

In all honesty, I know of no judicial determination concerning the status of community development corporations under the Open Meetings Law. Nevertheless, I believe that such corporations are subject to the Open Meetings Law in all respects.

Article 6-A of the Private Housing Finance Law deals with community development corporations. According to §253 of the Private Housing Finance Law, community development corporations

> "...shall be incorporated and organized in the manner provided in the not-for-profit corporation law for not-for-profit corporations, except that the certificate of incorporation shall be approved by the commissioner [of the New York State Housing Finance Agency] instead of such approval or approvals as may be required by the not-for-profit corporation law."

In terms of the rationale behind the creation of community development corporations, §251 of the Private Housing Finance Law, entitled "Policy and purposes of article" states that:

> "[I]t is the policy of the state to promote the reconstruction and redevelopment of municipal urban renewal areas in a manner that will serve the civic, cultural and recreational needs of the community as a whole. There is need for local non-profit corporations to construct, with mortgage loan participation by the New York state housing finance agency and in furtherance of an urban renewal plan, civic, cultural and recreational structures and facilities and other capital development projects invested with a public interest, for the accomplishment of the purposes of article eighteen of the constitution and articles fifteen and fifteen-A of the general municipal law."

Based upon the statement of policy quoted above, it is in my opinion clear that a community development corporation is created and functions in order to carry out the public interest. Further, Articles 15 and 15-A of the General Municipal Law concerning urban renewal, also contain statements of policy based upon the promotion of the safety, health, morals and welfare of the people of the state (see General Municipal Law, §501). Section 501 of the General Municipal Law concerning urban renewal states that:

> "[I]t is necessary for the accomplishment of such purposes to grant municipalities of this state the rights and powers provided in this article. The use of such rights and powers to correct such conditions, factors and characteristics and to eliminate or prevent the development and spread of deterioration and blight through the clearance, replanning, reconstruction, rehabilitation, conservation or renewal of such areas, for residential, commercial, industrial, community, public and other uses is a public use and public purpose essential to the public interest, and for which public funds may be expended."

In Article 15-A of the General Municipal Law, the statement of policy and purposes appearing in §551 states that:

> "[I]t is hereby declared to be the policy of this state to promote the expeditious undertaking, financing and completion of municipal urban renewal programs by the creation of municipal urban renewal agencies which are hereby declared to be governmental agencies and instrumentalities and to grant to such urban renewal agencies the rights and powers provided in this article. The use of such rights and powers is a public purpose essential to the public interest, and for which public funds may be expended."

In view of the foregoing, it is in my opinion clear that the purposes of a community development corporation involve carrying out the public interest in a manner similar to and based upon the direction given to urban renewal agencies under the General Municipal Law. Therefore, even though a community development corporation may be a not-for-profit corporation, I believe that it falls within the definition of "public body" appearing in §97(2) of the Open Meetings Law and that it is subject to the Open Meetings Law.

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

> "...any entity, for which a quorum is required in order to 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 breaking the definition into its components, I believe that each of the conditions precedent in the definition necessary to a finding that a community development corporation is subject to the Open Meetings Law can be met.

First, a community development corporation is an entity consisting of two or more members.

Second, a community development corporation is required to act by means of a quorum under §608 of the Not-for-Profit Corporation Law.

Third, based upon the direction provided in the Private Housing Finance Law and Articles 15 and 15-A of the General Municipal Law, I believe that a community development corporation conducts public business and performs a governmental function.

And fourth, the business of a community development corporation is in my opinion performed for a public corporation, in this case a village.

It is noted that in somewhat similar situations, it has been found judicially that not-for-profit corporations may be subject to either the Open Meetings Law or the Freedom of Information Law. For instance, the Appellate Division, Fourth Department, recently held that the Board of Trustees of Cornell University, a not-for-profit educational corporation, is subject to the Open Meetings Law when it deliberates with respect to its four statutory colleges [see Holden v. Cornell University Board of Trustees, Sup. Ct., Tompkins County, February 19, 1980; aff'd Appellate Division, Fourth Department, May 21, 1981]. Similarly, in Westchester Rockland Newspapers v. Kimball

[50 NY 2d 575 (1980)], the Court of Appeals found that a volunteer fire company, a not-for-profit corporation, is an "agency" subject to the Freedom of Information Law.

For the reasons described above, I believe that a community development corporation is a "public body" subject to the Open Meetings Law in all respects.

With regard to the names of the members of a community development corporation, assuming that the Open Meetings Law is indeed applicable, the identities of the members might be determined by attending a meeting. Further, assuming that the municipality for which the corporation performs its duties has possession of a record indicating the identities of the members of a corporation, such a record would in my view be accessible under the Freedom of Information Law, for there would be no ground for denial that could be appropriately cited to withhold such a record. In addition, it is possible that the New York State Housing Finance Agency maintains records reflective of the identities of the members of community development corporations. If that is the case, I believe that such records would be accessible from that agency as well.

According to our telephone conversation, the community development corporation in which you are interested does not keep minutes. In this regard, I would like to point out that §101 of the Open Meetings Law requires that minutes be compiled and made available. Minutes of open meetings must be made available within two weeks of such meetings and minutes reflective of action taken during executive sessions must be prepared and made available within one week of the executive sessions.

Lastly, it is emphasized that the Open Meetings Law provides the public with the right to attend and listen to the deliberations of public bodies. It confers no right upon the public to speak or otherwise participate at meetings of public bodies. Therefore, if a public body chooses to permit public participation at meetings, it may do so, but it need not.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Mayor, Village of Spring Valley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-635
FOIL-AO-2033

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

June 3, 1981

Mr. David R. Battaglia
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Battaglia:

I have received your letter of May 17 and appreciate your interest in complying with the Open Meetings Law.

As a member of the Tonawanda Board of Education, you have questioned practices of the Board with regard to discussions of items during executive sessions under the heading of "personnel". You have asked for an advisory opinion with respect to particular situations in which the "personnel exception" has been invoked.

It is noted at that outset that the so-called "personnel" exception for executive session appearing in the existing Open Meetings Law differs from the analogous provision in the original Open Meetings Law. Under the original §100(1)(f), a public body could enter into an 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..."

Numerous problems of interpretation arose with respect to the language quoted above. In many instances, public bodies entered into executive sessions to discuss matters that dealt with personnel policy, personnel in general, or subjects concerning personnel in a tangential manner. From the Committee's perspective, §100(1)(f) was intended largely to protect privacy. Consequently, the Committee advised that the exception in question might appropriately be cited to enter into executive sessions only when discussions concerned specific individuals. Moreover, in its annual reports to the Legislature on the Open Meetings Law, the Committee recommended legislation to clarify the Law in conjunction with its view of §100(1)(f).

In 1979, the Open Meetings Law was amended in several respects. One of the amendments involved a change in the scope of the "personnel" exception for executive session based upon the Committee's proposal. The cited provision now states that a public body may enter into an 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)

In view of the alterations in §100(1)(f), it is in my view clear that an executive session regarding "personnel" may be conducted only with respect to those subjects listed in §100(1)(f) and, further, only with regard to discussions relative to a "particular" person.

In terms of the examples that you provided, the first concerns an executive session during with the Superintendent

> "...began discussion on the ability of the district to hire per diem and long-term substitute teachers from sources other than the preferred eligible list, which consists of previously employed teachers who are presently laid off."

I concur with your objections to the executive session, for the issue dealt with substitute teachers generally, rather than any particular individual.

I also agree that the second situation that you described would not in my view have constituted an appropriate discussion for executive session. That discussion concerned a review of a seniority list of District Administrators relative to the manner in which the list was compiled. Again, it would appear that there was no discussion of any particular individual on the list, but rather merely the means by which the list was created.

Following your objections to that executive session, you were informed that the issues could have been discussed during an executive session under the heading of "possible litigation". In this regard, §100(1)(d) of the Open Meetings Law states that a public body may enter into an executive session to discuss "proposed, pending or current litigation". It has been contended on several occasions that "possible litigation" constitutes an appropriate basis for entry into an executive session. I disagree, for virtually any subject discussed by a public body could be a topic of possible litigation. From my perspective, to be considered "proposed" litigation, there must be an imminence or a real threat of litigation in order to qualify under §100(1)(d) as "proposed" litigation. Consequently, I believe that "possible" litigation did not constitute an appropriate basis for entry into executive session.

Further, I agree with your contention that the seniority list to which you alluded would be available under the Freedom of Information Law.

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); 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, 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. Further, the seniority list would be reflective of factual data that is available under §87(2)(g)(i) of the Freedom of Information Law.

You have asked for citations of any court cases that might be relevant. To the best of my knowledge, there is but one judicial determination that dealt directly with the scope of the "personnel" exception. Specifically, 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..."

The only other suggestion that I can make is that you and others attempt to educate the members of public bodies with respect to the provisions of the Open Meetings Law. It is my hope that such a process will tend to enhance compliance with the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2034

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

June 3, 1981

Mr. Michael Borden, Jr.
80 A 3871
Box 445 1G25
Fishkill, New York 12524

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Borden:

I have received your letter of May 19.

According to your letter, when you were housed in the Orange County Jail, a log was kept in which your activities were recorded, including notations of the identities of visitors, phone calls that you made, and similar information. Your question is whether such information is accessible under the Freedom of Information Law.

I would like to offer the following observations with respect to your inquiry.

First, as indicated in my earlier letter to you, the Freedom of Information Law states that all records of an agency, such as Orange County, 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 Law.

Second, it is emphasized that §89(3) states in part that, as a general rule, an agency is not required to create or compile a record in response to a request. Therefore, if, for example, the information in which you are interested does not exist in the form of a record or records, Orange County would not be required to create such a record on your behalf.

Third, in terms of rights of access, there may be three relevant grounds for denial. However, I am not sure that any would be applicable.

One ground for denial that might be relevant under the circumstances 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". If, for example, the log or other record in which you are interested identifies other inmates, their visitors, their phone calls or similar information of a personal nature, it is possible that those aspects of the record could be withheld on the basis of the privacy provision quoted above. If, however, those portions of the record or records pertaining to you could be segregated from the remainder that pertains to other individuals, I believe that such portions of the records pertaining to you would be available, assuming that no other ground for denial is applicable.

Another possibly relevant 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 is noted that the language quoted above is based upon potentially harmful effects of disclosure. Based upon the information that you have provided, it would appear unlikely

that disclosure of the records, to the extent that they exist, would interfere with an investigation, deprive a person of a right to a fair trial, identify a confidential source, or reveal non-routine investigative techniques or procedures. Further, it is possible that the records in question may have been compiled in the ordinary course of business and not for law enforcement purposes.

The last ground for denial of potential significance 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 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.

Under the circumstances, it would appear that the log or similar records would consist solely of factual information. As such, it does not appear that such records could be withheld under §87(2)(g) of the Freedom of Information Law.

In sum, I believe that rights of access to the information that you are seeking may be dependent upon the existence of the information in the form of a record or records and the manner in which the information is kept. However, assuming that the records exist in a form from which information pertaining to you may be extracted, it would appear that the information should be available to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2035

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

June 3, 1981

Mr. Dan Lipsman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lipsman:

I have received your letters of May 18 and April 17 and apologize for the delay in response.

You indicated in your correspondence that you were charged a fee of four dollars for requesting your personal transcript from the registrar of the City College of the City University of New York (CUNY). You have asked whether the charge of four dollars was appropriate under the Freedom of Information Law.

I would like to offer the following observations with regard to your inquiry.

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, such as CUNY, 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. Further, a transcript would appear to be accessible to you as of right under the provisions of the Family Educational Rights and Privacy Act (20 U.S.C. §1232g).

Second, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may assess fees for copies:

> "...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."

Based upon my research, in accordance with §6206 (7) of the Education Law, the CUNY Board of Trustees has the authority to regulate "tuition charges, instructional and non-instructional fees and other fees and charges at the educational units of the city university." Further, the CUNY Board of Trustees passed a resolution setting the fee for a transcript at four dollars. Although the CUNY resolution does not specify that the fee is charged for the performance of certifying and affixing an official seal to a transcript, it would appear that this official certification procedure is a service contemplated by the resolution.

The key question raised concerns the effect of the resolution adopted by the CUNY Board of Trustees. In my opinion, it is doubtful that the resolution contains what may be considered a fee prescribed by law. In my view, the exception to the general rule that an agency may not charge in excess of twenty-five cents per photocopy envisions fees set by local law, statutes, or ordinances, for example. I do not believe that a different fee prescribed by law would include a resolution adopted by a public body. Nevertheless, the status of a resolution is not entirely clear. Consequently, while it is my view that the resolution does not constitute a "law" that would permit CUNY to charge a fee in excess of twenty-five cents per photocopy, it is possible that such a fee might be permissible.

In any event, I would contend that the fee envisioned by the resolution applies not only to photocopying, but also to other services rendered, i.e., the preparation of a transcript, certification as the accuracy of its contents and the affixation of the official seal. It is noted that an applicant for records under the Freedom of Information Law may seek a certification. That type of certification, however, is different from that in this case. Stated differently, a certification made under the Freedom of Information Law indicates only that a copy is a true copy. However, the certi-

fication envisioned by the resolution concerning fees for transcripts in my opinion pertains to the accuracy of the contents of a transcript as well as the services provided in relation to the issuance of an official transcript. Consequently, I believe that CUNY may charge for the services rendered in connection with the issuance of an official transcript. As such, I cannot advise with certainty that the fee of four dollars assessed by CUNY would violate any provision of law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Pamela Petrie Baldasaro

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:jm

cc: Lester Freundlich

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2036

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

June 4, 1981

Mr. John W. Lawrence, Esq.
Comsafe, Inc.
Committee to Secure Freedoms
of All Presidents, Inc.
57 West 10 Street (3-C)
New York, New York 10011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lawrence:

I have received your correspondence of April 3, April 7 and May 5 and apologize for the delay in response.

According to the correspondence, you are concerned that the advisory opinions issued by the Committee incorrectly construe the term "judicial authority (power)". If I am interpreting your comments correctly, your concern involves the manner in which administrative agencies, in particular state agencies, interpret or as you wrote "ascertain" the law in a manner that you consider to be outside the scope of their respective jurisdictions.

In this instance, it appears that you believe that the regulations promulgated by the Committee result in a deprivation of privacy under the First Amendment. I respectfully disagree with your contention. In this regard, the Committee's Second Annual Report to the Governor and the Legislature on the Freedom of Information Law (see enclosed, specifically parts E and F) set forth the Committee's views of privacy and §89(2) of the Freedom of Information Law, which permits the Committee to promulgate guidelines pertaining to personal privacy. In reviewing this material, please note that the Committee was unsuccessful in recommending that the Legislature delete that provision. The recommendation was based upon the Committee's contention that guidelines concerning personal privacy might be considered binding on agencies.

Also enclosed for your review is a memorandum entitled "Problems and Solutions", which details problems that arose under the original Freedom of Information Law enacted in 1974 (cited as the "existing Law") and solutions offered by amendments to the Law that went into effect in 1978 (cited as "the amendments"). One of the improvements in the law is a presumption of access to records, as you noted in your correspondence, as opposed to the previous version in which records were available as of right only in certain specified areas.

Additionally, you may be unaware of a report on privacy undertaken by the Committee in accordance with legislative direction contained in Chapter 677 of the Laws of 1980 (enclosed). The Legislature required the Committee to obtain from state agencies notice of systems of records from which personal information may be retrieved. On the basis of this special report (see enclosed), the Legislature is presently studying the need for privacy legislation in New York. Given your concern for the protection of privacy, I hope you will find this study informative.

Lastly, enclosed is a copy of the Committee's latest annual report on the Freedom of Information Law. While the Committee cannot compel compliance with the Law, I believe that the report indicates that the advice of the Committee is often persuasive.

I hope that I have been of some assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2037

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

June 4, 1981

Mr. Joseph Rubino
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rubino:

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.

As requested, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern its procedural implementation by units of state and local government, an explanatory pamphlet on the Law and a pocket guide to the Freedom of Information Law.

With respect to your question, first, you have asked whether you may obtain "from a tax supporting administration" information concerning which employees receive "mileage payments" and over what period of time the payment would be made and the total amount received to date.

It is noted at the outset that the Freedom of Information Law is applicable to governmental entities. Specifically, §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 govern-

> mental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Assuming that you are interested in gaining access to records from an "agency" as defined above, such records would be subject to the Freedom of Information Law. If, however, the records are in possession of a non-governmental unit that merely receives funding from government, it is questionable whether the Freedom of Information Law would be applicable. If you could provide greater specificity, I could likely give you a clearer response.

If indeed the information in which you are interested is in possession of an agency subject to the Freedom of Information Law, I believe that records containing such information would be accessible. Specifically, records concerning mileage payments would constitute factual information that is available under §87(2)(g)(i) of the Freedom of Information Law, which states that intra-agency materials consisting of "statistical or factual tabulations or data" are available. Similarly, records reflective of dates of employment and the number of years of continuous service would also be reflective of factual information.

In addition, although §87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy", the information in question would in my view constitute a permissible invasion of personal privacy if disclosed and if it relates to public employees. As a general rule, the courts have held that public employees enjoy a lesser degree of privacy than members of the public generally, for public employees have a greater duty to be accountable than any other identifiable group. Further, in interpreting the Freedom of Information Law, it has been held in essence that records identifiable to public employees that are relevant to the performance of their official duties are available, for disclosure in such instances would constitute 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, if records relating to public employees are irrelevant to the manner in which they perform their official duties, it has been held that disclosure would constitute an ununwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Under the circumstances, if public employees receive payment for mileage, records reflective of such information would in my view be relevant to the performance of their official duties and therefore be available. Similarly, the date upon which a public employee may have been hired would in my opinion be relevant to the performance of the duties of both the public employee and his or her employer. It is also noted that §87(3)(b) of the Freedom of Information Law requires each agency to maintain a payroll record containing the name, public office address, title and salary of all employees of the agency. Consequently, a review of payroll records might indicate the dates of service of particular public employees.

Lastly, §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. Therefore, if an agency does not have records reflective of information sought, it would be under no obligation to create a record on your behalf. Further, if, for example, records concerning mileage are maintained individually, totals would not be required to be tabulated by the 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

FOIL-AO-203

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

June 4, 1981

Richard Behrens
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Behrens:

I have received your letter of May 17 in which you requested an "investigation and review" of the New York City Board of Education with regard to its implementation of the Freedom of Information Law.

In short, since October 5, 1980, you have submitted a series of requests in which you have attempted to gain access to records regarding all teachers in all high schools who are attendance teachers, teachers of biology, mathematics, english and social studies for a specific time period. Aside from your comments regarding the length of time during which it has taken the Board to respond to your requests, you were also informed that certain aspects of the information sought does not exist in a format that would enable the Board to respond.

I have spoken with a representative of the Board of Education on your behalf. That person informed me that you have made more than 1,200 separate requests under the Freedom of Information Law since October, 1980. Although the Freedom of Information Law and the regulations promulgated by the Committee prescribe specific time limits for responses to requests, I believe that all laws should be carried out and given a reasonable interpretation. In view of the substantial number of requests that you have made, it is understandable, from my perspective, that the Board of Education might not have the capacity to respond in each instance within the requisite periods of time.

Further, having communicated with representatives of the Board of Education over a period of several years, I believe that the Board seriously attempts to comply with the Freedom of Information Law.

With regard to the response indicating that particular information does not exist in a format that permits a response, it is noted that, as a general rule, an agency need not create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, if information sought does exist in the form of a record or records, the Board of Education is under no obligation to create a new record containing the information that you seek in a format that is desirable to you. Moreover, it is noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records in which he or she is interested. If a request does not enable an agency to identify or locate information requested, it is suggested that you discuss the matter with the Board's records access officer in order to determine how information is kept so that you can make a request that reasonably describes the records in question.

Lastly, as I have indicated in the past, the Committee has neither the authority nor the resources to conduct an "investigation". On the contrary, the Committee merely has the authority to advise with respect to the Freedom of Information and Open Meetings Laws.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2039

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

MEMORANDUM

TO: Renzy H. Hanshaw June 8, 1981

FROM: Robert J. Freeman

SUBJECT: Materials in possession of Burgos and Associates, Inc.

I have received the materials that you transmitted for review regarding a request by the Division of Fire Prevention and Control, a division of the Department of State, for documentation regarding the activities of Burgos and Associates, Inc. (hereafter "Burgos").

In terms of background, the Department and Burgos have engaged in a contractual agreement known as the Arson Awareness Agreement, in which Burgos is performing a market research analysis. The Department has requested from Burgos records reflective of the identities of persons surveyed and similar related information. However, George Herrera, President of Burgos, has to date withheld the information sought based upon contentions that the identities of those surveyed are confidential. Mr. Herrera also cited the Code of Professional Ethics and Privacies of the Marketing Research Association, Inc. as a basis for withholding the information that you are seeking.

It is noted at the outset that, in my opinion, the documentation that you are seeking must be made available to you.

First, and perhaps most important, the agreement between the Department and Burgos contains provisions which clearly enable the Department and require Burgos to make available to the Department virtually any documentation used or prepared in relation to the agreement. Specifically, I direct your attention to §III(3) of the General Conditions aspect of the Agreement, which deals with "availability of reports" and states that:

> "[D]uring the term of this agreement and at any time within four years of the final audit or of the submission of the activity report or the final financial report, whichever occurs later, the recipient shall make such financial reports, activity reports and other reports and documents prepared in connection with the project and this agreement available to the department or the state or their authorized representatives for review and audit within the State of New York".

Based upon the language quoted above, it appears that there was a clear intent of the parties to the agreement that the Department of State have the capacity to review "documents prepared in connection with the project".

Similarly, item 4 of §III of the Agreement makes reference to audits, which may be conducted "periodically during the performance of the project". From my perspective, since an audit may be prepared or requested at any time during the performance of the contract, and since the documentation requested might be necessary to carry out an audit, such documentation must also be made available under the cited provision of the Agreement.

In a related vein, Part IV of the General Conditions of the Agreement states in the first subdivision that:

> "[T]he project shall be conducted under the general supervision and direction of the department and the progress thereof may be frequently inspected by the department. The recipient agrees to cooperate with the department at all times during the progress of the project and to promptly study and act upon all department recommendations and proposals".

Further, Part 3 of IV states that:

> "[T]he recipient shall cooperate with the department in promptly completing and submitting all documents and records required by the department or the state for proper administrative rules, regulations and procedures of the department and the state government".

Once again, there appears to have been a clear intent to permit the Department of State, in cooperation with Burgos, to review any documentation prepared by Burgos in the course of carrying out the project.

Second, in my view, the documentation prepared by Burgos is in the legal custody of the Department of State. In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which 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".

It is emphasized that the definition quoted above includes not only those records in possession of an agency, such as the Department of State; it also includes "any information... produced..." for an agency. Consequently, it is my contention that the documentation prepared by Burgos would constitute "records" as defined by the Freedom of Information Law that are in the legal custody of the Department of State.

Third, although the thrust of the Code of Ethics and Privacies adopted by the Marketing Research Association, Inc., may be cited to provide direction, the Code does not constitute a law, nor does it have the force and effect of law. Further, in my view, to the extent that such a code conflicts with a statute enacted by the State Legislature, it would be void to that extent.

Lastly, although the names, addresses, and telephone numbers of persons surveyed by Burgos might become known to the Department of State, the Freedom of Information Law permits the Department to withhold such information from the public. Section 87(2)(b) of the Freedom of Information Law enables an agency to withhold records or portions

thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy". Based upon extant case law [see e.g., Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)], I believe that a court would find that the results of a survey would be accessible under the Freedom of Information Law, i.e., statistical findings, but that any identifying details concerning those members of the public who were surveyed could justifiably be withheld under the privacy provisions of the law. As such, the privacy of individuals surveyed would not be compromised due to the capacity to withhold personal information under the Freedom of Information Law.

In sum, I believe that the documentation in which you are interested must be made available to you. Further, once the personal information is made available, any identifying details could in my view be withheld from the public on the ground that disclosure would constitute 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.

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2040

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

June 9, 1981

Ms. Elisabeth Ann Altruda
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Altruda:

I have received your letter of May 18. Please accept my apologies for the delay in response to your inquiry.

It is noted at the outset that I have contacted representatives of the New York City Board of Education on your behalf. Although I have not been completely successful in reaching those who could most likely assist you, information will be provided to you in the hope that the controversy can be resolved.

In terms of your request, you are seeking various records, which according to a representative of the Board's Office of Counsel, comprise virtually dozens of documents. The records in question concern "program descriptions, including description of pupils suitable for each program, program goals, curriculum design, staffing patterns and related services pertaining to specific aspects of programs dealing with education of the physically handicapped, children with retarded mental development and education of the emotionally handicapped.

Although you were informed that a response would be forthcoming, the records access officer for the Board of Education stated that no determination with respect to your request could be made until mid-July. Further, you wrote that by withholding the information in question,

the Board of Education might effectively deny you the opportunity to "make informed visits to various special education programs" that may be appropriate to the needs of your child, for the school year will be ended by the time you receive the information.

In terms of rights of access to the information sought, two points should be made.

First, the Freedom of Information Law, as a general rule, does not require that an agency create a record in response to a request. As such, to the extent that the information sought does not exist in the form of a record or records, the Board of Education need not create new records on your behalf.

And second, 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 accessible, except those records that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

In my view, based upon your description of the records sought, I believe that they would be available. Section 87(2)(g) of the Freedom of Information Law provides that inter-agency and intra-agency 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 records in question constitute factual information and are reflective of the policy of the Board of Education, it would appear that they are accessible.

With respect to the problem of the school year ending prior to your receipt of the records, I was advised that Deidre Tompkins, an attorney for the Board of Education, specializes in your areas of concern. Although I attempted to reach her on several occasions, I have not yet had an opportunity to obtain information from her regarding the steps that you might take to view special education programs in action. It is suggested that you contact Ms. Tompkins at (212) 596-5627 in order to obtain information concerning the opportunity to view the programs in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deidre Tompkins

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS
OML-AO-639
FOIL-AO-2041
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 9, 1981

Carolyn J. Pasley
Assistant Counsel
State University of New York
State University Plaza
Albany, New York 12246

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pasley:

I have received your letter of May 20 in which you offered several comments regarding an advisory opinion written at the request of Dr. Stuart Lewis, April 28, 1981.

I would like to offer the following observations with regard to the opinions you have expressed.

First, I thank you for enclosing copies of Article 31 of the Collective Bargaining Agreement negotiated by the United University Professions, Inc. (UUP) and the State of New York. You expressed concern that our letter to Dr. Lewis represents a belief that the State University has adopted a restrictive policy with respect to the rights of access of a state university employee (and/or a UUP member) to his or her personnel file. In his correspondence, Dr. Lewis stated that he had never been a member of UUP. Our response was intended to indicate to him that if he had been represented by UUP, his rights of access under the Freedom of Information Law could not have been curtailed or superceded by a negotiated agreement. In my view, rights of access under the Freedom of Information Law exist concurrently with any rights of access to personnel files granted by a negotiated agreement; however, rights granted by the Freedom of Information Law would not in my opinion be limited by the terms negotiated in a collective bargaining contract. Stated differently, to the extent that a collective bargaining agreement contains terms more restrictive than the Freedom of Information Law, it would be void to that extent, for a contract could not abridge rights granted by a statute.

Secondly, you commented on the Committee's view regarding the application of the Open Meetings Law to various entities of the Downstate Medical Center of the State University. As indicated in the earlier opinion, it was unclear from the facts in Mr. Vigneau's letter whether a State University faculty meeting and/or a meeting of the Residency Review Committee is subject to the Open Meetings Law. You indicated in your letter that the faculty of each State University operated campus is responsible for the "initiation, development and implementation of the educational programs" of the campus. Additionally, you wrote that although a faculty committee such as the Residency Review Committee "perform(s) significant responsibilities with respect to academic matters within the University", those responsibilities do not involve the performance of a "governmental function for the State or for an agency or department thereof". In this regard, case law has consistently held that the State University is an integral part of the government of New York State [see Ehrlich v. University of Houston, 69 AD 2d 75 (1979), rev'd on other grounds, 49 NY 2d 574 (1980)]. Moreover, in my view, the responsibilities of initiating, implementing, developing and/or undertaking of educational programs and academic matters, whether by the Regents, the Board of Trustees, the Councils, campus faculty, or a committee, subcommittee or advisory group thereof, involve the performance of a governmental function envisioned in the definition of "public body" in §97(2) of the Open Meetings Law. If such activities are not the types of governmental functions envisioned by the Legislature in its creation of the State University system, which activities could be considered governmental?

Many public bodies perform their duties by means of delegation. In this regard, under the original Open Meetings Law effective in 1977, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I believe that the definition of "public body" as amended clearly includes advisory bodies within the scope of the Law. Moreover, this point was confirmed in a recent decision, which found that a mayor's task force was subject to the Open Meetings Law, even though it performed solely advisory duties [see e.g., Matter of Syracuse United Neighbors v. City of Syracuse, __ AD 2d __ (Fourth Department, Appellate Division, March 27, 1981)]. As such, I would like to reiterate the contentions expressed in the earlier opinion which advised that the entities in question appear to be public bodies subject to the Open Meetings Law.

As you are aware, even though an entity may be covered by the Open Meetings Law, that does not mean that all of its deliberations must be conducted in public. On the contrary, there are eight grounds for executive or closed sessions during which the public may be excluded.

Moreover, as noted in the opinion addressed to Dr. Lewis, §100(1)(f) of the Law authorizes a public body to enter into a closed 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..."

Based on the situation described in Dr. Lewis' correspondence, it appears that the ground for executive session quoted above could properly be cited when performance evaluations are considered, for discussions of that nature would likely deal with the "employment history" of a particular person.

I hope these comments are responsive to your concerns.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2012

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

June 9, 1981

Mr. Michael J. Gabel, Jr.
81-D-93
Downstate Correctional Facility
Box 445
Red Schoolhouse Road
Fishkill, New York 12824

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gabel:

I have received your letter of June 7 in which you appealed a denial of access to records by Ann Stantion, Head Clerk of the Downstate Correctional Facility.

Please be advised that an appeal of a denial of access is not directed to the Committee on Public Access to Records, but rather to the head of the agency that maintains possession of the records that were withheld. Specifically, I direct your attention to §89(4)(a) of the Freedom of Information Law, which states that:

> "[A]ny person denied access to a record may withhin 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."

Further, each agency, such as the Department of Correctional Services, is required to develop regulations designed to implement the Freedom of Information Law. In this regard, §5.45 of the regulations promulgated by the Department of Correctional Services, entitled "Appeal from denial of access", states in relevant part that:

> "[A]ny person whose application to inspect or copy a department record has been denied may appeal such denial to the Counsel, Department of Correctional Services, Building 2, State Campus, Albany, N.Y. 12226. Such appeal must be in writing and must set forth: the name and address of the applicant; the specific records denied; the date of the request; the place of request if other than Building 2, State Campus; and, if known, the person denying such request and the date thereof."

In view of the foregoing, it is suggested that you appeal to Counsel to the Department of Correctional Services.

Lastly, it is noted that the Committee on Public Access to Records does not have possession of records generally. Since the Committee does not have the possession of the records in which you are interested, it does not have the capacity to either grant or deny access to the records in question. Again, your request should be directed to Counsel to the Department of Correctional Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:JM

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2043

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

June 10, 1981

Mr. Roland Hodge
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hodge:

I have received your letter of June 8 in which you requested information regarding an attorney.

Specifically, you wrote that you are interested in knowing whether a particular attorney "is experienced and credible", and whether he is a member of the "Bar Association" and, if so, for how long he has been a member.

It is noted at the outset 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, such as those concerning an attorney, nor does it have the authority to compel an agency subject to the Freedom of Information Law to comply with the Law. As such, this office does not have in its possession the information that you are seeking.

Further, the Freedom of Information Law is applicable only to records in possession of governmental agencies. Consequently, a bar association, which is separate and distinct from the government, would not be an "agency" subject to the Freedom of Information Law [see attached, Freedom of Information Law, definition of "agency", §86(3)]. In addition, the definition of "agency" specifically excludes the courts and court records from its provisions.

Nevertheless, I have contacted the New York State Bar Association on your behalf. I was informed that there is a lawyer admitted to practice by the name of Robert J. Riordan. The address listed for that Mr. Riordan is 32 Court Street, Brooklyn, New York. The attorney in question is not a member of the New York State Bar Association, and I have no way of knowing whether that Mr. Riordan is the same individual to whom you made reference in your letter.

It is also emphasized that membership in a bar association is purely voluntary. Therefore, the fact that an attorney might not be a member of a bar association likely has no bearing upon his or her capacity to practice law effectively. It is also important to point out that there are numerous bar associations in the state. While there is a New York State Bar Association, there is also an Association of the Bar of the City of New York. To the best of my knowledge, virtually each county also has a bar association. In each instance, membership is voluntary.

I hope that 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-646
FOIL-AO-2044

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

June 10, 1981

Honorable George Friedman
Member of the Assembly
Room 704
Legislative Office Building
Albany, New York

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Assemblyman Friedman:

I have received your letter of June 9 and appreciate your interest in compliance with the Freedom of Information and Open Meetings Laws. You have raised a series of questions regarding community boards in New York City and I will attempt to respond to each.

Your first question is whether community boards of the City of New York are subject to the Freedom of Information and Open Meetings Laws.

In terms of background, community boards were created initially by local law No. 39, which was added to the New York City Charter in 1969. Under that provision, community boards were governed by §84 of the New York City Charter. Section 84 of the Charter was repealed by the passage of local No. 102 enacted in 1977. The cited provision was replaced by §2800 of the Charter entitled "Community Boards". According to §2800, the members of a community board are appointed by a bureau president. Further, it is clear that a community board performs duties of a governmental nature for the City of New York.

Based upon §2800 of the New York City Charter, I believe that a community board may be considered an "agency" subject to the Freedom of Information Law and a "public body" subject to 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".

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

Section 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 subcommittee or other similar body of such public body".

By breaking the definition into its components, I believe that it may be concluded that a community board is a "public body" subject to the Open Meetings Law. First, it is an entity that may consist of up to fifty persons. Second, while there may be no specific reference in the City Charter to a quorum, §41 of the General Construction Law requires that any entity consisting of three or more persons designated to perform a duty collectively as a body can only do so by means of a quorum, a majority of the total membership. Third, based upon §2800 of the City Charter, a community board clearly conducts public business and performs a governmental function. And fourth, the duties of a community board are performed on behalf of a public corporation, the City of New York.

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

It is also noted that the definition of "public body" as amended includes not only governing bodies that have the authority to take final action, but advisory bodies, committees and subcommittees as well. Further, it was recently held that an advisory body designated by a mayor constituted a "public body" subject to the Open Meetings Law [see e.g., Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ___AD 2d___, (1981)]. In view of the case law and the thrust of applicable provisions of the Open Meetings Law, once again, I believe that a community board clearly falls within the scope of that law.

Your second question is whether a vote by a community board for the election of its officers may be conducted by secret ballot. In this regard, I direct your attention to §87(3)(a) of the Freedom of Information Law, which states that each agency shall maintain:

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

Since a community board is an "agency" subject to the Freedom of Information Law, it is required to create a record of votes indicating the manner in which each member voted in each instance in which a vote is taken.

Third, you have raised a question regarding the ramifications of a failure to adhere to the requirements of the Freedom of Information and Open Meetings Laws. Under the Freedom of Information Law, if, for example, a voting record envisioned by §87(3)(a) is not prepared, presumably any person would have the capacity to initiate a proceeding under Article 78 of the Civil Practice Law and Rules in the nature of mandamus to compel the board to perform a duty that it is required to perform.

In the case of the Open Meetings Law, if, for example, the provisions of the Law are not followed, a court may, upon good cause shown, make null and void action taken in violation of the Law (see §102).

Lastly, you raised a question regarding the jurisdiction of the Committee on Public Access to Records with respect to the interpretation of the Freedom of Information and Open Meetings Laws. In this regard, §89(1)(b)(ii) of the Freedom of Information Law states that the Committee shall:

> "...furnish to any person advisory opinions or other appropriate information regarding this article..."

Similarly, §104(1) of the Open Meetings Law states that the Committee shall:

> "...issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law..."

It is also noted that, although an opinion rendered by this office is solely advisory, numerous judicial decisions have relied upon advisory opinions rendered by the Committee. Further, two Appellate Divisions have found that an opinion of the Committee should be upheld, unless the opinion is found to be unreasonable [see e.g., Sheehan v. City of Binghamton, 59 AD 2d 808, (1977); Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2045

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

June 11, 1981

Daniel E. Wartenberg
Science for the People
601 Graduate Biology Bldg.
State University of New York
Stony Brook, New York 11794

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wartenberg:

As you are aware, I have received your letter of May 19, as well as the correspondence appended to it, in which you requested an advisory opinion regarding a request for records directed to the Suffolk County Department of Health Services.

According to a letter addressed to Dennis Moran of the Water Quality Division of the Department of Health Services, you requested copies of various records pertaining to "health and safety studies" conducted on eastern Long Island "in relation to ground water and soil contamination by pesticides and herbicides, in general, and by aldicarb (Temik) in particular". You also wrote that the records in which you are interested "primarily concern the methodologies and unpublished results utilized in water quality and epidemiology studies conducted at the site". Your request described in detail the particular types of information sought with respect to water quality, epidemiology and farm worker studies.

In all honesty, I have no expertise with respect to the technical nature of the information that you are seeking. However, I would like to offer the following observations with respect to your request relative to rights of access granted by the Freedom of Information Law.

First, the Freedom of Information Law is an access to records law. Stated differently, the Law grants rights of access only with respect to existing records. Consequently, an agency, such as the Department of Health Services, is not required to create a record in response to your request if records reflective of the information sought do not exist. Similarly, if you seek records in a specific format, but the records do not exist in that format, the agency need not alter the records or its program to accommodate you.

Second, the Freedom of Information Law is based upon a presumption of access. Section 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 grounds for denial appearing in paragraphs (a) through (h) of the cited provision. It is also noted that the introductory language in §87(2) makes reference to "records or portions thereof" that may be withheld. As such, it is clear that the Legislature envisioned situations in which a record might be both accessible and deniable in part. In such cases, I believe that an agency would be obligated to provide access to those portions of a record that are accessible, while deleting the remainder.

Third, it would appear that two of the grounds for denial might be relevant to your request.

Section 87(2)(g) of the Law states that an agency may withhold records that:

> "are inter-agency or intra-agemcy 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. 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 policies or determinations must be made available.

Under the circumstances, it appears that the raw data that you are seeking was developed by the Department of Health Services. If that is the case, the data could properly be characterized as "intra-agency material". However, it also appears that the data would consist of "statistical or factual tabulations or data" that would be accessible under §87(2)(g)(i). Further, it would appear that records reflective of methodologies, for example, might be considered instructions to staff that affect the public or the policies of the agency with respect to the means by which the studies were carried out.

One of the areas of request concerns conclusions reached by studies. If the conclusions are reflective of final determinations and are factual in nature, I believe that they would be available. However, if the conclusions are essentially advisory in nature or are reflective of opinion or suggestion, for instance, I believe that those aspects of the records sought could justifiably be withheld. Under such circumstances, so-called "conclusions" would be intra-agency materials that are not statistical or factual, instructions to staff that affect the public or final agency policies or determinations.

A second ground for denial that may be relevant in view of the correspondence is §87(2)(b). The cited provision 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 the data identifies particular individuals, it is possible that disclosure of the identities of such individuals would constitute an unwarranted invasion of personal privacy.

However, according to your letter of April 28 to David Gilmartin of the County Attorney's Office, you were informed that the data may refer only to "approximate locational information so that there should be no confidentiality considerations". Without being familiar with the data, I could not conjecture as to the privacy considerations that may be present. However, if indeed disclosure of the identities would result in an unwarranted invasion of personal privacy, such information may in my view be withheld or deleted from records that are otherwise accessible.

Lastly, with respect to your capacity to view or gain copies of the information in question, I would like to offer the following remarks. If, for example, records contain information the disclosure of which would result in an unwarranted invasion of personal privacy, such records might justifiably be withheld from personal inspection if copies are not sought. However, if copies are requested, and if identifying details can be deleted, copies should in my view be made available after having deleted identifying details. Further, §87(1)(b)(iii) states that an agency may assess a fee for copying 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".

As such, in the case of records that are subject to conventional photocopying methods, you may be assessed a fee of up to twenty-five cents per photocopy. In the case of the duplication or inspection of other records, such as computer tapes or microfilm, for example, fees may be based upon the actual cost of reproduction. In addition, §89(3) of the Law states in part that an agency must make copies of accessible records "upon payment, or offer to pay" the requisite fees for copying. Consequently, I believe that the County could require you to pay the appropriate fees prior to reproducing 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

Robert J. Freeman
Executive Director

RJF:ss

cc: Dennis Moran
David Gilmartin
Frederick Foster

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2046

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

June 11, 1981

Mr. Robert B. Jarosz
Box 149
76-C-648
Attica, New York 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jarosz:

I have received your letter of May 18.

You have indicated in your correspondence and enclosures that you have been unable to obtain copies of records that you believe were withheld by various law enforcement agencies at your trial. Specifically, you wrote that a police department and department of probation refused to comply with your Freedom of Information Law request.

I would like to offer the following observations with regard to the issues you raised.

First, the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states that all records of an agency, such as a police department, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Second, it is possible that records of the taped telephone conversations to which you made reference may no longer exist. For instance, while police departments often tape record such communications, if a tape record-

ing has been erased or destroyed, very simply, there may be no records to be made available. Further, §89(3) of the Law specifically states that, as a general rule, an agency need not create a record in response to a request.

Assuming that the radio communications that you are seeking remain in existence, there may be grounds for withholding. 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."

The provision quoted above is based largely upon potentially harmful effects of disclosure. While the radio communications in question may have been created or compiled for law enforcement purposes, it is in my view doubtful at this time whether disclosure could interfere with an investigation, deprive a person of a right to a fair trial, or reveal non-routine criminal investigative techniques or procedures. It is possible, however, that the communications might contain information regarding a confidential informant, for instance. If that is the case, portions of tapes or transcripts of the radio communications could likely be withheld.

Third, another ground for denial that arises in the context of law enforcement investigations is §87(2)(f). That provision states that an agency may withhold records or portions thereof when disclosure would "endanger the life or safety of any person". Since I am not familiar with the contents of the records in question, it is unknown to me whether the language quoted above would be applicable.

Fourth, a last possible 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 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. Therefore, the taped telephone conversations may be withheld either in full or in part if the contents did not fall within the three exceptions.

Fifth, you are seeking a copy of a "worklog and duty roster" in order to determine whether a particular police department employee was scheduled to work on a specific date. If such a record is maintained by the police department, it would appear to be accessible to the extent that the information contained in the record does not fall within any of the exceptions set forth above.

Sixth, one area of request concerns records which you believe are in possession of an office of a district attorney. Although an office of a district attorney is an agency which must comply with the Freedom of Information Law, the grounds for denial discussed in the preceding paragraphs could also be cited as a basis for withholding records in the possession of a district attorney.

Further, I would like to point out that the Freedom of Information Law requires that an applicant "reasonably describe" in writing the records in which he or she is interested. Consequently, rather than requesting "all tangible items" concerning your arrest, for example, without more, it is suggested that you attempt to provide as much specificity as possible when making a request. Identifying information, such as dates, file designations, or similar information would likely enable an agency to respond more readily to a request.

Seventh, you indicated that you have requested the probation term of a particular individual from a county probation department. Information contained in probation records such as presentence investigation reports or a probation supervision file are confidential, and access to such information is restricted unless a particular statute or court order authorizes that particular information be made available [see Executive Law, §243; Criminal Procedure Law, §390.50; and 9 NYCRR 348]. Therefore, it is unlikely in my view that you would be able to obtain information regarding the probation period of another individual from a department of probation.

Eighth, 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)].

Lastly, it is possible that some of the information that you are seeking may exist as part of court records, particularly if the information was introduced into evidence during a trial. In this regard, although the Freedom of Information Law does not include the courts or court records within its coverage, many court records are available under §255 of the Judiciary Law. If you believe that a court clerk would have possession of the records in which you are interested, you should request such records from 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

Pamela Petrie Baldasaro

BY: Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 643
FOIL-AO-2047

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

June 12, 1981

Wayne O. Alpern
Law Offices
170 Broadway
New York, NY 10038

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Alpern:

As you are aware, I have received your letter of May 29 in which you requested an advisory opinion under the Freedom of Information and Open Meetings Laws.

Your inquiry generally concerns the process by which the New York State Council on the Arts (NYSCA) arrives at its determinations. Specifically, you indicated that NYSCA's determinations involve numerous stages, including "what NYSCA refers to as 'auditors', 'staff', 'panels', 'committees', 'subcommittees', and finally, 'council'". You also wrote that:

> "[C]ouncil is theoretically the only body authorized to make 'final' decisions. However, there is little question that council decisions are not only very strongly influenced and reflective of reviews and recommendations made at lower levels within the agency, but in fact generally ratify without challenge or exception such prior 'determinations'".

It is your contention that the "final determination" made at the end of the decision-making process by the Council should be viewed:

> "as a ratification or confirmation of prior determinations by staff, panels and committees which the agency calls recommendations".

According to your letter:

> "...NYSCA's apparent position is that panels are advisory bodies that do not make final determinations, and no council members sit on the panels, and therefore OML requirements are inapplicable. It is further indicated that committee meetings go into executive sessions in order to consider specific grant applications".

On the basis of the information that you provided, your first area of inquiry raises a series of questions concerning the applicability of the Open Meetings Law to the groups specified.

Perhaps the most important provision of the Open Meetings Law relative to your inquiry is the definition of "public body". Section 97(2) of the Open Meetings 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".

Based upon the language quoted above, it is my view that each of the groups that you identified concerning the application of the Law (panels, committees, subcommittees and the Council) constitute public bodies subject to the Open Meetings Law, except meetings of staff. From my perspective, gatherings among staff of an agency would not constitute meetings subject to the Open Meetings Law, for

staff would not constitute a public body. It is noted in this regard that a series of amendments to the Open Meetings Law recommended largely upon recommendations made by the Committee became effective on October 1, 1979. One of the amendments concerns a redefinition of "public body". In its deliberations that led to a recommendation concerning the definition in question, it was clearly intended that the definition of "public body" should not be construed to include meetings of staff. In my view, a gathering of staff members does not generally represent a meeting among individuals designated to perform a duty collectively as a body. Further, the identities of staff members working with respect to particular duties often changes, for there is likely no designation of a group of individuals to perform their duties in a collegial manner acting as a single voice.

The other groups that you mentioned, however, such as panels, committees, subcommittees and the Council itself, are public bodies, for each of the conditions precedent to a finding that they constitute public bodies may in my view be met.

First, each of those groups would be an entity consisting of two or more members.

Second, whether the groups in question are comprised of public officers, others, or a combination of both, they are in my view required to perform their duties by means of a quorum. It is noted in this regard that §41 of the General Construction Law defines "quorum" and states that:

> "[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 definition of "quorum" quoted above, it is clear that any group of three or more public officers or persons charged with any public duty to be performed or exercised by them collectively as a body can do so only by means of a quorum, a majority of the total membership.

Third, each of the groups in question in my view conducts public business and performs a governmental function, for each analyzes applications made to the Council and performs a step in the deliberative process that influences the final determination by the Council.

And fourth, the functions performed by those groups are carried out for an agency of state government, NYSCA.

As such, I believe that each of the requirements necessary to a finding that an entity is a "public body" is present with respect to the groups that you mentioned.

Moreover, the amendments to the definition of "public body" tend to strengthen a contention that advisory bodies, such as the panels, committees and subcommittees that you mentioned, are "public bodies". 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", for such groups generally have no authority to take final action.

In addition, in a recent determination rendered by the Appellate Division, Fourth Department, it was found that both an advisory committee and an advisory task force designated by a mayor constituted public bodies subject to the Open Meetings Law [see e.g., Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ___ AD 2d ___ (1981)].

In reaching its conclusion, the Court stated that:

> "[W]hile neither of the committees here usurp the powers of other municipal departments and their recommendations may be characterized as advisory only, in that they did not bind the common council or other city departments, it is clear that their recommendations have been adopted and carried out without exception. To hold that they are not public bodies within the meaning of the Open Meetings Law would be to exalt form over substance. Both committees perform vital governmental functions affecting the municipality and its citizenry, and their recommendations receive the automatic approval of the common council. To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration in section 95 of the Public Officers Law" (id. at 468).

Based upon the amendments to the definition of "public body" and the thrust of recent case law, it is my view that the panels, committees, subcommittees and the Council itself constitute "public bodies" subject to the Open Meetings Law in all respects.

Assuming that the conclusion expressed above is accurate, I believe that any gathering of a quorum of any of the entities identified above would constitute "meetings" as defined by the Law.

It is noted in this regard that the Court of Appeals held in 1978 that the definition of "meeting" should be construed to include any gathering of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized.

In terms of the capacity to close meetings, the Open Meetings Law permits a public body to engage in executive sessions under §100. In addition, §103 identifies three exemptions from the Open Meetings Law.

In my view, based upon the information that you have provided, none of the three exemptions appearing in §103 could be cited to remove a meeting of the groups that you identified from the coverage of the Open Meetings Law.

With respect to executive sessions, §100(1) lists eight areas of discussion that may be conducted during executive sessions. It is noted that a public body must follow a procedure prescribed in the Law before it may enter into an executive session, for §97(3) defines "executive session" to mean a portion of an open meeting during which the public may be excluded. In brief, the procedure for entry into an executive session [see §100(1)] involves three components: a motion to enter into an executive session made during an open meeting, the identity in general terms of the subject sought to be discussed behind closed doors; and a vote to carry the motion by a majority of the total membership of a public body.

Based upon a review of the grounds for executive session, it appears that only one might be applicable. Specifically, §100(1)(f) permits a public body to 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..."

While most of the areas identified in the language quoted above would not appear to be present in discussions of the groups in question, it is possible that some discussion might deal with the employment or financial history of a particular person or corporation. To the extent that §100(1)(f) would be applicable, or to the extent that any of the remaining grounds for executive session may appropriately be cited, the groups in question would have the capacity to enter into an executive session.

Your next area of inquiry involves rights of access to records in possession of NYSCA under the Freedom of Information Law. The documents in which you are interested are cited on page three of your letter and are numerous. In all honesty, without greater familiarity with the contents of specific records, it is all but impossible to provide specific direction. Nevertheless, I would like to offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as NYSCA, are accessible, except to the extent that records fall within one or more of the grounds for denial listed in §87(2)(a) through (h).

It would appear that virtually all of the documents identified would constitute inter-agency or intra-agency materials. In this regard, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records 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. 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 policies or determinations must be made available. Therefore, to the extent that the records in question consist of statistical or factual information, instructions to staff that affect the public, or final agency statements or policy or determinations, they must in my view be made available.

Conversely, to the extent that the materials contain advice that is solely reflective of opinion and not factual information opinion which the agency relies in carrying out its duties, they would be deniable [see e.g., Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979)]. It is also noted that factual information is in my view available, even though it may be contained in what may be characterized as pre-decisional materials [see e.g., Miracle Mile, supra, Polansky v. Regan, 427 NYS 2d 161 (1980)].

I believe that minutes of meetings of the panels, committees, subcommittees and the Council are also available, particularly if it is assumed that each of those entities is subject to the Open Meetings Law. Under §101 of the Open Meetings Law, public bodies are required to prepare minutes. In the case of motions, proposals, resolutions, and actions taken during open meetings, minutes must be compiled and made available within two weeks of such gatherings. Minutes reflective of action taken during executive sessions must be compiled and made available during one week of the executive sessions.

Further, although the determination made by a panel or committee, for example, might not be reflective of the final determination of NYSCA, it would in my view nonetheless be the final determination of the panel or committee. As such, I believe that those determinations are accessible under the Law, even though they may not represent the last step of the decision-making process. In this regard, it has been held that the term "final" (as in "final determination") should not be accorded an ordinary dictionary definition, for such a construction "would produce an unreasonable result by denying access to all opinions, orders and determinations except those made by the highest agency. Adopting the legal definition...permits the access intended under subdivision 5 of section 89 at each stage of an often multilevel administrative process" (Miracle Mile, id. at 182).

Lastly, it is noted that §87(3)(a) of the Freedom of Information Law requires that a voting record must be compiled in every instance in which a vote is taken in which the manner in which each member voted is indicated.

I hope that I have been 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: New York State Council on the Arts

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-644
FOIL-AO-2048

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

June 12, 1981

Ms. Peggy Vega, Chairperson
Bronx Community Board No. 10
3100 Wilkinson Avenue
Bronx, New York 10461

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Vega:

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

You have requested a "ruling" from this Committee "as to whether or not this vote can be by a ballot given to each member, or whether it must be an open vote identifying each member's vote."

Please be advised that the Committee does not have the authority to issue "rulings". On the contrary, the Committee is authorized to render advisory opinions under both the Freedom of Information Law [Public Officers Law, §89(1)(b)(ii)] and the Open Meetings Law [Public Officers Law, §104(1)]. Therefore, the comments provided in the ensuing paragraphs should be considered advisory.

In my view, a community board is prohibited from voting by secret ballot.

In terms of background, community boards were created initially by local law No. 39, which was added to the New York City Charter in 1969. Under that provision, community boards were governed by §84 of the New York City Charter. Section 84 of the Charter was

repealed by the passage of local No. 102 enacted in 1977. The cited provision was replaced by §2800 of the Charter entitled "Community Boards". According to §2800, the members of a community board are appointed by a bureau president. Further, it is clear that a community board performs duties of a governmental nature for the City of New York.

Based upon §2800 of the New York City Charter, I believe that a community board may be considered an "agency" subject to the Freedom of Information Law and a "public body" subject to 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."

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

Section 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 subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that it may be concluded that a community board is a "public body" subject to the Open Meetings Law. First, it is an entity that may consist of up to fifty persons. Second, while there may be no specific reference in the City Charter to a quorum, §41 of the General Construction Law requires that any entity consisting of three or more persons designated to perform a duty collectively as a body can only do so by means of a quorum, a majority of the total membership. Third, based upon §2800 of the City Charter, a community board clearly conducts public business and performs a governmental function. And fourth, the duties of a community board are performed on behalf of a public corporation, the City of New York.

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

It is also noted that the definition of "public body" as amended includes not only governing bodies that have the authority to take final action, but advisory bodies, committees and subcommittees as well. Further, it was recently held that an advisory body designated by a mayor constituted a "public body" subject to the Open Meetings Law [see e.g., Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ___ AD 2d ___, (1981)]. In view of the case law and the thrust of applicable provisions of the Open Meetings Law, once again, I believe that a community board clearly falls within the scope of that law.

Since a community board is an "agency" subject to the Freedom of Information Law, it is in my view required to follow the direction provided by that statute. Specifically, §87(3)(a) of the Freedom of Information Law requires that each agency shall maintain:

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

As such, a community board is required to create a record of votes indicating the manner in which each member voted in each instance in which a vote is taken. Further, I believe that the record of votes should be contained within minutes required to be compiled under §101 of the Open Meetings Law. The cited provision requires that minutes include the vote taken at any meeting of a public body.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2049

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

June 15, 1981

Mr. Michael J. Gabel, Jr.
81-D-93
Downstate Correctional Facility
Box 445
Red Schoolhouse Road
Fishkill, New York 12824

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gabel:

I have received your letter of June 11 in which you appealed a denial of access to records by the Senior Parole Officer at the facility in which you are being housed.

Please be advised that an appeal of a denial of access is not directed to the Committee on Public Access to Records, but rather to the head of the agency that maintains possession of the records that were withheld. Specifically, I direct your attention to §89(4)(a) of the Freedom of Information Law, which 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".

Further, each agency, such as the Department of Correctional Services, is required to develop regulations designed to implement the Freedom of Information Law. In this regard, §5.45 of the regulations promulgated by the Department of Correctional Services, entitled "Appeal from denial of access", states in relevant part that:

> "[A]ny person whose application to inspect or copy a department record has been denied may appeal such deniel to the Counsel, Department of Correctional Services, Building 2, State Campus, Albany, N.Y. 12226. Such appeal must be in writing and must set forth: the name and address of the applicant; the specific records denied; the date of the request; the place of request if other than Building 2, State Campus; and, if known, the person denying such request and the date thereof".

In view of the foregoing, it is suggested that you appeal to Counsel to the Department of Correctional Services.

Lastly, it is noted that the Committee on Public Access to Records does not have possession of records generally. Since the Committee does not have the possession of the records in which you are interested, it does not have the capacity to either grant or deny access to the records in question. Again, your appeal should be directed to Counsel to the Department of Correctional Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2050

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

June 15, 1981

Mr. George F. Burbank, Jr.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Burbank:

I have received your letter of June 9 in which you wrote that you were interested in obtaining records pertaining to you from the New York City Police Department for the year 1974.

I would like to make the following observations with respect to your inquiry.

First, 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 Police Department, are available, except to the extent that records fall within one or more grounds for denial listed in §87(2)(a) through (h). As a general rule, the exceptions to rights of access are based upon potentially harmful effects of disclosure. For instance, one of the grounds for denial often cited by law enforcement agencies is §87(2)(e), which states that records compiled for law enforcement purposes may be withheld under specified circumstances.

Second, §89(3) of the Freedom of Information Law states that an agency may require that an applicant for records submit a request in writing. Further, the cited provision requires that an applicant request records "reasonably described". As such, when you make a request, it should be in writing, providing as much specificity as possible, including dates, file designations, docket numbers and similar information that will enable an agency to locate the records sought.

Third, each agency is required to designate one or more "records access officers", who are responsible for answering requests made under the Freedom of Information Law. It is suggested that you direct your request to the Records Access Officer of the New York City Police Department.

Lastly, enclosed are copies of the Freedom of Information Law, procedural regulations promulgated by the Committee, and an explanatory pamphlet that 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2051

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

June 16, 1981

Mr. Simon Taylor
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman, P.C.
Attorneys at Law
30 East 42nd Street
New York, New York 10017

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Taylor:

I have received your letter of May 19 as well as the materials attached to it. Please accept my apologies for the delay in response.

You have asked for an opinion regarding the "validity of the demands" made by the National Black United Front (NBUF) for records of the New York City Police Department, as well as the reasons for the denial given by the Department.

It is noted at the outset that the request submitted to the Police Department by NBUF is voluminous. The records sought are many and varied and, as a consequence, it would be all but impossible for this office to provide specific direction. In short, without having the capacity to become familiar with the contents of particular records, advice regarding access to records must of necessity be general.

Nevertheless, I would like to offer the following observations with respect to your inquiry.

Your first area of request in the letter of February 6 dealt with "[A]ll records regarding the Department's response to or handling of mentally ill or emotionally disturbed persons or persons that have required or may be thought to require restraint by Department personnel" including "all reports or evaluations of Department practices, all proposals for police methods or guidelines, and any information regarding the Department's use of nets to deal with mentally ill or disturbed persons".

In response, Rosemary Carroll, Assistant Counsel to the Department for Civil Matters, responded that the request failed to "specifically describe the records sought as required by the Public Officers Law". She also wrote that evaluations and proposals for police methods or guidelines may be withheld on the ground that they are "pre-decisional and non-final" under §87(2)(g) of the Freedom of Information Law.

In my view, it is possible that the request might be so broad in particular areas as to preclude the Department from responding. While the Department may have records regarding its response to persons who are mentally ill or emotionally disturbed, its records might not be filed or kept in a manner that permits their location in accordance with your request. Nevertheless, I disagree with the statement made by Ms. Carroll that a request must "specifically describe the records sought". In this regard, I direct your attention to §89(3) of the Freedom of Information Law, which requires that an applicant request records "reasonably described". Based upon §89(3), an applicant need not "specifically" describe the records sought. Further, as you may be aware, the regulations promulgated by the Committee under the Freedom of Information Law provide direction regarding the procedural implementation of the Law by agencies. Relevant to the request is §1401.2(b), which describes the duties of an agency's designated "records access officer". According to the regulations, one of the duties of a records access officer is to "assist the requester in identifying requested records, if necessary" [§1401.2(b)(2)]. In view of the cited provision of the regulations, I believe that it is the responsibility of the records access officer to assist you in locating the records sought. Having discussed your request with Michael Julian, I believe that such steps have indeed been taken.

With respect to records reflective of responses to or evaluations of Department practices and all proposals regarding police methods or guidelines, Ms. Carroll wrote that such records would be denied under §87(2)(g) on the basis that they are "pre-decisional and non-final".

Again, without having seen reports or evaluations that fall within the area of your request, specific advice cannot be rendered. However, §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 emphasized that 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 policies or determinations must be made available. Therefore, even if evaluations or reports may be characterized as "pre-decisional", to the extent that they contain statistical or factual information, they are in my view available so long as no other ground for denial may appropriately be cited. In addition, it is possible that some evaluations or reports may have been prepared by an entity outside of government. In such instances, I do not believe that §87(2)(g) could be cited as a basis for withholding, for the reports or evaluations would not have been prepared by an agency, but rather for an agency. If, for example, a consultant prepared an evaluation or report on a contractual basis with the Police Department, such a report would not in my opinion fall within the scope of the exception regarding inter-agency or intra-agency materials.

I agree with the denial insofar as it deals with "proposals for police methods or guidelines", for such records would likely constitute "intra-agency materials" which are advisory in nature and may later be accepted or rejected by the executive head of the agency.

Many of the records sought in your fourth area of inquiry, i.e. records regarding Lewis Baez and Elizabeth Mangum, were withheld under §§87(2)(e) and (g). Section 87(2)(e) permits an agency to 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, the language quoted above is based upon potentially harmful effects of disclosure. If, for example, a criminal act is currently under investigation and disclosure of records compiled for law enforcement purposes would interfere with the investigation, records may be withheld under §87(2)(e)(i). However, if an investigation has been terminated or disclosure of records would not result in the harmful effects of disclosure envisioned by subparagraphs (i) through (iv) of §87(2)(e), those provisions could not in my view justifiably be cited to withhold records.

One of the areas of records denied concerns firearm discharge/assault reports. Those reports were withheld on the ground that they constitute police officers' personnel records that are exempted from disclosure under §50-a of the Civil Rights Law, and therefore, may be withheld under §87(2)(a) of the Freedom of Information Law. The cited provision of the Civil Rights Law states in brief that personnel records of police officers that are used to evaluate performance toward continued employment or promotion are confidential. Without greater knowledge regarding the contents of the reports in question or their use, all that I can suggest is that if the records are indeed personnel records that are used to evaluate performance toward continued employment or promotion, they fall within the scope of the exemption from rights of access; if they are not personnel records or are not used in the manner specified in §50-a of the Civil Rights Law, the reports would be subject to the provisions of the Freedom of Information Law.

Another area of inquiry to which you made reference in your letter involves a denial of access to interim orders if such orders have been superseded by later directives. In my view, interim orders are accessible. Although they might be characterized as "intra-agency materials", it would appear that they are reflective of both instructions to staff that affect the public as well as the policy of the Police Department for the period of time in which they are in effect. Since such materials would be available while they are in effect, I question whether they could be withheld even though they may have been superseded at a later date.

Lastly, I have received a copy of a letter addressed to you by Rosemary Carroll that is dated June 4, 1981. Ms. Carroll made reference to a request for a waiver of fees regarding documents that have been made available. In this regard, it is important to point out that while the federal Freedom of Information Act (5 U.S.C. §552) contains a provision that enables a federal agency to waive fees for reproduction of records, there is no analagous provision in the New York Freedom of Information Law. As such, there is no requirement that the Police Department waive fees for photocopying. Further §89(3) of the Freedom of Information Law states in part that an agency must make copies of accessible records "upon payment of, or offer to pay..." the requisite fees for photocopying. Therefore, it appears that an agency need not make photocopies available until the appropriate fees have been paid. In addition, it appears that an agency may request fees for photocopying in advance of reproducing records sought.

If you could provide greater specificity regarding the contents of particular records in which you are interested, perhaps more specific advice could be given.

I hope that 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: Michael Julian

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2052

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

June 16, 1981

Ms. Nancy Cestaro
c/o Fortunato
Rt. 1 - Box 244
Belle Mead, NJ 08502

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Cestaro:

I have received your letter of June 1 and appreciate your kind words. Your inquiry once again concerns access to medical records.

In this regard, you requested a copy of a law known as the "Confidentiality of Medical Information Act", which you believe was under consideration by the New York State Legislature in 1977.

To the best of my knowledge, no such act was passed. I am familiar with a conference report entitled "Privacy in the States" which was prepared by Speaker Stanley Steingut of the New York State Assembly in conjunction with the National Council of State Legislators. The conference report contains a number of legislative proposals concerning privacy. For instance, there were proposals dealing with medical, employee, criminal justice, government, customer, credit and bank records. However, none of the proposals offered in the conference report has been passed to date. Consequently, I believe that the materials transmitted to you last month represent the most up to date statements on the subject.

You also mentioned a "Common Law" that applies to medical records and confers a right of inspection upon the subjects of such records. It is noted that the phrase "common law" generally refers to judge made law. Stated differently, in the absence of specific legislation, judges and the courts essentially make law based upon principles of equity and fairness. There are judicial decisions of which I am aware that were rendered long before the passage of the Freedom of Information Law, for example, which held in essence that the subjects of particular records would have an equitable right to inspect and/or copy records pertaining to them. Nevertheless, I am not familiar with any judicial decision that confers an equitable right upon the subject of medical records to gain access to such 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2053

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

June 16, 1981

Mr. George H. Porter
Records Access Officer
Waverly Central Schools
32 Ithaca Street
Waverly, New York 14892

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Porter:

I have received your letter of May 29 and appreciate your interest in complying with the Freedom of Information Law.

You have asked for an advisory opinion with respect to a request made by John B. Schamel, the NYEA representative for the Waverly Educational Secretaries Association. Mr. Schamel requested information regarding specific members of the District's Administration Unit, including salary information for five separate fiscal years, the amount paid by the District for health insurance for each individuals, and the numbers of sick days and vacation days that may be taken by each individual named.

I would like to offer the following observations with respect to the information requested.

First, as you may be aware, 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 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 Law.

Second, as a general rule, the Freedom of Information Law is applicable to existing records. Consequently, unless direction is provided to the contrary, an agency generally need not create a record in response to a request [see Freedom of Information Law, §89(3)].

Third, there are two provisions in the Freedom of Information Law of potential significance to the information sought. One such provision is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". In this regard, it has long been held that public employees enjoy a lesser degree of privacy than members of the public generally, for public employees have, according to the courts, a greater duty to be accountable than any other identifiable group. Further, in terms of records identifiable to public employees, it has been held in several instances that records that are relevant to the performance of public employees' official duties are available, for disclosure in such instances would constitute 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 (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, if a record is irrelevant to the performance of one's official duties, it may be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977].

With respect to salary information, it is emphasized that §87(3)(b) of the Freedom of Information Law requires that each agency maintain:

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

Due to the clear direction in the language quoted above, I believe that the Legislature determined that disclosure of the salaries of public employees would constitute a permissible rather than an unwarranted invasion of personal privacy. Further, the payroll record provision quoted above and its predecessor appearing in the original Freedom of Information Law have required that a payroll

listing be maintained since 1974. Consequently, I believe that the salary information required by Mr. Schamel, to the extent that it continues to exist, must be made available.

With respect to the amount paid by the District for health insurance, I assume that the request concerns health insurance as a benefit and not information concerning claims that may have been made. With regard to claims, I believe that disclosure of such information would constitute an unwarranted invasion of personal privacy, for the claims would of necessity involve the medical history of a claimant or his or her family members. However, if my assumption is accurate that the figure sought concerns a premium paid as a fringe benefit, I believe that such information would be available. In a similar situation in which a health insurance premium is an aspect of a collective bargaining agreement, such information would clearly be available. In addition, in a case dealing with a request for a study involving salary and fringe benefit data relative to a number of school districts, a Court of Appeals found that such information should be available [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979)].

Lastly, with regard to the number of sick days and vacation days, again it is assumed that the inquiry does not deal with the number of vacation or sick days used by particular individuals, but rather the number of sick or vacation days available to be used by such individuals. If my assumption is accurate, again, it is my view that such information would be available, for disclosure would in my opinion constitute a permissible invasion of privacy. In addition, I believe that such information would essentially be reflective of a term and condition of employment that would be contained in a collective bargaining or other employement agreement, which would be available to the public under the Freedom of Information Law.

If my interpretation of the request is inaccurate or if you have questions regarding the contents of the foregoing opinion, please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: John B. Schamel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2054

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

June 16, 1981

Mrs. Rita Boscia
Village Clerk
Tuckahoe, NY 10707

Dear Ms. Boscia:

This afternoon I received a telephone call from Donald Larson of the Conference of Mayors, who informed me that you are in need of copies of the Freedom of Information Law and forms used under the Law for the purpose of making requests.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the Law, and an explanatory pamphlet that may helpful to you.

With respect to forms used for making requests, there are no specific forms prescribed by the Law. Further, the Committee has never developed a particular form to be used by the public for making requests. On the contrary, it has consistently been advised under §89(3) of the Freedom of Information Law that any request made in writing that reasonably describes the records sought should be sufficient. In view of the direction provided in the provision cited above, it has also been advised that a failure to complete a form prescribed by an agency should not constitute a valid basis for withholding records or delaying a response to records. Once again, if a request is made in writing and it reasonably describes the records in which a person is interested, that request should be sufficient for the purposes of the Law.

If you would like additional copies of any of the materials enclosed, I will be happy to send them to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Donald Larson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2055

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

June 16, 1981

Ms. Alma Giannini
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Giannini:

I have received your letter of May 20. Please accept my apologies for the delay in response.

According to your letter, you have been attempting without success to obtain the contents of a 911 emergency phone call made to the New York City Police Department in August of 1980. You wrote further that the call was erased from the tape and written in a log. You have asked for a description of the procedure by which you may request and obtain the aspect of the log or the transcript of the 911 call.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation with which all agencies, including the New York City Police Department, must comply, and an explanatory pamphlet on the subject. The pamphlet may be particularly useful to you, for it contains model letters of request and appeal.

In brief, in order to make a request under the Freedom of Information Law, §89(3) of the Law states that an agency may require that a request be made in writing. Further, the cited provision states that an applicant must "reasonably describe" the records in which he or she is interested. Consequently, when submitting your request, you should supply as much information as possible, including the date, the time of day, the subject of the call and similar identifying information that will assist the Police Department in locating the information sought.

In terms of rights of access, the Freedom of Information Law states in brief 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). Under the circumstances, since you are apparently requesting a transcript of a 911 telephone call that you made, it is in my view unlikely that any ground for denial could appropriately be cited to withhold that portion of the log.

Lastly, under §1401.2 of the regulations adopted by the Committee, each agency is required to designate one or more records access officers who are responsible for dealing with requests made under the Freedom of Information Law. As such, it is suggested that you direct your request to the "Records Access Officer", New York City Police Department, 1 Police Plaza, New York, New York 10038. In addition, it is recommended that you mark on the outside of your envelope "Freedom of Information Request" or something similar in order to ensure that it 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:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2056

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

June 16, 1981

Mr. Kenneth Kutner
Assistant Attorney
Bureau of House Counsel
NYS Department of Social Services
40 North Pearl Street
Albany, New York 12243

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kutner:

I have received your letter of May 29, 1981 in which you requested an advisory opinion regarding rights of access to the contents of a personal financial statement form created by the Department of Social Services.

As we discussed, the form (#2789) is required to be completed by an individual or, in the case of a partnership, by each partner, seeking to obtain an operating license for a Private Proprietary Home for Adults (PPHA) under §461 of the Social Services Law, et seq., which is entitled "Residential Programs for Adults".

I would like to offer the following observations with respect to your inquiry.

First, it is emphasized at the outset that this opinion is limited to the situation in which a "natural person", as designated in §461-b of the Social Services Law, completes the form. As such, the ensuing advice would not apply to a corporate entity that submits such a form.

Second, 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 Law. As you intimated in your correspondence, the most applicable ground for denial is likely §87(2)(b), which states that records or portions thereof may be withheld when disclosure would result in "an unwarranted invasion of personal privacy".

With regard to the form, a copy of which you enclosed, disclosure of much of the personal income information might, in my view, result in an unwarranted invasion of privacy. Records of personal income contained in federal and state income tax forms are deniable due to various confidentiality provisions [see e.g., Tax Law, §697(3)]. It appears that those statutory provisions were enacted to prevent disclosure of records when disclosure would constitute an improper or unwarranted invasion of personal privacy. The personal financial statement in question requires that detailed financial information be submitted in the following categories: A. Assets and Liabilities; B. Anticipated Annual Personal Income From; C. Anticipated Expenses; D. Contingent Liabilities; Current Assets Schedule A; Non-Current Assets Schedule B; Current Liabilities Schedule C; and Non-Current Liabilities Schedule D. In addition to the detailed dollar amounts required to be set forth in each of those categories, the specific location, nature and full market value of an asset, investment and/or liability must also be specified. In my view, the financial information contained in the form may in some areas be more detailed than the information contained in personal income tax forms. Since tax forms are confidential based on legislative considerations relative to privacy, it would appear that the detailed financial information contained in the forms in question might justifiably be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

With regard to category D (contingent liabilities) of the form, it is possible that disclosure would be dependent on the nature of the liability. For example, if a liability required some type of public filing pursuant to statute (e.g. the Uniform Commercial Code), disclosure would constitute a permissible invasion of personal privacy when the information submitted is available elsewhere as a public record. Similarly, §91 of the Partnership Law concerning the formation of a limited partnership, requires

the disclosure in a certificate of particular financial information, which is available from the County Clerk maintaining possession of the certificate. However, a case by case analysis of the type of liability involved would be necessary to determine the extent to which financial information is publicly available from other sources.

Third, you have asked whether the opinion would differ depending upon whether or not the operating certificate for which the form is being completed is approved or denied. It would appear that a denial of the application would not alter or diminish the impact of an invasion of privacy. Stated differently, the personal financial information submitted is the same, whether or not an application is approved. Further, from my perspective, the nature of the information and the potential effects of disclosure determine the capacity to withhold.

Fourth, with respect to your final question, you indicated that the Department's audit services staff may have assured applicants that their personal financial statement information would remain confidential. In my opinion, such a promise of confidentiality may be all but meaningless. Prior to enactment of the Freedom of Information Law, the courts held on several occasions 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 (1975)]. The language of the Freedom of Information Law as amended confirms this principle by placing the burden of defending secrecy on the agency, the custodian of records, rather than a third party that may have submitted records to an agency. Although the decision in Cirale, supra, has been cited as a basis for asserting the governmental privilege regarding "official information", recent case law has apparently overruled Cirale and abolished this governmental privilege. Specifically, 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 Street Corp. (35 NY 2d 113) was intended to suggest otherwise" (Doolan at 346).

As such, if records sought do not fall within one or more among the eight grounds for denial appearing in the Freedom of Information Law, they must in my view be made available, notwithstanding a promise of confidentiality [see also, Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

And fifth, it is noted that the Freedom of Information Law is permissive. Stated differently, while an agency may withhold records falling within one or more of the categories of deniable information under §87(2), 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.

Lastly, it is emphasized that this opinion is exactly that - an opinion. In dealing with privacy, an attempt to balance interests and subjective judgments must of necessity be made. Therefore, although one reasonable person might contend that disclosure of particular information would result in a permissible invasion of privacy, another equally reasonable person might feel that disclosure of the same information would result in an unwarranted invasion of privacy. As such, a final determination regarding the issues could in my opinion be finally rendered only by a court.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2057

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

June 17, 1981

Mr. A. Anthony Miller
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Miller:

I have received your letters of May 30 and June 8. Your inquiry concerns your right under the Freedom of Information Law to gain access to records indicating the name of a person who directed complaints against you to the Town of Hempstead.

I would like to offer the following observations with respect to your letters and the materials attached to them.

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, such as the Town of Hempstead, 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, the Freedom of Information Law is an access to records law. Therefore, as a general rule, an agency is not obliged to create a record in response to a request. Further, from my perspective, the Freedom of Information Law is not intended to permit what may be characterized as the cross-examination of public officials.

In this regard, in your letter of April 23 addressed to Robert Plonsky, Commissioner of the Department of Engineering of the Town of Hempstead, you requested copies of written complaints relative to the matter that you cited, the identities of complainants, and the substance of any oral complaints received by the Town. If, for example, oral complaints were received but no record was created reflective of the information sought, the Town would be under no obligation to create a record on your behalf.

Third, with respect to complaints submitted to agencies, it has consistently been advised that the substance of a complaint is available, but that the identifying details regarding a complainant might 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. In dealing with the protection of personal privacy, several judicial decisions have based their determinations upon the relevance of identifying details, for example, to an agency. If, for instance, you enter a restaurant and believe that it is dirty and later transmit a complaint to your local health department, the health department in reviewing the complaint in all likelihood does not base its actions on who you are (your identity). On the contrary, its concern is whether the complaint is valid, i.e. whether the restaurant was indeed dirty. Moreover, I would conjecture that often complaints are investigated even if they are submitted anonymously. If that is so, the contention that the identity of a complainant is irrelevant to the work of an agency would in my view be strengthened. In short, I believe that a complaint must be made available, but that the agency may delete identifying details, such as the name of a complainant, when disclosure would in the agency's view constitute an unwarranted invasion of personal privacy.

Fourth, it is emphasized that determinations concerning privacy must often of necessity be based upon subjective judgments. In viewing a single record, one reasonable person might contend that disclosure would result in an unwarranted invasion of personal privacy, while another equally reasonable person might believe that disclosure of the same record would constitute a permissible invasion of personal privacy.

Moreover, it is noted that §89(2)(b) of the Freedom of Information Law lists a series of five unwarranted invasions of personal privacy. However, in my view, that list is not exhaustive. The introductory language in §89(2) states that an unwarranted invasion of personal privacy "includes but shall not be limited to" the ensuing examples of unwarranted invasions of privacy. Therefore, from my perspective, §89(2)(b) represents but five among conceivable dozens of unwarranted invasions of personal privacy, and the examples presented in the cited provision should not be considered the only instances in which records may be withheld under the privacy provisions.

Lastly, your letter of June 8 made reference to a decision rendered by the Court of Appeals in which it was held that approved applications for pistol permits must be made available in their entirety under the Freedom of Information Law. You pointed out that the Court found that the approved applications must be made available, even if disclosure might pose a potential danger to the applicant [see e.g., Matter of Kwitny, ___NY 2d___(1981)]. From my perspective, the determination of the Court of Appeals is not relevant to the issue that you have raised. I believe that the decision was based upon the language of §400.00(5) of the Penal Law, which states, in brief, that approved pistol license permits shall be public records. In this regard, §89(5) of the Freedom of Information Law states that nothing in that statute shall be construed to limit or abridge rights of access granted by any other provision of law. Under the circumstances, this office was compelled to advise and the Court of Appeals agreed that the grounds for denial in the Freedom of Information Law could not be cited to diminish rights of access granted under the Penal Law. In terms of complaints, there is no provision of law of which I am aware that specifically grants access to such records. Consequently, the grounds for denial in the Freedom of Information Law remain applicable, which was not the case with respect to access to pistol permits.

I hope that 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: Kenneth Chave

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO - 636
FOIL-AO-2058

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

June 5, 1981

Perry Godfrey
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Godfrey:

As requested, enclosed are materials that you requested concerning the status of a volunteer fire company under the Freedom of Information and Open Meetings Laws.

The materials include a decision rendered by the state's highest court, the Court of Appeals, which held that a volunteer fire company is an "agency" subject to the Freedom of Information Law [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In addition, I have enclosed recent advisory opinions on the subject.

Since the issuance of the Court of Appeals' decision, I have not written any opinions regarding the coverage of the Open Meetings Law with respect to volunteer fire companies. However, in view of the decision rendered under the Freedom of Information Law, I believe that it is clear that the board of a volunteer fire company would constitute a "public body" subject to the Open Meetings Law.

Section 97(2) of the Open Meetings Law (see attached) 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".

By breaking the definition into its components, I believe that one may conclude that a volunteer fire company is a "public body".

First, the board of a volunteer fire company is an entity that consists of two or more members. Second, a quorum is required in order to conduct business under §608 of the Not-for-Profit Corporation Law. Third, based upon the Court of Appeals' decision, it is clear that a volunteer fire company conducts public business and performs a governmental function. And fourth, it is also clear that a volunteer fire company performs its duties for a public corporation, such as a village or town, for example.

Based upon the foregoing, I believe that each of the conditions precedent required to be met in order to find that an entity is a public body is met by the board of a volunteer fire company. Consequently, I believe that its meetings must be held in accordance with the provisions 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:ss

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2059

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

June 19, 1981

Mr. Philip C. Sweet
Records Access Officer
County of Nassau
Office of Consumer Affairs
160 Old Country Road
Mineola, New York 11501

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sweet:

I have received your letter of June 2. Your kind words and your interest in complying with the Freedom of Information Law are much appreciated.

Two areas of inquiry were raised in your letter, both of which concern the protection of personal privacy.

The first question deals with a request by the Postal Inspector's Division of the U.S. Postal Service for the names and addresses of persons who submitted complaints to your office.

As you are aware, the Committee has generally advised that identifying details concerning a person who submits a complaint to a government agency may be deleted when, in the agency's view, disclosure would constitute an "unwarranted invasion of personal privacy". Under such circumstances, the personally identifying details could be withheld under §87(2)(b) of the Freedom of Information Law. However, based upon your letter and our telephone conversation, the Postal Service requires the names and addresses in conjunction with an investigation that it is conducting. In similar situations, when it is clear that

an agency of government seeks information in order to carry out its official duties, it has been suggested that the information be made available as a matter of comity, unless there is a statutory provision that requires confidentiality of particular records. From my perspective, when an agency seeks records from another in the performance of its official cuties, such an inquiry should not be considered a request made by the public under the Freedom of Information Law.

Further, in order to avoid setting a precedent or the appearance of a precedent regarding public access to records that might ordinarily be denied under the Freedom of Information Law, it has been suggested that explanatory letters be transmitted to an agency when such records are made available. For instance, if you determine to make complainants' names and addresses available to the Postal Service, you might specify that such information is generally withheld from the public under §87(2)(b) of the Freedom of Information Law, but that the information is being made available only because it was requested to enable the Postal Service to carry out its official duties.

The second question concerns a request for the names and home addresses of the principals of a particular home improvement contractor. The information was requested by an attorney seeking "to serve the principals with papers of process". I agree with your determination that the names and home addresses could justifiably be withheld so long as the business address of the contractor "was bona fide".

Once again, §87(2)(b) of the Freedom of Information Law concerning the capacity to withhold records when disclosure would result in an unwarranted invasion of personal privacy is the focal point of the question. In all honesty, questions regarding privacy are often perplexing, for the standard in the Law of necessity requires that subjective judgments be made. Stated differently, while one reasonable person might consider that disclosure of a particular record would be offensive and result in an unwarranted invasion of personal privacy, and equally responsible person might consider that disclosure of the same record would be inoffensive or innocuous and contend that disclosure would result in a permissible invasion of privacy.

It has generally been advised that home addresses need not be made available due to the possibility of unwarranted invasions of privacy. I would like to point out that the Freedom of Information Law since its enactment in 1974 has required that each agency maintain and make available a list of its employees by name, address, title and salary. In its original version, the Law did not specify which address, home or business, should be disclosed. Due to complaints that home addresses were being used for solicitation or, in some instances, harassment, the provision in question was altered to specify that the public office address, not the home address, should be included in the payroll record. Further, several judicial decisions have considered rights of access to personally identifiable information in terms of the relevance of such details to the work of the agency or the performance of duties of a public employee, for example. In the case of a public employee, a home address is not likely relevant to the performance of one's official duties; a public office address, however, would be relevant to the performance of duties.

In the case of a licensee, I believe that a business address appearing on the license is available, for a license is in my view intended to enable the public to know that a person or firm is qualified to engage in a particular profession or endeavor, and where that person of firm can carry out the profession or endeavor, i.e., the business address. In my opinion, the home address of a licensee is largely incidental to the license and therefore, as a general rule, may 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- 647
FOIL-AO-2060

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

June 19, 1981

Theodore W. Micek, Jr.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Micek:

I have received your letter, which raises questions regarding both access to records and the conduct of meetings in the Copenhagen Central School District.

Your first question concerns access to minutes of meetings of the Board of Education. According to your letter, on May 6, you requested the minutes of the School Board meeting of April 22. In response you were informed that the minutes had not yet been typed and that the attorney for the District advised the Clerk that minutes should be withheld until they are approved. You also cited a book published in 1970 entitled "School Law" in which it was stated that minutes need not be approved prior to making them available to a taxpayer.

In my opinion, any person may gain access to minutes of an open meeting of a public body within two weeks of the meeting. I direct your attention to §101 of the Open Meetings Law, which in subdivision (1) prescribes the minimum contents of minutes of open meetings and in subdivision (3) requires that minutes of open meetings be compiled and made available within two weeks of such meetings.

Before the provision cited above went into effect on October 1, 1979, the Committee recognized that in some instances a public body might not have the opportunity to approve minutes within two weeks. As such, in a memorandum

transmitted to all public bodies in the state, including school boards, it was advised that unapproved minutes be compiled and made available within two weeks as required by law, but that they be marked "unapproved", "draft", or "non-final", for example. By so doing, the public can generally be aware of what transpired at a meeting, and at the same time, the recipient of unapproved minutes is given notice that the contents are subject to change, thereby giving a board and its members a measure of protection.

Your second area of inquiry pertains to a situation in which a group of concerned citizens submitted a petition to the Board prior to its regularly scheduled meeting. Since the minutes failed to make reference to the petition, you asked whether reference to the petition must be included in the minutes.

Once again, I direct your attention to §101(1) of the Open Meetings Law, which prescribes minimum requirements concerning the contents of minutes of open meetings, and 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 language quoted above, it appears that there was no requirement that the minutes make reference to the submission of the petition.

Your third question concerns a denial of access to records indicating the names of twenty students who attend the Copenhagen schools tuition free. In this instance, a federal law, the Family Educational Rights and Privacy Act (20 U.S.C. §1232g) determines rights of access. In brief, the Act states that any "education record" that identifies a particular student is confidential, unless the parent of the student consents to disclosure. As such, unless the parents of the students in question have consented to disclosure, I would agree that the names must remain confidential.

The final question raised in your letter pertains to a contention by the Superintendent that you "had no right to ask questions at a board of education meeting..." I concur with the statement made by the Superintendent. The Open Meetings Law gives the public the right to attend and listen to the deliberations of public bodies; it does not, however, grant the public to speak or otherwise participate at meetings. Therefore, if the School Board chooses to permit the public to ask questions at meetings, it may do so. Nevertheless, it need not, for there is no right to participate granted by the Open Meetings Law or any other law of which I am aware.

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, which is attached to a memorandum explaining changes in the Law that became effective on October 1, 1979, and an explanatory pamphlet that may be useful to you. The same materials, as well as a copy of this opinion, will be sent to the School Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2061

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

June 19, 1981

Mr. Michael Borden, Jr.
80 A 3871
Box 445 1G25
Fishkill, New York 12524

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Boren:

I have received your letter of June 4 in which you requested assistance in gaining access to records.

Your first question concerns your right to receive a copy of your fingerprints from the U.S. Department of Justice or the FBI.

In this regard, the New York Freedom of Information Law applies only to records in possession of units of state and local government. Consequently, I am not sure of the procedure by which you could gain access to such records from a federal agency.

Nevertheless, I believe that your criminal history records and fingerprints can be made available to you by requesting them through either the Department of Correctional Services or the Division of Criminal Justice Services, which maintains such records. In order to direct a request to the Division of Criminal Justice Services, you should write to:

The Division of Criminal Justice Services
Identification Services
Executive Park Towers
Stuyvesant Plaza
Albany, New York 12203

Your second area of inquiry concerns your capacity to gain access to records reflective of the District Attorney's presentation before the grand jury. To the best of my knowledge, grand jury proceedings and reports, including the information in which you are interested, must be kept secret under Article 190 of the Criminal Procedure Law. However, it is suggested that you might want to discuss the matter with an attorney from an organization such as 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-649
FOIL-AO-2062

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

June 22, 1981

Mrs. E. Kostiuk
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kostiuk:

I have received your letters of May 27 and June 10.

You have requested an advisory opinion regarding the availability of minutes allegedly taken at a closed meeting of the Town Board of the Town of Riverhead on April 20, 1981. To date, you have made two requests under the Freedom of Information Law and been denied on both occasions. In particular, you have contended that the minutes include a reprimand of a Riverhead dog warden for removal of your dog from your property.

First, it is unclear in your letter whether the Town Board convened its meeting as an executive session or whether the executive session was called after an open meeting had begun. In this regard, I would like to point out that the phrase "executive session" is defined by §97(3) of the Open Meetings Law (see attached) to mean a portion of an open meeting during which the public may be excluded. Moreover, §100(1) describes a procedure that must be followed before a public body may enter into an executive session. Specifically, the cited provision 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..."

Based upon the language quoted above, a public body may enter into an executive session only after having convened an open meeting, and only when the procedural steps described above have been followed.

Assuming that an executive session was properly convened, minutes of the executive session would be required to be made available only if action was taken during the executive session. Section 101(2) of the Open Meetings Law states that minutes reflective of the action taken during an executive session must be compiled and made available in accordance with the Freedom of Information Law within one week of the executive session. However, if no action was taken, minutes of the executive session need not have been compiled.

Second, if a formal vote to reprimand the dog warden was taken by the Town Board during an executive session, that record is in my view available under the Freedom of Information Law, whether or not the reprimand is found within records characterized as minutes.

The Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states that all records of an agency, such as a town, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

In my view, the reprimand you are seeking is accessible under the Freedom of Information Law, notwithstanding possible invasions of privacy. In this regard, I direct your attention to §87(2)(b) (see attached) of the Law, which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Although subjective judgments must often be made regarding the extent to which one's privacy might be invaded, the courts have provided significant direction, particularly with respect to the privacy of public employees. Under the Freedom of Information Law and other areas of law, the courts have 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, it has been held on several occasions that records that are relevant to the performance of public employees' official duties are available, for disclosure in such cases would constitute 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Contrarily, if information concerning a public employee is irrelevant to the performance of his or her official duties, a denial may be proper, for disclosure might indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977).

When a town board votes to issue a reprimand to one of its employees, based upon case law, I believe that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy, for the reprimand 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 similar nature. In Farrell, supra, it was held that reprimands of named public employees were available, for the reprimands were relevant to the performance of the official duties of the public employees involved and because the reprimands essentially constituted "final determinations" that are available.

Third, one of the other grounds for denial which could apply to the situation is §87(2)(g), which states that an agency may withhold records or portions thereof that:

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

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 during or following the executive session might be considered "intra-agency" material. Nevertheless, I believe it may also be characterized as a "final determination" of the Town Board that is required to be made available.

Fourth, you attached to your correspondence copies of the Town of Riverhead's response to your Freedom of Information Law request. These copies indicated that your requests were denied because they constituted a "confidential disclosure". A claim of confidentiality can in my opinion be invoked, only where a specific statute authorizes confidentiality [see Freedom of Information Law, §87(2)(a)]. I am unaware of any relevant statute which would authorize the Town of Riverhead to deny the information you are seeking under a claim of confidentiality.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2063

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

June 23, 1981

Mr. John Rosenberg
Executive Director
The Nation Institute
72 Fifth Avenue
New York, NY 10011

Dear Mr. Rosenberg:

I finally received a copy of the proposed settlement regarding Handschu et al v. Special Services Division et al.

It is emphasized at the outset that, as a general rule, this office does not prepare advisory opinions after litigation has been commenced. However, under the circumstances, since opinions concerning the proposed settlement have been requested, and since issues relative to access are ancillary to the action, I do not believe that the comments offered in the ensuing paragraphs could be considered unethical.

In accordance with our discussion of last month, I believe that there are several aspects of the stipulation of settlement that might properly be revised.

In terms of background, the Handschu case was, to the based of my knowledge, initiated approximately a decade ago. Since its initiation, two significant legislative events have occurred. First, in 1974, the New York Freedom of Information Law was enacted. Further, that statute was substantially altered in a series of amendments that became effective on January 1, 1978. Second, in 1977, the New York City Charter was amended by means of the creation of a new Department of Records and Information Services.

In my view, the direction provided by the two new laws would likely well serve the interests of the public and the New York City Police Department better than the proposed settlement. Moreover, I believe that the proposed settlement fails to take into account the two laws cited above.

With respect to the New York Freedom of Information Law, as in the case of the federal Act, it is based upon a presumption of access. Stated differently, all records in possession of an agency, such as the New York City Police Department, are available, except to the extent that records fall within one or more grounds for denial listed in §87 (2)(a) through (h) (see attached Freedom of Information Law, Public Officers Law, §§84 through 90).

Several points should be made with respect to the records at issue in conjunction with the Freedom of Information Law.

First, §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."

Therefore, all records in possession of an agency are subject to rights of access granted by the Law, regardless of the date of their creation or initial maintenance by an agency. Therefore, it is possible that restrictions in terms of time relative to the files that are the subject of the proposed settlement may conflict with the Freedom of Information Law.

Second, specific language appears in the proposed settlement regarding documents related to "an organization". In this regard, although there may be significant considerations of privacy with respect to records that identify particular individuals, I do not believe that such considerations arise relative to records that identify organizations.

Third, §4 of the proposed settlement states in part that:

> "[T]he defendants shall be authorized to deny requests for inspection when the requested file relates to a current investigations or when information was collected in the course of an investigation based on specific information that the subject engaged in, was about to engage in, or threatened to engage in conduct constituting a crime or when the disclosure of the file would endanger the life of physical safety of any person."

From my perspective, the capacity to deny requests is overly broad and fails to consider rights of access granted by the Freedom of Information Law. As a general rule, the Freedom of Information Law states that records must be made available except when disclosure would cause harm, either to an individual or to a governmental process. Further, the majority of the grounds for denial contain an operative verb that describes a potentially harmful effect of disclosure.

Relevant 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.

In view of the foregoing, records compiled for law enforcement purposes may be withheld only when disclosure would result in the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e), i.e., when 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 my view, if an investigation is ongoing and disclosure would interfere with the investigation, certainly §87(2)(e)(i) could justifiably be cited as a basis for withholding. Nevertheless, if records sought pertain to investigations that have been terminated, in some cases years ago, it is difficult to envision how any of the grounds for denial could be cited with justification.

Another provision of potential relevance is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". As intimated earlier, many of the records in question likely identify particular individuals. In such cases, it is possible that disclosure to persons other than the subjects of such records would constitute an unwarranted invasion of personal privacy. Nevertheless, it appears that many records also identify organizations rather than named individuals. In such cases, privacy considerations may be minimal.

I would like to offer two final points with respect to the Freedom of Information Law.

Specifically, as indicated earlier, §87(2) of the Freedom of Information Law states that an agency may 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, if, for example, a name can be deleted, i.e., to protect privacy, it is possible that the remainder might be available. Moreover, it is also clear that an agency is obligated to review records sought in their entirety to determine with portions, if any, may justifiably be withheld.

Second, one of the underlying principles of the Freedom of Information Law is that if a record is accessible, it should be made equally available to any person, without regard to status or interest (see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165). As such, it is possible that many records might be available under the Freedom of Information Law to persons other than those in the class designated in Handschu.

In view of both rights of access granted by the Freedom of Information Law and the capacity to deny under that statute, it might be preferable to use the statute rather than the proposed settlement to determine rights of access and the authority to deny.

At this juncture, I would like to bring to your attention applicable provisions of the New York City Charter concerning the newly created Department of Records and Information Services.

Specifically, under Chapter 72 of the City Charter, a New York City agency cannot destroy or otherwise dispose of its records without following a specified procedure. Section 3005 of the Charter entitled "Disposal of Records" states that:

> "[N]o records shall be destroyed or otherwise disposed of by an agency of the city unless approval has been obtained from the commissioner, the corporation counsel and the agency which created or has jurisdiction over the records who shall base their determinations on the potential administrative, fiscal, legal, research or historical values of the record. Approval for records disposal schedule and remain in force until the status of the records may initiate action to eliminate records eligible for disposal. The commissioner shall insure the destruction of disposable records within six months of the date of eligibility. Records retained for historical or research purposes shall be transferred, upon request of the commissioner, to the municipal archives for permanent custody."

Second, as in the case of the Freedom of Information Law, §3010(2) defines "records" expansively to include "any documents, books, papers...regardless of physical form or characteristics, made or received pursuant to law or ordinances or in connection with the transcation of offical city business". As such, the records at issue in Handschu would constitute "records" subject to the authority of the Department of Records and Information Services.

From my perspective, the professional records managers and archivists employed by the Department of Records and Information Services might be the best and most knowledgeable resources available to determine issues regarding the retention and disposal of the records at issue in Handschu.

Enclosed for your consideration are copies of the Freedom of Information Law, Chapter 72 of the New York City Charter, and the regulations promulgated by that Department.

In sum, I believe that the proposed settlement fails to consider the direction provided by existing law, specifically the New York Freedom of Information Law and Chapter 72 of the New York City Charter. In my view, those laws provide a more appropriate framework for a settlement than the current proposal.

I hope that 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-2064

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

June 23, 1981

Mr. Daniel Cetrone
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cetrone:

I have received your mailgram of June 9 in which you described a series of events that were apparently precipitated by your submission of a request for records to the Rockland County District Attorney's Office.

I would like to offer the following observations with respect to your inquiry.

First, the coverage of the Freedom of Information Law is determined in part by the definition of "agency" appearing in §86(3) of the Law (see attached). Specifically, 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 Office of the District Attorney is governmental in nature and operates with the government of a county, which is a public corporation, I believe that the Office of the District Attorney and the records in possession of the District Attorney clearly fall within the scope of the Freedom of Information Law. Moreover, there are judicial

interpretations of the Freedom of Information Law which indicate that the Freedom of Information Law is applicable to records in possession of a district attorney [see New York Public Interest Research Group v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; and Dillon v. Cahn, 79 Misc. 2d 300, 359 NYS 2d 981 (1974)].

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, §87(2) of the Law states that all records of an agency, such as the Office of the District Attorney, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Third, as a general rule, the exceptions to rights of access listed in §87(2)(a) through (h) are based upon potentially harmful effects of disclosure. In most of the grounds for denial there is an indication of the potential harm that might arise by means of diclosure. For instance, the exception that is cited most often by law enforcment agencies is §87(2)(e). That 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 provedures."

Based upon the language quoted above, it is clear that not all records compiled for law enforcement purpose may be withheld. On the contrary, such records may be withheld only in accordance with the limitations on disclosure

indicated. As such, the question that arises when a request is made for records compiled for law enforcement purposes involves the extent to which such records might if disclosed 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.

Fourth, I would like to direct your attention to §89(3) of the Law. That provision states that an agency may require that a request by made in writing. In addition, it states that an applicant must seek a record "reasonably described". In all honesty, I am not sure that a request for all records pertaining to you would "reasonably describe" the records in which you are interested. It is suggested that, in making a request, you provide as much detail as possible, including dates, file designations, and any other information that may assist an agency in locating requested records. By so doing, an agency may have the capacity to respond to a request within the time limits specified in the Law.

Fifth, the Freedom of Information Law requires the Committee to devise regulations of a procedural nature concerning the implementation of the Law. In turn, each agency, including Rockland County, is required to adopt its own regulations consistent with and no more restrictive than those promulgated by the Committee.

In this regard, one of the requirements found in the Committee's regulations involves the designation of one or more "records access officers". A records access officer designated by an agency is required to respond initially to requests made under the Freedom of Information Law. In addition, the regulations state that:

> "[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, if you have difficulty in identifying the records in which you are interested, a records access officer has the responsibility of assisting you in identifying the records.

Lastly, as you requested, copies of the Freedom of Information Law, the regulations and an explanatory pamphlet on the subject will be sent to the Office of the District Attorney in Rockland County.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: District Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2065

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

June 23, 1981

Mr. Vernon Patrick
Box B
80-A-2831
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Patrick:

I have received your letter of June 5, in which you requested that this office investigate a controversy in which you are involved and that the Committee have a copy of the "master index" developed by the Department of Correctional Services sent to you.

I would like to offer the following observations with respect to your requests.

First, 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 authority to compel an agency to comply with the Freedom of Information Law. Consequently, the Committee has no power to "investigate" the actions of officials of the Department of Correctional Services or to request and obtain records on your behalf.

Second, according to your letter, in order to obtain a copy of the master index, you are required under the Department's regulations to pay for photocopies of the records comprising the index. In this regard, you wrote that you completed a disbursement form in order to take money out of your account and to mail a check to the Department in order to pay for the master index. However, the disbursement form was returned to you and marked "Denied Per Order of J. Sullivan". Mr. Sullivan is apparently the Deputy Superintendent at Dannemora.

In all honesty, I am not familiar with the procedures of the Department of Correctional Services with respect to the disbursement of money or your capacity to obtain money from your account. However, rather than seeking judicial review of the actions of Deputy Superintendent Sullivan, it is suggested that you contact Prisoners' Legal Services or a similar organization. Perhaps an attorney or assistant from such an organization can help you in resolving the controversy. Such an individual would likely be more familiar with procedures in correctional facilities than I.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-652
FOIL-AO-2067

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

June 24, 1981

Joseph G. Halloran, Director
Syosset Public Library
225 South Oyster Bay Road
Syosset, New York 11791

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Halloran:

I have received your letter of June 4, 1981.

In your original request for an opinion, you asked for guidance regarding rights of access to library personnel records by an individual library trustee. In our opinion of May 1, it was advised that specific direction in this area was limited to a 1967 Supreme Court case, Gorton v. Dow, 54 Misc. 2d 509. Your more recent correspondence seeks advice regarding the propriety of using regulations promulgated by the Commissioner of Education, which provide direction to school board members concerning access to school employee personnel records.

I would like to make the following comments in response to your inquiry.

First, the Commissioner of Education's regulations mentioned in Section 3:64 of "School Law" are found in 8 NYCRR 84. Specifically, §84.2 of these regulations, which apply only to school board members, states that:

> "[E]xamination of school employee personnel records by the Board of Education shall be conducted only at executive sessions of the board. Any board member may request the chief school officer to bring the personnel records of a designated employee or em-

> ployees to an open meeting of the board. The board shall then determine whether to conduct an executive session for the purpose of examining such records. The chief school officer shall present such records to the board at the executive session. Such records shall, in their entirety, be returned to the custody of the chief school officer at the conclusion of the executive session of the board."

As indicated in our previous opinion, the holding in Gorton v. Dow, supra, emphasized that library trustees could implement regulations for inspection of library records as long as such regulations were reasonable and did not obstruct the trustee's right to investigate those records. Further, in the case of school boards, it has been held judicially that a member has not only the right to view personnel records, but also the obligation to do so. In my opinion, although the regulations quoted apply to school boards and not library trustees, rights of access of library trustees of necessity should be analogous to those of school board members in order that they may carry out their official duties [see Gustin v. Joiner, 95 Misc. 2d 277, aff'd 68 AD 2d 880]. Enclosed for your consideration is a copy of Gustin v. Joiner which may be useful to you.

Lastly, notwithstanding the direction given to school boards under the Commissioner's regulations, it is important to note that the Open Meetings Law governs both the procedure for entry into executive session and the areas of discussion that may be considered during an executive session. In terms of procedure, §100(1) 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..."

Based upon the language quoted above, it is clear that an executive session may be held only after a public body has convened an open meeting, and only after a motion made in public generally identifying the subject to be considered is carried by a majority of the total membership.

I would also like to point out that so-called "personnel" matters regarding specific individuals may often be considered during an executive session. One of the grounds for executive session is §100(1)(f), which states that a public body may close its doors to consider:

> "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..."

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2068

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

June 25, 1981

Mr. James Haskins
79-A-2943
Box 149
Attica, NY 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Haskins:

I have received your letter of June 12.

You explained that you have been unable to obtain a copy of a brief submitted with respect to an appeal. You also indicated that the brief is necessary to your appeal.

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 an agency to comply with the Law. Further, this office cannot request or obtain records on behalf of an applicant.

Nevertheless, I would like to offer the following suggestions.

First, although the Freedom of Information Law does not apply to courts or court records, many court records are available under §255 of the Judiciary Law and other applicable provisions. Consequently, it is suggested that you request a copy of the brief and other court papers from the clerk of the court in which the appeal is being heard.

Second, it is suggested that you might want to contact an organization such as Prisoners' Legal Services. Perhaps such an organization can help you in gaining access to the materials that you need.

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-2069

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

June 25, 1981

Mr. Levi Wilkins
80-A-1022
Drawer B
Stormville, NY 12582

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wilkins:

I have received your letter of June 11.

According to your letter, you directed a request for records to the New York City Police Department which was denied. You appealed the denial on April 30 and approximately three weeks later, you received a letter from the Department indicating that the appeal could not be determined within seven business days as required under §89(4)(a) of the Freedom of Information Law, but that every effort would be made to provide you with "an expeditious reply."

Since you have not yet received a response, you have asked what your options might be.

First, having dealt with the New York City Police Department for several years, I believe that it seriously attempts to comply with the Freedom of Information Law. As such, I do not believe that the response to you represents a stalling tactic but rather an attempt to inform you that, do to the press of business, a determination on appeal simply cannot be rendered within the statutory time limit.

Second, notwithstanding the burden of the Department's other duties, if no response is received within the statutory time limit, I believe that you may initiate a proceeding under Article 78 of the Civil Practice Law and Rules. In a similar situation in which an applicant had not received a response within seven business days of the receipt of an appeal by the New York City Police Department, it was held that the applicant had exhausted his administrative remedies and therefore could seek judicial review of a "constructive" denial of access (see attached, Floyd v. McGuire, Sup. Ct., New York Cty., NYLJ, April 20, 1981).

Lastly, in the alternative, you might want to write to the New York City Police Department in order to remind the appeals officer that no determination has yet been rendered. Perhaps such a step would result in a response, a settlement of the controversy, and the avoidance of 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2070

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

June 25, 1981

Mrs. Pearl Michaels
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Michaels:

I have received your letter of June 10 concerning your submission of a request for "reimbursable time sheet logs" with respect to named employees of District #19.

You asked initially what your recourse might be if your request is ignored. In this regard, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural implementation of the Law, prescribe specific time limits for response 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 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)].

If a denial is rendered on appeal, your only recourse would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. It is noted that §89(4)(b) of the Freedom of Information Law states that the burden of proof rests upon the agency, which 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.

Your second area of inquiry concerns my "vague recommendation concerning access to pupil participation sheets". Having reviewed our correspondence, I agree that the response was vague, for I am not familiar with the content of a pupil participation sheet. Further, you wrote that the "Bureau of Audit" transmitted materials to this office. Unless I am mistaken, this office never received such materials.

I do have copies of your completed "Personnel Time Report for Reimbursable Programs". I believe that the substance of such a report, i.e., the portion indicating the times in and out and dates during which an employee is present, would be available under the Freedom of Information Law. However, I do not have a copy, blank or otherwise, of a pupil participation sheet.

As intimated in an earlier letter to you, if a pupil participation sheet identifies a particular student or students, it would likely be confidential under a federal law, the Family Educational Rights and Privacy Act (20 U.S.C., §1232g). That Act states in brief that any "education records" that identify a particular student or students are confidential to all but the parents of the students unless otherwise specified.

If you would like to send a copy of a blank pupil participation sheet, I would be happy to review it and provide advice. However, at this juncture, I regret that I cannot provide more specific direction.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2071

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

June 29, 1981

Ernest A. Kaarsberg
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kaarsberg:

I have received your correspondence of June 13, in which you wrote that your request directed under the Freedom of Information Law to the Staten Island Community College concerning records pertaining to yourself has not yet been answered.

Specifically, you directed a request to the academic records officer at the Administration Center of CUNY on April 21. However, according to your letter, no response to your request has been given to date. Further, in that request, you wrote that you had been "advised by the Committee on Public Access to Records...that all records and documents...relating to [your] employment...with CUNY are available..."

I would like to offer the following observations with respect to your correspondence.

First, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural implementation of the Law, contain specific 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 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 thaf follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Second, §89(4)(a) of the Freedom of Information Law enables a person who has been denied access to appeal the denial within thirty days. Since more than thirty days has elapsed without a response, it is suggested that you renew your request and inform the access officer of the time limits for response. If no response is given within five business days of the receipt of your request, you should consider yourself to have been constructively denied and thereafter appeal to the person or persons designated to render determinations on appeal under the Freedom of Information Law. It is also suggested that you telephone the appropriate office to determine the identity of the appeals person or body.

And third, I have reviewed my letter to you of February 3, in which general advice was given with respect to your rights of access. Although your letter addressed to the academic records officer indicated that I advised that all records pertaining to you should be made available, a review of my letter to you does not so state. In brief, that opinion explained that all records are available under the Freedom of Information Law, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h). It is reiterated that, while the Freedom of Information Law is based upon a presumption of access, there may be records or portions of records pertaining to you that could justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Lester G. Freundlich
Ms. Galvez

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2072

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

June 29, 1981

James F. Hayes
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hayes:

I have received your correspondence of June 15 in which you requested that this office "encourage" a more substantial response under the Freedom of Information Law from the Regents External Degree Program.

Having reviewed your correspondence, requests for records were directed to the Regents External Degree Program as early as December 15. Although some information was forwarded to you, the records supplied were not reflective of those requested. Further, you requested a copy of the Program's subject matter list and were informed that efforts would be made to respond to your request by the end of February. However, to date, it appears that no response has been given.

I would like to offer the following observations with respect to the situation.

First, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural implementation of the Law, prescribe specific 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 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.

Second, as a general rule, an agency need not create a record in response to a request. However, §87(3) of the Freedom of Information Law provides an exception to that rule. In this regard, §87(3)(c) 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".

In view of the foregoing, it is clear that there must be a subject matter list maintained by either the Regents External Degree Program or by the State Education Department, which operates the program. It is also noted that the subject matter list need not be an index to each and every record in possession of an agency. On the contrary, as indicated in the language of the Law, the subject matter list should make reference by subject matter to all records in possession of an agency.

Lastly, in order to apprise officials of the Regents External Degree Program of their responsibilities under the Freedom of Information Law, a copy of this opinion will be transmitted to that office, as well as the other materials that have been enclosed for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Judith Safranko

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 654
FOIL-AO-2023

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

June 29, 1981

Lorna Kramer, Assistant Clerk
Delaware County Board of Supervisors
Office of the Clerk
Court House
Delhi, New York 13753

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kramer:

I have received your letter of June 16 and appreciate your interest in compliance with the Open Meetings Law.

According to your letter, a reporter recently requested that minutes be furnished within two weeks of the date of meetings of the Delaware County Board of Supervisors, as required by §101 of the Public Officers Law (Open Meetings Law). You wrote, however, that the Board is concerned that the minutes, which may not be approved until a month following the meeting, may be inaccurate if disclosed within two weeks. You have asked for a "ruling" on the matter.

First, it is noted that the Committee on Public Access to Records does not have the statutory authority to issue "rulings" of a binding nature. However, the Committee is authorized to render advisory opinions under both the Freedom of Information and Open Meetings Laws.

Second, prior to the effective date of amendments to the Open Meetings Law, October 1, 1979, which included a provision requiring that minutes of open meetings be made available within two weeks of such meetings, the Committee recognized that minutes might not be approved in every instance within two weeks. Consequently, in a memorandum that was transmitted to all public bodies (see attached), it was suggested that unapproved minutes be made available within the specified time limit, but that they

be marked "unapproved", "draft", or "non-final", for example. By so doing, a person in receipt of unapproved minutes could learn generally what transpired at a meeting, but at the same time a board and its membership is given a measure of protection by indicating that the minutes are subject to change.

And third, even before the enactment of the requirement that minutes be made available within two weeks of meetings, it was advised under the Freedom of Information Law that minutes, unapproved or otherwise, are subject to the Law as soon as they exist.

In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which 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, although minutes might not be approved, they would likely constitute factual information that is available [see Freedom of Information Law, §87(2)(g)(i)].

In sum, I believe that minutes must be made available within two weeks of meetings as provided by law, but that such minutes may be marked, as suggested earlier, in order to ensure rights of access while concurrently indicating that they may be 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

Robert J. Freeman
Executive Director

RJF:ss

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2074

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

June 29, 1981

Mr. Steve Seltzer
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Seltzer:

I have received your letter of June 13 in which you requested an advisory opinion under the Freedom of Information Law.

According to your correspondence, in response to a request for the 1979 taxi fleet financial reports from the New York City Taxi and Limousine Commission, certain aspects of the report were made available, while others have been withheld. The records withheld involve financial information contained on a preprinted form, a copy of which you have enclosed, entitled "Annual Report Taxicab Fleet Operator for Calendar Year Ended December 31, 1980". Following the denial of your request of the financial report, you were advised by a representative of Counsel's Office that any identifying information in the reports would be redacted in order to protect personal privacy. The basis for the denial was cited as §89(2)(b)(v) of the Freedom of Information Law.

I would like to make the following observations with regard to the situation you described.

First, as you indicated in your correspondence, §2302 of the New York City Charter requires that:

> "[A]ll proceedings of the commission and all documents and records in its possession shall be public records and the commission shall make an annual report to the city council on or before the second Monday of January in each year."

Section 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. In this regard, the financial reports you are seeking appear available to the public under the New York City Charter. Further, nothing in the Freedom of Information Law could be cited as a basis for withholding records that are accessible under the Charter.

Second, even if §2302 of the New York City Charter did not exist, the Freedom of Information Law would in my view, grant access to the information you are seeking.

The Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the New York City Taxi and Limousine Commission, 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 Law.

As noted earlier, the denial cited §87(2)(b) as a basis for withholding. Further, the denial indicates that the disclosure of specific financial information contained in the annual report form would violate "the privacy rights of others". In my opinion, the personal privacy exception is applicable to individuals, and not to a corporate entity. Therefore, it appears that the financial information regarding a corporate entity would not be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Third, the Commission denied access on the basis of §89(2)(b)(v) which states that an unwarranted invasion of personal privacy includes:

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

From my perspective, in view of the duties of the Taxi and Limousine Commission, the financial information required in the annual report would appear to be relevant to the "development and improvement of Taxi and Limousine Service in the City of New York" [see §2300 of the New York City Charter].

Moreover, other sections of Chapter 65 of the New York City Charter and Administrative Code, required that the Commission submit an annual report and consider all facts in order to determine a fair rate for taxis and limousines. In my opinion, given the legislative intent, §89(2)(b)(v) of the Freedom of Information Law would not constitute an appropriate basis for denial.

Lastly, any promise of confidentiality by the Taxi and Limousine Commission to the submitters of the annual reports would in my view be all but meaningless. Prior to the enactment of the Freedom of Information Law, the courts held on several occasions 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 AD 2d 586, 589 (1958); see also People v. Keating, 286 App. Div. 150 (1955); Cirale v. 80 Pine St. Corp. 35 NY 2d 113 (1975)]. The language of the Freedom of Information Law as amended confirms this principle by placing the burden of defending secrecy on the agency, the custodian of records, rather than a third party that may have submitted records to an agency. Although the decision in Cirale, supra, has been cited as a basis for asserting the governmental privilege regarding "official information", recent case law has apparently overruled Cirale and abolished this governmental privilege. Specifically, 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 Street Corp. (35 NY 2d 113) was intended to suggest otherwise" (Doolan at 346).

As such, if records sought do not fall within one or more among the eight grounds for denial appearing in the Freedom of Information Law, they must in my view be made available, notwithstanding a promise of confidentiality [see also, Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (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

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

cc: New York City Taxi and Limousine Commission

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2075

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

June 29, 1981

Leonard De Nicola
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. De Nicola:

I have received your letter of June 18 and thank you for your kind words.

Your inquiry concerns rights of access to records regarding applicants for or recipients of public assistance.

Specifically, your first question is whether the Freedom of Information Law applies to private institutions that treat recipients of medicaid and medicare. In this regard, §86(3) of the Freedom of Information Law defines "agency" to include only entities of state and municipal government in New York. Although a private institution might receive a significant amount of funding from government, it is nonetheless outside the scope of the Freedom of Information Law. Consequently, in my view, there is no right to gain access to records in possession of a private institution.

Second, you have raised questionswith respect to Part 357 of the regulations of the New York State Department of Social Services. In brief, Part 357 indicates that records identifiable to either applicants for or recipients of public assistance are confidential. This is so due to requirements pertaining to confidentiality contained in various provisions of the Social Services Law (see, for example, Social Services Law, §136). However, Part 357 also indicates that extracts of a case record may be furnished to an applicant or recipient, "when the provision of such information would be beneficial to him". In addition, the cited provision also states that any portion of

the case record admitted as evidence in a fair hearing shall be open to the applicant or recipient. In view of the foregoing, it is clear that there is no general right to materials contained within a case record. It appears that the right to the contents of a case record exist only with respect to portions of such materials that have been submitted as evidence in a fair hearing.

It is noted that, although the Freedom of Information Law may offer procedural advantages, it likely would not increase rights of access. As stated earlier, case records are generally confidential and are exempt from disclosure. In this regard, under the Freedom of Information Law, an agency may withhold records that are "specifically exempted from disclosure by state or federal statute" [see §87(2)(a)], such as §136 of the Social Services Law. As such, the Freedom of Information Law does not increase rights of access to case records pertaining to applicants for or recipients of public assistance beyond the scope of access permitted under Part 357.

Nevertheless, if a request for such records is made and denied, the denial must in my view be given in writing. Further, the denial should indicate that you have a right to appeal and provide the name and address of the person to whom an appeal should be directed.

With regard to judicial review of a denial of access, as you are aware, §89(4)(b) of the Freedom of Information Law states that a denial of access following an appeal may be challenged by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. Further, the Freedom of Information Law specifies that the agency has the burden of proving that records fall within one or more of the grounds for denial appearing in the Law.

Lastly, you indicated that neither a legal aid office nor a private attorney is willing to represent you at no cost. In all honesty, I do not know what the nature of the controversy in which you are involved might be. However, it is suggested that you discuss the problem with a representative of the County Department of Social Services. In the alternative, you might want to write to the appropriate bureau of the State Department of Social Services, which is located at 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2026

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

June 29, 1981

Mr. William Gately
81-A-1370
Downstate Correctional Facility
P.O. Box 445
Red Schoolhouse Road
Fishkill, New York 12524

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gately:

I have received your letter of June 25, in which you requested from the Committee medical and personal records pertaining to you.

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 or control of records generally, such as those in which you are interested. Further, the Committee does not have the authority to compel an agency to comply with the Freedom of Information Law. In short, the Committee neither has possession of nor the capacity to gain access on your behalf to the records that you are seeking.

Nevertheless, I would like to offer the following suggestions.

The Department of Correctional Services has promulgated regulations concerning access to Department records. In this regard, I have enclosed a page from the regulations containing §5.20 entitled "Examination of inmate record by subject or his attorney". According to the regulations, "[A] present inmate shall direct his request to the facility superintendent or his designee."

Further, in the event that the superintendent or his designee denies access to the records, you may appeal the denial to Counsel to the Department of Correctional Services.

In view of the foregoing, it is recommended that you submit a new request to the superintendent at the Downstate Correctional Facility.

I hope that 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-2077

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

June 30, 1981

The Honorable Robin Schimminger
Member of the Assembly
The Honorable Walter J. Floss
Member of the Senate
Legislative Office Building
Albany, New York 12248

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Assemblyman Schimminger and Senator Floss:

I have received your letter of June 24 and appreciate your continued interest in compliance with the Freedom of Information Law.

According to your letter, following the death of her mother, one of your mutual constituents filed charges with the Office of Professional Medical Conduct against the attending physicians. After an investigation, the Board for Professional Medical Conduct found no evidence of misconduct. Your constituent apparently believes that the investigation was terminated because the Buffalo bureau of the Board for Professional Medical Conduct did not transmit relevant data submitted by the constituent to Albany. The constituent now wants to review the case file to determine if all of the evidence that she submitted was included in the file.

You indicated further that Theodore Murawski of the Board for Professional Medical Conduct has advised you that the file is not available under the Freedom of Information Law.

In my opinion, it is likely that the contents of the file were properly withheld.

As a general rule, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Board for Professional Medical Conduct, are available, except to the extent that records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Most relevant under the circumstances is §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". In this regard, I direct your attention to §230 of the Public Health Law concerning the State Board for Professional Medical Conduct. Subdivision (6) of the cited provision makes reference to committees and subdivision (9) states that:

> "[N]otwithstanding any other provisions of law, neither the proceedings nor the records of any such committee shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided. No person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting".

Based upon the language quoted above, it appears that virtually any testimony or records of any committee remain confidential, unless specific direction is given to the contrary.

In addition, in a case in which a physician charged with professional misconduct initiated proceedings under the Freedom of Information Law to gain access to records in possession of the Board for Professional Medical Conduct, it was held that such records could be withheld under a

variety of provisions. Specifically, in response to a request for a copy of a report of the Screening Committee that led to charges, the court found that such records would be "exempt by another state statute (see Public Health Law, §230[9])" [Marshall v. State Board for Professional Medical Conduct, 73 AD 2d 798 (1979), motion for leave to appeal denied, 49 NY 2d 709 (1980)].

In view of §230(1) of the Public Health Law as well as its judicial interpretation in conjunction with the Freedom of Information Law, I believe that the records in possession of the Board for Professional Medical Conduct and its committees are confidential.

It is noted that I have dealt with officials of the State Health Department and its Board for Professional Medical Conduct on several occasions. It is suggested in this regard that your constituent might contact Mr. Murawski in order to attempt to confirm whether all of the evidence that she submitted was indeed forwarded to the appropriate office. By so doing, the confidentiality requirements discussed earlier would not be compromised, while, concurrently, it may be possible to learn whether all of the evidence that she submitted was indeed considered.

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: Theodore Murawski

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2078

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

June 25, 1981

Mr. & Mrs. Raymond Hopkins
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. & Mrs. Hopkins:

I have received your letter of June 9.

According to your letter, you have been unable to obtain access to documents related to a complaint made against an attorney who represented you. Specifically, it is your belief that a document exists on which your signatures were improperly affixed and notarized. Further, although the District Attorney's Office had possession of the documents in which you are interested, you have been advised that any documents regarding the disciplinary investigation were returned to the Fifth Judicial District Grievance Committee.

I would like to make the following comments with regard to the situation described in your correspondence.

First, the definition of "agency" in the Freedom of Information Law is applicable to all units of state and municipal government, except the "judiciary" and the State Legislature. Stated differently, access to court records is governed by statutes other than the Freedom of Information Law.

The Fifth Judicial District Grievance Committee functions under the jurisdiction of the Appellate Division, which is a branch of the New York State court system. In this regard, §90(10) of the Judiciary Law requires that

"all papers, records and documents...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." There are two exceptions to the requirement of confidentiality. One involves an order by the Appellate Division to release particular documents; the second occurs when the charges brought against an attorney are upheld, in which case the documents become public records. Consequently, if no charges were brought against the attorney after investigation of your complaint, the records in question must likely remain confidential.

Second, an office of a district attorney is an agency subject to the provisions of the Freedom of Information Law. Therefore, it is required to provide access to records in its possession in accordance with rights granted under the Freedom of Information Law. However, the District Attorney's Office has apparently returned the records that you are seeking. As such, there appear to be no records in possession of the District Attorney that can be made available.

Lastly, I have spoken with Mr. Ginnelly of the Grievance Committee on your behalf. He indicated during our conversation that he has returned all documents to you other than investigatory reports compiled by his office. If you have not received them since the submission of your letter to this office, you might want to contact your attorney or Mr. Ginnelly.

I regret that I have been unable to be of greater assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2029

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

June 30, 1981

Mr. Harold Press
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Press:

I have received your letter of June 18 addressed to Gilbert P. Smith, Chairman of the Committee.

Please note that advisory opinions are generally prepared by the staff of the Committee rather than its members.

You have raised questions regarding your rights under the Freedom of Information Law and your capacity to enforce the Law.

First, as requested, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the Law and have the force and effect of law, and an explanatory pamphlet that may be useful to you.

Second, you have asked for an opinion regarding a request for records that you directed to a local deputy superintendent of schools, who has labeled certain parts of your request "confidential" and has refused to grant access to those materials.

In this regard, the term "confidential" is, in my view, greatly overused. Further, under New York Law, I believe that "confidential" has but a single meaning. Specifically, I believe that a record may be considered

"confidential" whan an act passed by Congress or the State Legislature precludes disclosure and forbids an agency from making particular records available. In such cases, records may 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".

It is also noted that there had been judicial determinations concerning access that cited what is known as the "governmental privilege". The principle behind the privilege is based upon the idea that if government could demonstrate to a court that disclosure would, on balance, result in detriment to the public interest, the governmental privilege would be successfully asserted. Nevertheless, the state's highest court, the Court of Appeals, appears to have recently 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 Street 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 addition, the Court found that records may justifiably be withheld only under one or more of the eight grounds for denial found within §87(2)(a) through (h) of the Freedom of Information Law.

In view of the foregoing, it is clear that an agency official cannot merely stamp or otherwise signify that a records is "confidential". On the contrary, unless the record falls within one or more of the grounds for denial appearing in the Freedom of Information Law, it must in my opinion be made available.

Third, with respect to the "enforcment" of the Law by initiating a judicial challenge to a denial of access, an applicant must exhaust his or her administrative remedies. It is suggested that you review the pamphlet and the regulations in order to ensure that the appropriate steps are taken. In brief, §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)].

If a denial is given in writing or if a response is not given within the designated time limits, 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)].

If access is denied on appeal, you may then initiate a proceeding under Article 78 of the Civil Practice Law and Rules. I would like to point out that §89(4)(b) specifies that the agency has the burden of proving that the records withheld in fact fall within one or more of the eight grounds for denial.

Lastly, although I believe that it is best to engage an attorney should a judicial proceeding be initiated, if you determine to initiate such a proceeding pro se, it is suggested that you go to a law library and review "form books". By means of reviewing forms regarding Article 78 proceedings, you might have the capacity to submit the appropriate materials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2080

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

July 2, 1981

Mr. Ned Davis
location 3 west low 6 cell
130 Plymouth Avenue South
Rochester, New York 14614

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Davis:

I have recently received your inquiry in which you requested the "necessary forms" that will enable you to adequately represent yourself.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. Consequently, it does not have possession of records generally, such as those in which you are interested.

Further, the Committee has never devised specific forms that are used for the purpose of making requests under the Freedom of Information Law. In brief, §89(3) of the Freedom of Information Law requires that a request be put in writing that "reasonably describes" the records sought. Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet on the subject that may be useful to you.

It is also noted that, in my view, the Freedom of Information Law may not be of significant help to you in presenting a defense in a criminal case. It is suggested that if you are indigent, as you have stated, you contact the Legal Aid Society or the Monroe County Public Defender's office. I would guess that one of those organizations might be able to provide you with legal assistance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2081

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

July 2, 1981

Mr. James Thomas
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Thomas:

I have received your recent letter in which you requested records from the Committee pertaining to yourself.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the New York 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 an agency to comply with the Freedom of Information Law. Consequently, I regret to inform you that this office cannot supply you with the records that you are seeking.

Further, assuming that the records in question, which deal with your tour of duty in the military, are in possession of the Air Force, it is suggested that you direct your request to the Department of the Air Force in Washington. Specifically, I believe that you may direct a request under the federal Freedom of Information Act to:

Major Gordon Finley (693-5750)
HQ USAF/JACL
1900 Half Street, S.W.
Washington, DC 20323

It is noted that the New York Freedom of Information Law applies only to records in possession of units of government in New York. Its counterpart, the federal Freedom of Information Act, is applicable to records in possession of federal agencies, such as the United States Air Force.

If you believe that the same records may be in possession of the New York State Office of the Advocate for the Disabled, it is suggested that you send a request directly to that office.

In making a request, it is recommended that you provide as much identifying detail as possible, such as the dates, your identification number, your social security number, which you have indicated, as well as any other information that may assist an agency in locating the records sought.

Lastly, a good source for tracking down information is the Federal Information Center. The Federal Information Center generally provides assistance for the purpose of resolving problems or locating records. It is suggested that you look under "United States Government" in your telephone book and call the nearest Federal Information Center in order to attempt to locate the appropriate office that maintains possession of the information that you are seeking.

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-2082

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
MARCELLA MAXWELL
HOWARD F. MILLER
BASIL A. PATERSON
IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 6, 1981

Mr. Randolph Jenkins
81-A-1656 (D2-32)
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jenkins:

I have received your inquiry of June 22.

According to your letter, you are attempting to locate the agency in possession of a "medical record of a person on public assistance." You wrote that you may need the information regarding a judicial proceeding.

The agency would likely have possession of the information in question is the New York State Department of Social Services. The address for the Department of Social Services is 40 North Pearl Street, Albany, New York 12243.

However, it is important to point out that, in all likelihood, the information in which you are interested is confidential. Specifically, §136 of the Social Services Law states in brief that any records that identify either an applicant for or a recipient of public assistance are confidential. As such, records pertaining to a recipient of public assistance could be withheld under the Freedom of Information Law, which states in part that an agency may withhold records that are specifically exempted from disclosure by state or federal statute [see attached Freedom of Information Law, §87 (2)(a)].

Further, even if an exemption from disclosure did not exist in the Social Services Law, it is likely that the information that you are seeking could be withheld under the Freedom of Information Law. Section 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. Moreover, §89(2)(b)(i) states that an unwarranted invasion of personal privacy includes the disclosure of medical histories.

Unless I am mistaken, the only way in which you could gain access to the materials in question from the Department of Social Services would involve the use of a subpoena.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2083

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

July 6, 1981

Ms. Henrietta Acampora
Town Clerk
Town of Brookhaven
Town Hall
Long Island, NY 11772

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Acampora:

As you are aware, I have received your letter of June 23 in which you requested an advisory opinion.

Specifically, a request for records relating to a matter currently in litigation between the Town of Brookhaven and a public utility were requested by Charles Adams, of the Pennysaver News. In response to the request by Mr. Adams, the Town Attorney wrote that the records sought could be withheld under §87(2)(a) of the Freedom of Information Law. Your question concerns the sufficiency of the denial.

Having discussed the matter with both yourself and Martin J. Kerins, the Town Attorney, it appears that the denial was appropriate. According to Mr. Kerins, numerous records have been made available to Mr. Adams, including pleadings and other records submitted to the court, as well as material prepared in the ordinary course of business in the development of the assessment. Based upon my conversation with Mr. Kerins, the records withheld consist of the work product of an attorney and material prepared for litigation, both of which may be withheld under §3101 of the Civil Practice Law and Rules.

In this regard, I direct your attention to §87 (2)(a) of the Freedom of Information Law, which states that an agency, such as the Town of Brookhaven, may withhold records that are "specifically exempted from disclosure by statute." Since an attorney's work product and material prepared for litigation are specifically exempted from disclosure under §3101 of the Civil Practice Law and Rules, it appears that the basis for withholding offered by the Town Attorney, §87(2)(a) of the Freedom of Information Law, is appropriate.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Martin J. Kerins

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2084

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

July 6, 1981

[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]:

As I advised you in a letter of June 26, a request for regulations cited by the Bureau of Vital Statistics in New York City was made prior to issuing an advisory opinion on your behalf. Having received the regulations in question, I would like to make the following observations.

In terms of background, you wrote that you were successful in obtaining an amendment to that portion of your husband's death certificate indicating the cause of death. However, when you attempted to view the amended death certificate, you were advised by the Board of Health that it was "private information". As such, you requested advice from this office regarding your rights of access to your husband's death certificate.

First, rights of access to vital records, such as birth and death records, are not governed by the Freedom of Information Law. As a general rule, rights of access to such records are governed by provisions of the Public Health Law. However, access to these records for the City of New York is determined by provisions of the New York City Charter and Administrative Code. In particular, §567-4.0(b) of the New York City Administrative Code, which deals with the Department of Health, states in relevant part that:

> "[A] transcript of a record of fetal death, or death, upon such forms as the department shall prescribe, shall be issued upon request unless it does not appear to be necessary or required for a proper purpose".

Unfortunately, there is no clear definition of the phrase "proper purpose". Consequently, the right to review death records in the custody of the Bureau of Vital Statistics is unclear.

Second, as noted previously, a representative of the Bureau of Vital Statistics informed me that your assumption that the reason for your husband's cause of death had been amended on the death certificate is correct. However, I was also advised that this information was "confidential" and therefore would not be released to anyone. Section 205.07 of the regulations promulgated by the Department of Health was cited as the basis for that advice. That regulation provides that:

> "[T]he confidential medical report of death shall not be subject to subpoena or to inspection by persons other than the Commissioner or authorized personnel of the Department, except in a criminal action or criminal proceeding, or for official purposes by a federal, state, county or municipal agency charged by law with the duty of detecting or prosecuting crime. The Board may, however, approve the inspection of such confidential medical reports for scientific purposes".

In my view, it appears that the Bureau of Vital Statistics may be denying you the capacity to review the amended death certificate due to an overly broad interpretation of the regulation quoted above. The Director of Vital Statistics indicated to me that when a medical examiner's report contains a cause of death, that information is confidential based upon §205.07. Nevertheless, I believe that there is a distinction between medical examination reports prepared by the medical examiner and death certificates that are routinely prepared.

Moreover, the Bureau of Vital Statistics had confirmed that your husband's death certificate is not a medical examiner's certificate. Consequently, I do not believe that the provision requiring confidentiality is applicable in this instance. In my opinion, when a death has occurred that is not the subject of a criminal investigation by a law enforcement agency, the "proper purpose" clause of §5.67-4.0(b) is applicable. In addition, it is difficult

to envision how a request made by yourself, the next of kin, could be considered anything but a request made for a proper purpose. Stated differently, as Mr. Von Werne's spouse, it is my opinion that §205.07 should not limit your inspection of the death certificate in order for you to verify the amended cause of death. Also, you indicated that you previously received a copy of your husband's original death certificate. If so, it would appear inconsistent to deny you the capacity to inspect the amended certificate.

In sum, it is my view that a request by a spouse for a death certificate, amended or otherwise, meets the "proper purpose" standard and that the provision requiring confidentiality of the medical examiner's records generally prepared in conjunction with a criminal investigation could not appropriately be cited as a basis for withholding 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive
Director

PPB:RJF:ss

cc: Irene Scanlon

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2085

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

July 7, 1981

Mr. Stephen W. Parker
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Parker:

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 wrote to the records access officer of the Greenhaven Correctional Facility to request certain information regarding a corrections officer employed at that facility. Specifically, you want to determine the job classification, job title, yearly salary and benefits of that employee. However, the access officer advised you that your request must be denied unless you are able to obtain written consent from the employee to whom the information pertains.

I would like to offer the following observations with respect to your inquiry.

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 thereof fall within one or more among eight grounds for denial appearing in §87(2)(a) through (h) of the Law.

From my perspective, there are two possible grounds 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 individual 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 employee favoritism. They are subject therefore to inspection." [Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In view of the specific direction given by §87(3) of the Freedom of Information Law as well as judicial interpretations of the privacy provisions of the Law, the subject of a record need not give consent to disclose with respect to the information that you are seeking.

Lastly, with regard to obtaining general information on employee benefits, it is suggested that you seek to review the collective bargaining agreement between the employee's union and the Department.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:JM
cc: Betty Reilly, Principal Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2086

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

July 8, 1981

Bill Gately
81-A-1370
Downstate Correctional Facility
P.O. Box 445
Red Schoolhouse Road
Fishkill, New York 12524

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gately:

I have received your letter of June 18 in which you requested advice concerning the Freedom of Information Law.

According to your letter, you are an inmate at Downstate Correctional Facility and have requested copies of your "personal and medical history" from both Downstate and State Board of Parole. You wrote further that you have received no reply from Downstate and that the Parole Board has sent only a summary report.

I would like to offer the following observations with respect to your request.

First, in terms of procedure, I have enclosed appropriate portions of the regulations adopted by the Department of Correctional Services concerning access to records by inmates. According to §5.20, your request should be directed initially to the facility superintendent or his designee. In the event that you are denied access, the denial should be in writing stating the reasons therefor. In addition, a denial may be appealed to the Counsel, Department of Correctional Services, Agency Building #2, State Office Building Campus, Albany, New York 12226.

Second, in all honesty, I have no idea of what the contents of a "personal history" might be. However, assuming that it is a factual summary of relevant aspects of your life, it should likely be made available to you.

With respect to medical history, I have engaged in several discussions regarding access to medical records by inmates with officials of the Department of Correctional Services. As a general rule, I believe that the Department provides access to medical information of a factual nature, such as laboratory tests, X-rays, and similar information. Medical records reflective of advice, such as a diagnostic opinion, are generally withheld. In my view, that policy is reflective of compliance with the Freedom of Information Law, for factual information contained within intra-agency materials must be made available, while such materials that consist of advice, recommendation, or opinion, for example, may justifiably be withheld [see Freedom of Information Law, §87(2)(g)].

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern its procedural implementation, and an explanatory pamphlet on the subject that 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2082

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

July 9, 1981

Mr. Lawrence Kates
Marshall, Kates & Rosen
P.O. Box 25991
Los Angeles, CA 90025

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kates:

I have received your letter of June 25 in which you requested an advisory opinion.

Specifically, you have requested from the Office of the State Comptroller "all documents including but not limited to financial analysis, brokerage commissions, mortgages, and mortgage notes for all loans made on real estate by the New York State Retirement System" for the years 1977 through 1980 inclusive.

It is noted that I have discussed your request with various officials of the Comptroller's office. I was informed that the number of documents that fall within the scope of your request is substantial. Further, the documents in question are currently under review in order to determine rights of access.

I would like to offer the following observations with respect to your inquiry.

First, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Office of the Comptroller, are available, except those records or portions thereof that fall within one or more among eight grounds for denial appearing in §87(2)(a) through (h) (see attached).

Second, as indicated by Marvin Nailor in his letter to you of June 17, §89(3) of the Freedom of Information Law requires that a request be reflective of records "reasonably described." Despite the breadth of your request, having discussed the matter with a representative of the Office of Counsel to the Comptroller, as you intimated, it appears that the records requested have been sufficiently described to permit a response. Moreover, although the standard in the Freedom of Information Law that a request reasonably describe records sought is not specific, it has been held judicially that if the agency can determine the nature of the records sought, an applicant has met his or her burden of reasonably describing the records [see e.g., Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

Third, in terms of rights of access, based upon the descriptions of the records, it appears that most, if not all of the records sought are available, for no ground for denial could appropriately be asserted. For instance, an agreement to loan money by the New York State Retirement System would in my view be reflective of a final determination that would be available under the Law, for none of the grounds for denial would be applicable.

With respect to related documents, it appears that, to the extent that they exist, they would also be available. In this regard, I direct your attention to §87(2)(g) of the Freedom of Information Law. The cited provision states that an agency may withhold records that:

> "are inter-agency and 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. 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. Under the circumstances, it would appear that records containing financial analyses and similar, related information would constitute "statistical or factual tabulations or data" that would be available. Other related documents consisting of inter-agency or intra-agency materials that contain advice, recommendation or similar matters might justifiably be withheld or deleted from records that are otherwise 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

Enc.

cc: Marvin Nailor
John Feeney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2088

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

July 9, 1981

Mr. Jack McAndrew
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McAndrew:

I have received your letter of June 24, as well as the enclosures attached to it.

You wrote that the nine pages of enclosures you attached to your correspondence were part of the minutes taken at a September 6, 1978 meeting of the Port Jervis School Board, but were subsequently removed. It appears that these minutes taken during an executive session of the meeting, as well as material you submitted to the Board, were removed from the public minutes and returned to you. Therefore, your concern is that no record exists that indicates or explains the removal of those records from the custody of the School Board, despite your unsuccessful efforts to return the documents to School District officials.

I would like to offer the following observations with regard to the situation.

There are no provisions in either the Freedom of Information Law or the Open Meetings Law which are relevant to the removal of minutes. However, I believe that another section of law might be applicable. Specifically, §65-b of the Public Officers Law (see attached) 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 you described, it is questionable whether the records in question could legally be "removed" from the custody of the School District without compliance with the requirements of §65-b of the Public Officers Law.

It is suggested that you request and review the Education Department's schedules for the retention and disposal of school district records. The schedules may be obtained from either the Education Department or the District. By reviewing the appropriate schedule, it may be possible to determine whether the documents in question were properly relinquished by the District.

I regret that I have been unable to be of greater assistance in this matter.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosure

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2089

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

July 9, 1981

Mr. Eduard Lefrak
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lefrak:

I have received your letter of June 24 in which you requested information regarding the use of the Freedom of Information Law.

Specifically, you wrote that you are interested in gaining access to records pertaining to you from the Nassau County Correctional Center, Police and Probation Departments, and the Nassau County Legal Aid Society.

I would like to offer the following observations and suggestions with respect to your inquiry.

First, the Freedom of Information Law is applicable to entities of government. Therefore, although each of the Nassau County offices that you cited are subject to the Freedom of Information Law, the Legal Aid Society, which is not an entity of government, would not be subject to the Freedom of Information Law.

Second, with respect to the means by which you can make requests, I have enclosed copies of the Freedom of Information Law, procedural regulations, and an explanatory pamphlet on the subject. The pamphlet may be particularly useful to you, for it contains sample letters of request and appeal.

It is noted that §1401.2 of the enclosed regulations requires that each agency, such as Nassau County, designate one or more records access officers who are responsible for dealing with requests made under the Freedom of Information Law. Consequently, it is suggested that you direct your requests to the "records access officers" of

the County offices that have possession of the records in which you are interested.

Third, §89(3) of the Law requires that an applicant "reasonably describe" the records that he or she is seeking. As such, although you need not request specific records, it is suggested that you provide as much detail as possible when making a request. For instance, if possible, you should provide dates, file designations, docket numbers and similar information that will enable a records access officer to locate the records sought.

Lastly, one of the agencies that you identified is the Nassau County Department of Probation. In this regard, although some of the Department's records may be accessible, it is important to point out that a presentence report or memorandum is confidential under §390.50 of the Criminal Procedure Law. However, a copy of a presentence report may be made available to a defendant or the defendant's attorney by the court in possession of a presentence report. Therefore, if you are interested in gaining access to a presentence report, it is suggested that you contact the court in possession of the report.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2090

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

July 10, 1981

Carlton Pugh
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pugh:

I have received your letter of July 9 in which you explained that you are having difficulty in gaining an opportunity to review past licensing exams for nurses. You explained that Mildred Schmidt of the State Board for Nursing has reviewed your requests "on at least four occasions" but has refused to permit you to review the exams.

In all honesty, I am not sure that I can provide significant assistance. However, I would like to offer the following comments with respect to rights of access to the exams in question.

First, the New York Freedom of Information Law is applicable to all records in possession of units of state and local government, including the State Education Department and the State Board for Nursing, which functions within the State Education Department.

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 appearing in §87(2)(a) through (h) of the Law.

Third, there is one ground for denial that might be asserted with respect to the records in which you are interested. Specifically, §87(2)(h) of the Freedom of Information 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".

Based upon the language quoted above, if an examination question has not been finally administered and will be given in the future, both the question and the answer may be withheld.

Therefore, to the extent that past nursing examinations contain questions that will be given in the future, both the questions and the answers may be withheld from public inspection. However, as noted previously, it is emphasized that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. Under the circumstances, it is possible that certain aspects of prior examinations might not be administered in the future. From my perspective, upon request, the State Board for Nursing should review the examinations in question in their entirety to determine which questions will indeed be administered in the future. To the extent that particular questions will be given again, the questions and answers may be withheld. Conversely, to the extent that questions appearing on prior examinations will not be given in the future, I believe that those questions are 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:ss

cc: Mildred Schmidt

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2091

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

July 10, 1981

Joseph J. Jarent
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jarent:

I have received your letter of June 28.

Having reviewed the regulations promulgated by the Committee under the Freedom of Information Law, you raised questions regarding the thirty day time limit for appealing a denial of access, and the time limit for initiating an Article 78 proceeding if an appeal is denied.

I would like to make the following comments regarding your questions.

First, you are correct in your assumption that an appeal of a denial of access should be timely brought in order to avoid jeopardizing the appeal procedure. However, if you are unable to appeal a denial of access within the thirty day period as indicated in §89(4) of the Freedom of Information Law and the Committee regulation §1401.7(d), you would not be prevented from beginning the procedure again by submitting a new request under the Freedom of Information Law.

Second, the statute of limitations applicable to an Article 78 proceeding is found in the Civil Practice Law and Rules §217, which states that such a proceeding must be initiated within four months of a final determination. Therefore, upon receipt of a determination in which an appeal has been denied, there is a four month period within which the Article 78 proceeding must be brought.

Thank you for attaching to your correspondence a copy of the June 10, 1981 Newsday editorial regarding amendments to the Freedom of Information Law. You may be interested to learn that the legislation was vetoed by the Governor on June 16.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2092

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

July 10, 1981

Mr. Sidney Weiss
Schwab, Goldberg, Price
& Dannay
1185 Avenue of the Americas
New York, New York 10036

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Weiss:

I have received your letter of June 26 in which you requested an advisory opinion.

Your inquiry concerns unsuccessful attempts to gain access to the real estate tax assessment rolls of Nassau County, which exist in computer tape format. You wrote that the same information that exists on computer tapes is available to the public in tax assessment roll books. Apparently, the County has opted to withhold the computer tapes due to the provisions of §574(5) of the Real Property Tax Law, which prohibits the disclosure of forms or reports of sales data relative to the transfer of real property.

In my opinion, which is based upon several statutes, as well as a recent judicial determination, the assessment rolls existing in computer tape format are accessible.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as Nassau County, 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, §86(4) of the Freedom of Information Law defines "record" to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, filed, 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, it is clear that any information "in any physical form whatsoever" including computer tapes or discs, constitutes a "record" subject to rights of access granted by the Law.

Third, in my view, the computer tape is available under §87(2)(g)(i) of the Freedom of Information Law. Section 87(2)(g) of the Law enables an agency to 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 information, instructions to staff that affect the public or final agency policy or determinations must be made available.

Under the circumstances, the assessment rolls could in my view be characterized as "intra-agency" materials. However, it appears that virtually all of the information contained within an assessment roll, whether it is found within the traditional assessment books or on computer tapes, consists of factual data that is available.

Fourth, §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."

In view of the provision quoted above, nothing in the Freedom of Information Law can be cited to limit or abridge rights of access granted by other provisions of law or by means of judicial determination. Moreover, §89(5) preserves rights of access granted by other provisions of law or by the courts.

In this regard, it has long been held that the contents of an assessment roll as well as materials used in the development of assessments are available to the public [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951) and Sanchez v. Papontas, 32 AD 2d 948 (1969)].

In addition, most recently, it was held that the information contained in traditional assessment roll books that was reproduced within computer tapes is also accessible. In Szikszay v. Buelow [436 NYS 2d 558 (1981)], it was found that:

> "[A]n assessment roll is a public record (Real Property Tax Law §156 subd. 2; General Municipal Law §51; County Law §208 subd. 4)...Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law §51; County Law §208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law §66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying..." (id. at 562, 563).

Moreover, although it was argued that disclosure of the contents of the assessment roll would constitute an unwarranted invasion of personal privacy under §87(2)(b)(iii) of the Freedom of Information Law, the court stated that:

> "[I]n view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'..."

Lastly, I do not believe that §574 of the Real Property Tax Law bars disclosure of information contained on assessment rolls. The cited provision states in subdivision (5) that:

> "[F]orms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

From my perspective, the assessment roll, whether in book or computer tape format, would not fall within the scope of the forms or reports envisioned by §574 of the Real Property Tax Law or §333 of the Real Property Law. It is also noted that issues involving the interpretation of §574 of the Real Property Tax Law have arisen on several occasions since its enactment. Having discussed the matter with various officials of the Division of Equalization and Assessment and units of local government, I believe that the direction provided by the cited provision is restricted to particular forms. For example, one official of local government sent to this office a copy of a form devised by the State Board of Equalization and Assessment and entitled as a "Real Property Transfer Report." I have enclosed for your review a copy of the form as it was sent to this office. Clearly, that form is distinguishable from an assessment roll. It is also noted that the determination in Szikszay, supra, was rendered after the effective date of subdivision (5) of §574 of the Real Property Tax Law.

In sum, from my perspective, the restrictions imposed by the Real Property Tax Law are applicable only to particular forms and reports and are not applicable to assessment rolls generally. Consequently, I do not believe that the cited provision of the Real Property Tax Law could constitute a valid basis for withholding as assessment roll that exists either in traditional book form or in computer tape format.

I hope that 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: The First Chief Deputy County Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2093

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

July 10, 1981

Mr. Robert J. Scarpa
80-A-2989
354 Hunter Street
Ossining, New York 10562

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scarpa:

I have recently received your letter and the enclosures attached to it.

You indicated in your letter that after several attempts to obtain information concerning yourself, you feel that you have been denied access to records by various state agencies due to your inability to pay for copies of records. You have requested advice regarding the assessment of fees for photocopies of the records sought under the Freedom of Information Law.

I would like to make the following observations with regard to your inquiry.

First, it is noted that the federal Freedom of Information Act, which is applicable to records in possession of federal agencies, contains a provision that authorizes a federal agency to waive the fees for search and copying at its discretion. However, there is no comparable provision in the New York Freedom of Information Law, which applies to records in possession of agencies of government in New York, such as the Department of Correctional Services.

Second, you may be unaware of the rules and regulations of the Department of Correctional Services regarding access to Department records. Enclosed is a copy of the relevant regulations for your review. Specifically, §5.20 of the Department's regulations indicates that an inmate should direct a request for inspection and copying of his records to the facility superintendent. In addition, §5.36, entitled "Fees", authorizes the custodian of a department record to use discretion to "waive all or any portion of the fees authorized by this section". Since the definition of custodian in §5.15 includes the superintendent or director

of a facility, you might consider resubmitting your requests to the superintendent of the facility where you are housed.

Also enclosed for your consideration are copies of the New York Freedom of Information Law and an explanatory pamphlet on the subject 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2094

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

July 13, 1981

Andrew D. Presberg
Goldberg & Goldberg
Attorneys and Counsellors at Law
G & G Building
66 North Village Avenue
P.O. Box 876
Rockville Centre, NY 11570

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Presberg:

As you are aware, I have received your letter of July 1 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, according to your letter, the Nassau County Rent Guidelines Board is currently conducting a series of meetings to determine the 1981-1982 rent guidelines and increases pursuant to the Emergency Tenant Protection Act of 1974. The decision of the Board will affect approximately 18,000 apartments in Nassau County. You also indicated that landlords in the County have requested sizeable increases and that the Board, in response to their requests, sent printed questionnaires and expense schedules to landlords and apartment owners in which various data was sought concerning costs, income, profits, expenses and similar related information. As of June 8, ninety-five questionnaires were returned, representing some thirty-two percent of the apartments subject to the Act.

Having requested the questionnaires in an attempt to verify the data submitted by the owners, the Chairman of the Rent Guidelines Board denied access to the questionnaires. Further, the Board voted to uphold the denial.

In addition, you wrote that the landlord representatives stated that disclosure of the questionnaires would constitute an invasion of privacy and a breach of confidentiality. You have contended that if indeed disclosure of the names of landlords would constitute an unwarranted invasion of

personal privacy, that the information must nonetheless be provided after having deleted identifying details. You also stated your belief that such deletions should be permitted only with respect to individual apartment owners and not corporate landlords.

I would like to offer the following observations with respect to your inquiry.

First, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Nassau County Rent Guidelines Board, 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 Law.

Second, you mentioned an assertion by the landlords' representatives that disclosure would represent a breach of confidentiality. Having viewed the questionnaire, which was delivered to this office this morning, I do not believe that disclosure of the documents after identifying details have been deleted, would constitute a "breach of confidentiality". In this regard, at the bottom of the first page, the following appears:

> "STATEMENT OF CONFIDENTIALITY - No information obtained under the authority of the ETPA shall be disclosed except to the extent required under Article 6 of the Public Officers Law in which event identifying details shall be deleted as provided for in such law".

The language quoted above does not in my opinion require non-disclosure, despite the use of the term "confidentiality". All that it states is that records shall be made available and withheld in accordance with Article 6 of the Public Officers Law, which is the Freedom of Information Law. As such, to the extent that the contents of the questionnaires are accessible under the Freedom of Information Law, they must in my view be made available. Moreover, in a situation in which a state agency distributed questionnaires to a number of school districts and in which the school districts completed the questionnaires only when a promise of confidentiality was given, it was held that such a promise conflicts with the Freedom of Information Law

[see e.g., Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. In that case, the questionnaires were found to be available, so long as no names of specific students would be disclosed, for disclosure of the students' identities would constitute a violation of federal law (see Family Educational Rights and Privacy Act, 20 USC §1232g). In this case, the so-called "Statement of Confidentiality" appears in reality to be a statement reflective of an intent to comply with the Freedom of Information Law. Further, even if a promise of confidentiality had been offered, it would likely have been 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.

Third, as intimated on the questionnaire, the only ground for denial that is apparently relevant 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 constitute "an unwarranted invasion of personal privacy". As noted earlier, it is emphasized that the Freedom of Information Law permits an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Based upon that language, it is clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. It is also clear that an agency in possession of records has the responsibility of reviewing records sought in their entirety to determine which portions, if any, might justifiably be withheld. Under the circumstances, to the extent that the disclosure of identifying details would constitute an unwarranted invasion of personal privacy, those identifying details may in my opinion be deleted, while the remainder of the records should be made available.

With respect to your contention that identifying details may be deleted only with respect to questionnaires submitted by individuals as opposed to corporate landlords, I am not sure that I would agree.

It appears that the deletion of identifying details involves an intent to preclude the disclosure of personal information, such as the incomes and personal telephone numbers of particular individuals. In some cases, the income information, for example, might represent the only income of a particular person or corporation. If that is so, certainly I believe that the identifying details could be deleted to protect privacy. By means of analogy, income tax return information submitted to the Internal Revenue Service or the New York State Department of Taxation and Finance must be kept confidential and cannot be disclosed under penalty of law [see e.g., Tax Law, §697(e)]. If, however, the figures presented in the questionnaire represent a small fraction of the income of a large corporation, for instance, it is in my view questionable whether identifying details could justifiably be deleted, for such figures would represent neither "personal" information, nor a total picture of the income of a corporation.

In sum, based upon the information that you have provided, I believe that the questionnaires submitted to the Nassau County Rent Guidelines Board in which you are interested are accessible, except to the extent that identifying details found within such questionnaires may be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Concurrently, it is advised that the remaining information that can be reviewed and used for the purpose of statistical analysis is in my opinion accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Nassau County Rent Guidelines Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2095

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

July 13, 1981

Lewis Novod
Schweiger, Novod & Meier
Attorneys and Counsellors
at Law
18 East 48 Street
New York, New York 10017

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Novod:

I have received your letter of July 9 in which you requested an opportunity to examine the files in possession of this office regarding particular individuals or firms who had been licensed as real estate brokers or sales people. The same request was directed to the Division of Licensing Services at the Department of State.

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 those in which you are interested. Further, the Committee does not have the authority to compel an agency to comply with the Freedom of Information Law. In short, this office does not maintain custody of the records that you are seeking.

In terms of procedure, §89(3) of the Freedom of Information Law provides that an applicant should "reasonably describe" the records in which he or she is interested in writing. Based upon your request, without familiarity with the scope of records that may pertain to the individuals and firms that you identified, I could not conjecture as to the sufficiency of your request directed to the Division of Licensing Services. It has been suggested that, if possible, names, dates, file designations or other types of identifying particulars should be given in order to assist agency officials in locating records sought.

Enclosed for your consideration is a copy of an explanatory pamphlet regarding the 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2096

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

July 13, 1981

Patrick E. Locke
80 A 1972
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Locke:

I have received your letter of June 29 in which you requested advice regarding the means by which you may obtain certain records.

Specifically, you wrote that you are interested in obtaining your presentence report, information submitted by law enforcement officers, presumably to a court, comments of the sentencing judge and prosecuting attorney and their recommendations regarding parole, and admissions or confessions "of the inmate".

First, with respect to rights of access to a presentence report, §390.50 of the Criminal Procedure Law states that presentence reports are available by a court to a defendant. In relevant part, the cited statute states:

> "2. Presentence report; disclosure; general principles. The presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, or the defendant himself, if he has no attorney, in which event the prosecutor shall also be permitted to examine the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not

> relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review".

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

Second, it is noted that the Freedom of Information Law excludes from its coverage the courts and court records. Nevertheless, as a general rule, most records in possession of a court clerk are available under §255 of the Judiciary Law. As such, it is suggested that you direct a request for the records in question to the clerk of the court that has custody of the records in which you are interested.

And third, to the extent that the records sought are in possession of law enforcement agencies, the Freedom of Information Law is applicable. In brief, the Freedom of Information Law states that all records of an agency, such as a police department or district attorney's office, 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.

Many of the exceptions are based upon potentially harmful effects of disclosure. For instance, records compiled for law enforcement purposes may be withheld under §87(2)(e) of the Law when 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.

To make a request under the Freedom of Information Law, it is suggested that you direct such a request to the "records access officer" of the agency that maintains custody of the records. The request should "reasonably describe" the records sought and it is suggested that you provide as much detail as possible, such as dates, file designations, docket numbers and similar information that will assist the records access officer in locating records.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet on the subject. The pamphlet contains sample letters of request and appeal that 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2097

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

July 14, 1981

Murray Steyer, Esq.
Steyer & Sirota
235 Main Street
White Plains, NY 10601

Dear Mr. Steyer:

I have received your letter of July 9 and appreciate your continued interest in compliance with the Freedom of Information Law.

As requested, enclosed are the two advisory opinions dealing with reprimands of public employees to which you made reference. It is noted that opinion number 580 might be outdated and therefore inaccurate due to the enactment of §50-a of the Civil Rights Law. The cited provision states in brief that personnel records of police officers that are used to evaluate performance toward continued employment or promotion are confidential. Nevertheless, based upon the decision rendered in Farrell v. Board of Trustees, which is cited in both opinions, I believe that, as a general rule, reprimands of public employees are available.

The later opinion is more expansive and in my view provides a greater overview of rights of access to the types of records in question.

I have also enclosed a copy of Blecher v. Board of Education, in which the court granted access to virtually all records requested regarding teachers, including evaluations. In all honesty, I tend to feel that the decision rendered in Blecher may be overbroad. From my perspective, if an evaluation is reflective of advice, suggestion, impression, recommendation or the like, it is likely deniable under §87(2)(g) of the Freedom of In-

formation Law concerning inter-agency and intra-agency materials. However, if an evaluation is essentially reflective of a final determination, I believe that it is available. For instance, in a situation in which an evaluation was not appealed and became final and in which a monetary performance award was based upon the evaluation, it was advised that the evaluation was essentially a final determination and, therefore, accessible under the Freedom of Information Law. I have enclosed an advisory opinion dealing with that question.

Based upon the foregoing, if an evaluation of a superintendent is advisory in nature, it would in my view likely be deniable. If, however, it constitutes a final determination or is reflective of what may amount to "instructions to staff that affect the public", it would in my opinion be available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2098
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 14, 1981

George Palmero, Jr.
81-A-1647 (2-C-16)
Downstate Correctional Facility
Red Schoolhouse Road
Fishkill, New York 12524

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Palmero:

I have received your letter of July 1 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you wrote to the Suffolk County Department of Probation and requested a copy of your probation report. However, the report was denied. You wrote further that "after some quick research", you believe that the report in question is not "exempt under the Freedom of Information Act (5 USC SEC 522)".

I would like to offer the following observations with respect to your inquiry.

First, the Act that you cited, the federal Freedom of Information Act (5 USC §552), is applicable only to records in possession of units of state and local government. Access to records in New York is governed by the provisions of the New York Freedom of Information Law, and other provisions of law dealing with particular types of records.

Under the circumstances, it appears that the report in which you are interested was properly denied. In this regard, I direct your attention to §390.50 of the Criminal Procedure Law concerning presentence reports. The cited provision states that such reports may be made available only by a court to a defendant.

In relevant part, the cited statute states:

> "2. Presentence report; disclosure; general principles. The presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, or the defendant himself, if he has no attorney, in which event the prosecutor shall also be permitted to examine the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review".

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2099

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

July 14, 1981

James Keefe
Secretary
Local 2562
Uniform Firefighters of Cohoes
10 Wilmer Avenue
Cohoes, New York 12047

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Keefe:

I have received your letter of July 1, 1981.

According to your letter, you have been unsuccessful in your attempts to obtain a "complete list of instructions" to civilian dispatchers issued by the City of Cohoes. Further, despite numerous requests for the records in question, you have apparently received no responses. Consequently, you have asked that this office "take appropriate steps to allow disclosure of this information".

I would like to offer the following observations regarding the situation that you have described.

First, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. It has no authority to compel an agency, such as the City of Cohoes, to comply with the Law. However, often advisory opinions rendered by the Committee are persuasive, and a copy of this opinion will be sent to the appropriate City official.

Second, 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 Law.

Third, it appears that two grounds for denial may be relevant to the situation you have described. However, neither could in my opinion be justifiably cited to withhold the records in question.

One such 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 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 policies or determinations must be made available. Under the circumstances, the instructions might properly be characterized as "intra-agency" materials. However, it would appear that they consist of factual information, instructions to staff that affect the public, or final agency policy, and, therefore, would be available, under §87(2)(g)(i), (ii) or (iii).

The other ground for denial of possible relevance 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..."

You have not indicated whether collective negotiations are ongoing or imminent. Nevertheless, as noted in the previous paragraph, it appears that the records have been or should have been available as soon as the instructions were adopted as policy. Consequently, even if collective negotiations are ongoing, it is difficult to envision how records that had been available would now be deniable.

Fourth, you indicated that at least three written requests have been made under the Freedom of Information Law, but that the City has not replied to any of the 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 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, as you are aware, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Sixth, it appears from your letter that the City of Cohoes has complied with the requirements of the Freedom of Information Law and the Committee's regulations by promulgating "Rules and Regulations for Public Access to Records of the City of Cohoes". Although I am not familiar with those specific rules and regulations, I would like to offer some general guidance. If I correctly understand the situation, the Public Safety Commissioner is normally the records access officer and the Mayor of Cohoes is the designated appeals officer. However, since the Mayor is acting as the Commissioner of Public Safety, it is possible that he may be serving in two capacities, as access officer and as appeals officer, for the purpose of implementing the Freedom of Information Law. In this regard, it is noted that §1401.7(b) of the Committee's regulations requires that an access officer and appeals officer be separate individuals. However, your right to appeal should not in my view be obstructed by the failure of an agency to appoint separate access and appeals officers.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee which govern the procedural aspects of the Law, and 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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Mayor - City of Cohoes

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2100

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 14, 1981

Mr. Jim Callaghan
Editor
Staten Island Register
2100 Clove Road
Staten Island, NY 10305

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Callaghan:

I have received your letter of July 1 and the correspondence attached to it.

In brief, your inquiry deals with a situation in which the Office of the Borough President of Staten Island has engaged in efforts to register the Borough's civic organizations. Apparently, the project is a joint effort of the Borough President and the Staten Island Advance. You wrote that the civic organizations responding to a survey will be identified in a booklet that will be made available to the public upon completion of the project. Prior to the publication of the booklet, you requested copies of the responses by the civic organizations that will be identified in the booklet. Although you were offered an opportunity to review their responses, you were denied the capacity to copy the records. You have asked whether if you are permitted to "personally review" the records, are you then entitled to copy them.

I would like to offer the following observations with respect to your question.

First, in the response to your request given by Bernard Gold, the Counsel/Records Access Officer for the Office of the Borough President, it was stated that "no public record exists; only raw material which is in the

process of being compiled to form a list of community organizations". From my perspective, as soon as an agency, such as the Office of the President of the Borough of Staten Island, has possession of records, the records are subject to rights of access granted by the Freedom of Information Law. The fact that the "raw data" has not been compiled in the form of a booklet does not in my view diminish rights of access.

In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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, the "raw data", i.e., the responses from community organizations, constitute "records" subject to the Law, for the definition includes any information "in any physical form whatsoever" held by an agency.

A second basis for withholding offered by Mr. Gold is §87(2)(g), which permits an agency to withhold "inter-agency and intra-agency materials" under certain circumstances. In my view, that basis for withholding cannot justifiably be cited to deny access to the records in question. Based upon the definition of "agency" appearing in §86(3) of the Freedom of Information Law, intra-agency materials consist of records transmitted between or among employees of a single agency. Inter-agency materials consist of records transmitted between or among officials of two or more agencies. Since the community organizations fall outside the scope of the definition of "agency", I do not believe that their responses to the Office of the Borough President could be considered inter-agency or intra-agency materials. Consequently, it appears that §87(2)(g) could not be cited as a basis for withholding.

Lastly, with respect to your capacity to copy the records, two points are offered. It is noted initially that 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)]. In addition, the introductory language of §87 (2) of the Freedom of Information Law states that each agency shall "make available for public inspection and copying" all records, except those falling within one or more of the ensuing grounds for denial. Further, §89(3) of the Freedom of Information 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..." In view of the foregoing, if a record is available for review, I believe that it is also available for copying.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bernard Gold
Anthony Gaeta

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2101

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

July 15, 1981

Mrs. Pearl Michaels
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Michaels:

I have received your letter of July 5.

You wrote that in my most recent correspondence with you, I claimed that I had not received a particular form to which you made reference. Specifically, you wrote that you had sent to this office a blank pupil participation sheet with your correspondence of December 30.

As I believe that I explained to you in previous correspondence, it appears that there was a misunderstanding regarding the correspondence that you sent. Although you did send with your correspondence of December 30 copies of a document known as the "Personnel Time Report for Reimbursable Programs", having discussed the matter with various individuals at the Board of Education, that report is not the same record as the document you have characterized as the "pupil participation sheet". As such, to the best of my knowledge, I have never received or had an opportunity to review a pupil participation sheet. If you would like to send a copy of a blank pupil participation sheet to me, I would be more than pleased to review it on your behalf.

It is reiterated, however, that federal law prohibits the disclosure of "education records" related to specific students without the consent of their parents (20 U.S.C. §1232g). As such, as I have indicated in the past, it is in my view doubtful that a pupil participation sheet is available in its entirety if it identifies a particular student or students.

In addition, in your latest letter, you wrote that "[A]nyone who receives public assistance can be listed by name including children." I respectfully disagree with your contention. Although persons who receive public assistance are provided with monies through tax levies, there are numerous provisions of law that require that such records be kept confidential. For example, §§136 and 372 of the Social Services Law state in brief that virtually any record that identifies a recipient of or an applicant for public assistance must remain 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2102

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

July 15, 1981

Mrs. Ben Markey
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Markey:

I have received your letter of July 3 in which you requested further clarification of the advisory opinion prepared at the request of Assemblyman Schimminger and Senator Floss.

Specifically, you question your inability to review our file transmitted to Albany by the Buffalo office of the Board for Professional Medical Conduct. Additionally, you expressed the belief that you should be allowed to review your own complaint that was submitted to the Buffalo office.

I would like to offer the following comments in response to your letter.

First, on your behalf, I have contacted Dr. Thaddeus Murawski of the Board for Professional Medical Conduct in Albany. He was extremely helpful and advised me that you would be able to review and have copies of any material which you personally submitted to the Buffalo office relative to your complaint, including the complaint itself. Further, he advised me that he would be happy to speak with you in order to verify that the material you submitted was forwarded to the Albany office. As such, the confidentiality of the investigative records of the Board for Professional Medical Conduct would be protected as required by law, while you would be able to confirm receipt of this material.

Second, I would like to clarify what may be a misunderstanding with respect to the role and function of the Committee on Public Access to Records. The Committee is responsible for advising with respect to the Freedom of Information Law. It does not have authority to compel an agency to comply with the Law, nor does the Committee have possession of records generally.

Third, I would like to emphasize that, as indicated in the June 30 letter to Assemblyman Schimminger and Senator Floss, the Freedom of Information Law is not applicable to the investigative records in this situation. Section 230 of the Public Health Law imposes a requirement of confidentiality regarding such records. That requirement removes the records from the scope of the Freedom of Information Law, for §87(2)(a) of the Law states that an agency may withhold records that are specifically exempted from disclosure by statute.

It is suggested that you contact Dr. Murawski at (518)474-8357 to make arrangements for the reviewing the information he has offered to provide.

I hope that 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: Senator Floss
Assemblyman Schimminger
Dr. Thaddeus Murawski

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2103

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

July 15, 1981

Mr. Carl B. Raymo
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Raymo:

I have received your letter of July 11 in which you appealed a denial of access to records by Bonnie Bettinger, Superintendent of Schools in Gouverneur.

Please be advised that the Committee on Public Access to Records is responsible only for advising with respect to the Freedom of Information Law. Although an agency, such as a school district, is required to transmit copies of appeals to the Committee under §89(4)(a) of the Freedom of Information Law, the Committee itself cannot render determinations following the submission of appeals. Similiarly, the Committee does not have possession of records generally, such as the record in which you are interested. Consequently, it does not have the capacity to either provide or deny access to records in generally, nor does it have capacity to compel an agency to comply with the Freedom of Information Law.

Your appeal concerns a request for a letter of recommendation concerning you transmitted by a former superintendent of schools to the Upstate Transport Consortium. In response to your request, Superintendent Bettinger denied access on the basis of §89(2)(b)(i) of the Freedom of Information Law. I agree with the Superintendent's determination.

Although the Freedom of Information Law provides broad rights of access, certain categories of records may be withheld based upon the grounds for denial appearing in

§87(2) of the Law. One such ground for denial is §87(2)(b), which states that an agency may withhold records when disclosure would "constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..." In turn, §89(2)(b)(i) states that an unwarranted invasion of personal privacy includes, but shall not be limited to:

> "...disclosure of employment, medical or credit histories or personal references of applicants for employment..."

Based upon the direction provided in the language quoted above, I believe that a letter of recommendation constituting a reference of an applicant for employment could justifiably be withheld.

Lastly, if you disagree with the Superintendent's determination, you have the capacity to initiate a judicial proceeding under Article 78 of the Civil Practice Law and Rules in which a challenge to the denial may be made.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Bonnie Bettinger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2104

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

July 16, 1981

Richard Hodza
Attorney at Law
Route 35
South Salem, NY 10590

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hodza:

I have received your letter of June 30.

You have requested assistance in obtaining a copy of a certificate of involuntary admission issued under §9.27 of the Mental Hygiene Law. As an attorney, you are representing [redacted] and have commenced a proceeding to "get the certificate quashed". Apparently, several officials of a state out-patient facility have advised you that you are not permitted to obtain a copy of the certificate in question.

I would like to offer the following observations with regard to your inquiry.

First, the Freedom of Information Law is based upon a presumption of access. All records of an agency, such as the Office of Mental Health, 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, §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...", is most relevant. In this regard, I direct your attention to §33.13 of the Mental Hygiene Law, entitled "Clinical records; confidentiality". That provision states in brief that records of the Office of Mental Health identifiable to patients are confidential, except under circumstances specified in the statute. Two exceptions to the general rule of confidentiality may be applicable to your inquiry. Specifically, §33.13(c)(1) and (3)

state respectively that such records shall not be released except "pursuant to an order of a court of record" or "to attorneys representing patients in proceedings in which the plaintiffs' involuntary hospitalization is at issue".

Based upon §33.13(c)(3), since you are an attorney representing a patient in a proceeding in which the patient's involuntary hospitalization is at issue, it appears that the certificate in question should be made available to you.

Third, on your behalf, I have contacted the Office of Counsel at the Office of Mental Health, which has been most cooperative in reviewing this matter and indicated that you have commenced a proceeding in this matter. Despite the direction given in the language quoted above, two grounds for withholding the certificates were offered by that office.

The first basis for denial involves defining the point at which an involuntary hospitalization "is at issue". The attorney with whom I spoke believes that the phrase does not necessarily indicate that access to the certificate should be made before the patient is involuntarily hospitalized. I disagree, for §33.13(c)(3) refers to situations in which involuntary hospitalization is "at issue". That consideration is in my view "at issue" here or else a proceeding would not have been initiated. The other basis for denial is that the matter may now be moot due to the fact that the time period during which the certificate is valid has expired.

Lastly, it is my view that, as an attorney representing a client, you should have the capacity to obtain the certificate in question under §33.13(c)(3). It is suggested that you consider making a Freedom of Information Law written request for a copy of the certificate to the records access officer of the Harlem Valley facility. If you are unsuccessful in obtaining a copy, the appeals officer is Paul Litwak, Counsel of the Office of Mental Health in Albany. However, given the position of the Counsel's Office for the Office of Mental Health, it may be necessary to attempt to obtain the records pursuant to a court order.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2105

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

July 16, 1981

Theresa D'Antonio
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. D'Antonio:

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 and the correspondence attached to it, in response to a request to review the date of an incident recorded on the Village of Piermont's police blotter, you were informed that the Village could charge you five dollars per hour for a search.

You have questioned whether the fee suggested to you is reasonable.

In my opinion, it is unlikely that the Village may assess a fee for searching.

Section 87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge fees for copying 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". There is nothing in the language quoted above which authorizes an agency subject to the Freedom of Information Law to assess a fee for searching for records. In addition, §1401.8 of the regulations promulgated by the Committee, which have the force and effect of law, state in relevant part that:

"[E]xcept when a different fee is otherwise prescribed by law:

(a) There shall be no fee charged for the following:

(1) Inspection of records;

(2) Search for records..."

Based upon the direction provided in both the Freedom of Information Law and the regulations, I do not believe that an agency can assess a fee for searching for records, unless such a fee has been established by some other provision of law.

In sum, unless there is a provision of law of which I am unaware that specifically authorizes the Village to charge a fee for searching for the records in question, no such fee may in my opinion be imposed.

I hope that 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: Raymond G. Icobelli

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2106

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

COMMITTEE MEMBERS
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MARIO M. CUOMO
JOHN C. EGAN
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MARCELLA MAXWELL
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 16, 1981

Boisfeuillet Jones, Jr.
Vice President and Counsel
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jones:

I have received your letter of July 6 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, according to your letter as well as various items of correspondence transmitted to the Committee by the New York State Insurance Department and Ronald Kessler, a reporter for the Washington Post, a request for various records was made on December 15, 1980. After you were informed that the request would be granted, the decision to disclose was reversed and the request was finally denied on appeal on June 19. You have requested an advisory opinion "in the hope of possibly avoiding litigation".

In brief, the information requested by Mr. Kessler involves minutes of meetings of boards of trustees or boards of directors, and the finance and investment subordinate standing committees of three mutual life insurance companies regulated by the State Insurance Department. Based upon a letter denying the appeal by Joseph A. Oster, Assistant General Counsel to the Insurance Department, five bases for withholding were given.

I would like to offer the following observations with respect to the situation.

First, since the initial request was made in December of 1980 and finally determined in June of 1981, it appears that an inordinate amount of time has transpired in determining rights of access.

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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Insurance Department, are available, except to the extent that one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law may appropriately be asserted. It is emphasized that the introductory language of §87(2) makes reference to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Consequently, it is in my view clear that the State Legislature envisioned situations in which a single

record might be both available and deniable in part. Moreover, based upon the language of §87(2), I believe that it is clear that an agency is obliged to review records sought in their entirety in order to determine the extent, if any, to which the records fall within the scope of the grounds for denial. As you have intimated, it appears that the Department has not made efforts to segregate accessible information from deniable information.

Third, I would like to review the five bases for withholding offered by Mr. Oster.

The first basis for withholding is the only reason presented which in my view may in any way be justifiable. Specifically, Mr. Oster cited §87(2)(d) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In this regard, you indicated that the request by Mr. Kessler was

> "...specifically tailored to those years when the investments approved by the finance committees already have been disclosed publicly pursuant to law in the annual statements of the companies".

It is possible that portions of records sought consist of trade secrets which if disclosed would cause substantial injury to the competitive position of a particular corporation. Nevertheless, it is my view that if the remaining portions have in substance been publicly disclosed by means of annual statements or similar documentation, the harmful effects of disclosure envisioned by §87(2)(d) may have all but disappeared or been diminished to the point that disclosure would not result in "substantial injury" to the competitive position of a particular insurance company.

It is also important to note that the burden of proof in a proceeding brought under the Freedom of Information Law rests on the agency. Unlike the majority of Article 78 proceedings in which the petitioner has the burden of proving that an agency acted unreasonably, an agency involved in the defense of a denial of access under the Freedom of Information Law must demonstrate that the records sought in fact fall within one or more of the grounds for denial appearing in §87(2). 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, the agency must prove that the harmful effects of disclosure envisioned by the cited ground 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); see also Doolan v. BOCES, 48 NY 2d 341 (1979)].

In view of the foregoing, once again, it is emphasized that the Department is in my view required to review the records sought in their entirety to determine which portions, if any, may justifiably be withheld under §87 (2)(d).

The second basis for withholding offered by Mr. Oster states that:

> "[W]here the Department has obligated itself, by correspondence and circular letters, in good faith, not to disclose documents or information which it receives, the Department should be able to honor such obligations".

In my opinion, an assertion or 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 AD 2d 586, 589 (1958); see also People v. Keating, 288 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.

In a related manner, I would like to point out that it appears that the so-called "governmental privilege" has been abolished in New York. There are several cases pertaining to the governmental privilege in which it was held that the privilege was applicable when a governmental agency could demonstrate to a court that disclosure of particular records would, on balance, result in detriment to the public interest. However, the Court of Appeals in Doolan v. BOCES, supra, stated 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 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 133) 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 do not believe that even a good faith promise of confidentiality made by the Insurance Department may be cited as a basis for withholding the records in question.

The third ground for denial offered by Mr. Oster involves an assertion that the records in question are not "records of government", for the records have little to do with the "process of governmental decision making". Mr. Oster wrote further that the "minutes do not pass from the control of the companies, and, therefore, did not become property subject to the free disposition of the Department" (emphasis supplied by Mr. Oster).

I respectfully disagree with Mr. Oster. In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 language quoted above, so long as the minutes in question constitute information "kept, held, filed, produced or reproduced by, with or for..." the Insurance Department, such information would in my view constitute "records" subject to rights of access granted by the Law.

The fourth ground for withholding offered by Mr. Oster is apparently based upon §§26-a and 29 of the Insurance Law, which involves examinations of books of account. In my view, neither of the two statutes is applicable. Section 26-a of the Insurance Law pertains to inspection of books of account of an insurer by the Superintendent of Insurance. Unless I am mistaken, the minutes requested by Mr. Kessler are separate and distinct from the books of account that are the subject of §26-a. Similarly, §29 of the Insurance Law involves an order made by the Superintendent of Insurance regarding examinations of "books, records, files, securities and other documents of such insurer". Again, it does not appear that the records requested are relevant to an examination conducted under §29 of the Insurance Law.

The last basis for withholding appears to be a general statement of policy concerning the protection of the interests of policy holders. In my view, although the policy goals expressed by Mr. Oster may be well intentioned, they are in my view largely irrelevant to the obligation to disclose or the capacity to withhold under the Freedom of Information Law.

In sum, I agree with your contention that a "wholesale" denial of access to the records sought by Mr. Kessler by the Insurance Department is not reflective of a proper review of the records sought as required by the Freedom of Information Law. As stated earlier, on several occasions, I believe that the Department is required to review the records sought in their entirety to determine the extent, if any, to which the records fall within the grounds for denial. To the extent that no ground for denial may appropriately be cited, the records must in my view be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Joseph Oster
Ronald Kessler

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2107

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

July 17, 1981

Robert M. Glaubman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Glaubman:

Your recent letter of July 2 addressed to Lieutenant Governor Cuomo has been forwarded to the Committee on Public Access to Records. The Committee, of which the Lieutenant Governor is a member, is responsible for advising with respect to the Freedom of Information Law.

According to your letter, you have directed a request for personnel records concerning yourself to the New York City Board of Education. In response to your request, you received an acknowledgment from Ruth Bernstein, Deputy Records Access Officer, who indicated that a response could be anticipated by September 9, 1981.

I have contacted Ms. Bernstein on your behalf, who informed me that she is familiar with your request. Having had numerous communications with the Board of Education, please be advised that the Board receives a great number of inquiries under the Freedom of Information Law and, in my view, attempts to respond to requests as expeditiously as possible. Ms. Bernstein emphasized that the date given to you for response represents the latest date on which a response may be given. As such, it is likely that you will receive a response prior to the date indicated to you.

Lastly, you requested that the Lieutenant Governor assist you in gaining access to the records in which you are interested. In this regard, it is emphasized that the Committee has the authority only to advise with respect to the Freedom of Information Law; it does not have the authority to grant or deny access to records or compel an agency, such as the Board of Education, to comply with the 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:ss

cc: Lieutenant Governor Cuomo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2108

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

July 20, 1981

Mr. Paul J. Baroncelli
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Baroncelli:

I have received your letter of July 9, as well as the materials attached to it, in which you requested an advisory opinion under the Freedom of Information Law.

As I understand the facts, you have been denied access to personnel records concerning yourself by the Tax Department on the ground that your personal history folder had been lost. Consequently, the Department denied access on the basis that it does not maintain the records sought. The second area of inquiry apparently concerns a request relative to personnel records of another employee of the Department of Taxation and Finance. That request was denied on the ground that the personnel records were protected by "privacy laws".

While I am not in complete agreement with the breadth of the basis for denial concerning the personnel records of another employee, under the circumstances, I am in general agreement with the responses offered by the Department of Taxation and Finance to your requests.

With respect to your first area of inquiry concerning your personnel folders, very simply, if the records do not exist, they cannot be made available.

In a related vein, you requested copies of receipts from the United Parcel Service that would provide evidence that your file was indeed lost. Having discussed the matter with a representative of the Department of Taxation and Finance, I was informed that the receipts are discarded soon after deliveries are made. As such, again, it appears that the receipts in which you are interested are no longer maintained by the Department. Therefore, there are no receipts to be made available.

Your second request concerns a request for a review of "personal history folder" concerning another employee. Included in the request were documents, memoranda, correspondence and letters of recommendation relating to the appointment of the other employee.

Although I disagree with the statement that all personnel records may be denied, it would appear that the denial in this instance may have been justified.

The applicable provision concerning privacy in the Freedom of Information Law is §87(2)(b), which states that an agency may withhold records the disclosure of which would result in "an unwarranted invasion of personal privacy." In this regard, based upon case law, it is clear that not all records concerning a public employee may be withheld based upon §87(2)(b). For instance, the Freedom of Information Law 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. While disclosure of the payroll record may result in an invasion of privacy, the invasion has been considered implicitly by the Legislature to constitute a permissible, rather than an unwarranted invasion of personal privacy. Further, records such as eligible lists, job descriptions and similar information that have a bearing upon the performance of one's official duties has often been found to be available.

Nevertheless, other materials regarding a public employee might justifiably be withheld. For example, one of the areas of your request pertains to letters of recommendation regarding an employee, Here I direct your attention to §89(2)(b) of the Freedom of Information Law, which lists five examples of unwarranted invasions of personal privacy. The first example, §89(2)(b)(i), states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

From my perspective, letters of recommendation and similar materials may be withheld based upon the language quoted above.

There is another ground for denial that may also be applicable. Section 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 noted 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Conversely, such materials consisting of advice, recommendation, impression, and the like, would fall within the scope of the exception to rights of access. As such, it would appear that much of the documentation relating to the appointment of the individual in question might justifiably be withheld under §87(2)(g), as well as §87(2)(b).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2109

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

July 21, 1981

Dan Cetrone
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cetrone:

I have received your most recent letter of July 13 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have directed inquiries under the Freedom of Information Law to both the Rockland County District Attorney and the County Consumer Protection Office, but both agencies have ignored your requests.

In all honesty, I am not sure that I can recommend any thing substantially different from the advice given in our earlier correspondence. However, I would like to offer the following observations.

First, an agency cannot in my view "ignore" a request, whether or not the records sought are accessible. 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Second, as a general rule, an agency need not create a record in response to a request. There are, however, three exceptions to that rule found in §87(3) of the Freedom of Information Law. The cited provision states in relevant part 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" [see §87(3)(c)].

In view of the foregoing, the Freedom of Information Law imposes an affirmative duty on an agency to create a so-called "subject matter list".

It is possible that the County may maintain a single, centralized subject matter list in which the categories of records held by all agencies within Rockland County government are identified. It is suggested that you inquire of the governing body of the County as to whether it maintains such a list regarding all agencies within its jurisdiction.

Third, as noted in my letter to you of June 23, an applicant for records is required to submit a request for records "reasonably described" [see §89(3)]. Based upon the correspondence with which I am familiar, it is unclear from my perspective whether the records that you requested from the offices in question have indeed been reasonably described. Once again, it is suggested that, when making a request, you provide as much detail as possible, including dates, subjects, file designations or any other information that may assist the agency in locating the records sought. It is also reiterated that among the duties of the designated records access officer or officers is the responsibility to assist an applicant in identifying records sought, if necessary.

Fourth, you have requested advice as well as citations of cases that might be related to your circumstances. However, I am not sure of the nature of your complaint or the records that you are seeking. Perhaps with a greater description of the controversy, I could provide more specific direction.

Fifth, you have asked for a sample of the language used in an order to show cause. In this regard, it is suggested that you go to a law library and locate what are known as "form" books. For example, in McKinney's forms, in the section dealing with Article 78 proceedings, it is likely that you could locate appropriate sample forms.

Lastly, you indicated that, while at the BCI, you were permitted to "look" at your file and take notes. You have asked whether you can insist that copies be provided to you. I direct your attention to §89(3) of the Freedom of Information Law, which states in part that an agency must provide copies of accessible records "[U]pon payment of or offer to pay" the requisite fees. Further, it has been held for nearly sixty years that the right to copy is concomitant with the right to inspect [see re Becker, 200 AD 178, 192 NYS 754 (1922)]. Therefore, assuming that records are accessible as of right under the Freedom of Information Law, I believe that an agency would be required to produce copies on request and upon payment of the appropriate fees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Office of the District Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2110

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

July 21, 1981

Theodore W. Roth, President
Missing Heirs International, Inc.
19 West 44th Street
New York, New York 10036

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Roth:

Thank you for your thoughtful letter of July 10.

Once again, your inquiry concerns your capacity to gain access to records concerning beneficiaries of deceased members of the New York City Retirement System who have not yet received money due them from the System. You have requested comments that I might have with respect to your most recent correspondence with Harold Herkommer, Director of the New York City Employees Retirement System.

Having reviewed my response to you of September 22, 1980, I do not believe that there is a great deal in terms of substance that I can add to that letter. Nevertheless, I would like to offer the following observations.

First, you have indicated that your attempt to gain access to the records in question has "moved at a snail's pace". In this regard, I would like to point out that the Freedom of Information Law contains 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 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Second, if, as in the past, the basis for withholding is founded upon an assertion that records sought are "confidential", I believe that a denial on that basis without more would be insufficient. From my perspective, records may be considered "confidential" under New York law only when a statute specifically precludes an agency from disclosing. In such cases, an agency may deny access pursuant to §87(2)(a) of the Freedom of Information Law. That provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". It is noted that there are several cases concerning assertions of confidentiality based upon the so-called "governmental privilege". In such cases, it was determined that an agency could withhold records if it could demonstrate that disclosure would, on balance, result in detriment to the public interest [see e.g., Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)]. Nevertheless,

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 Street 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, the Court of Appeals has provided new and specific direction regarding the relationship between the governmental privilege and the Freedom of Information Law, and appears to have effectively "overruled" the 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.

Lastly, it is emphasized that, unlike the majority of proceedings brought under Article 78 of the Civil Practice Law and Rules, the burden of proof in a proceeding brought under the Freedom of Information Law pursuant to Article 78 is on the agency [see Freedom of Information Law, §89(4)(b)]. Moreover, it has been held by the Court of Appeals that an agency cannot merely assert a ground for denial and prevail; on the contrary, the agency must demonstrate that the harmful effects of disclosure envisioned by the ground or grounds for denial that it has cited would indeed arise by means of disclosure [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979); Doolan, supra].

I hope that 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: Harold Herkommer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2111

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

July 21, 1981

Joseph T. Kodey
P.O. Box 274
1416 North Street
Endicott, NY 13760

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kodey:

Your letter addressed to the Department of State in which you made an appeal under the Freedom of Information Law has been forwarded to the Committee on Public Access to Records.

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 the capacity to render determinations on appeal, nor is it authorized to compel an agency to comply with the Freedom of Information Law. As a rule, following a denial by an agency, an appeal is directed to the head or governing body of the agency [see Freedom of Information Law, §89(4)(a)].

Further, as indicated from the correspondence attached to your letter, it is my view that the New York State Association of Counties is not an "agency" subject to the Freedom of Information Law. Section 86(3) of the Law defines "agency" to include:

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

Since the definition quoted above is applicable to entities of state and local government, and since the Association in question is not government, but rather a not-for-profit association, its records are not in my opinion subject to rights of access under the Freedom of Information Law.

In short, I do not believe there is any statute that you may cite under which a member of the public would have a right to gain access to the records in which you are interested in possession of the Association.

I have enclosed copies of the Freedom of Information Law and an advisory opinion written with respect to the Association of Counties for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Mark Kriss
Edwin Crawford

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2112

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

July 21, 1981

Daniel B. Curry
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Curry:

I have received your letter of July 2, 1981, in which you requested a review of a denial under the Freedom of Information Law.

According to your letter, the New York State Department of Civil Service has refused to disclose the names of two raters of a performance evaluation examination held for the position of Correction Sergeant No. 36435. The question, therefore, is whether the denial was appropriate.

I would like to offer the following observations in regard to the information you are seeking.

First, on your behalf, I have contacted the Office of Counsel of the Department of Civil Service, which forwarded to me a copy of a letter of July 14 addressed to you. In his letter, Mr. Harold Snyder advised you that an earlier denial of access to examination raters' names by the Department of Civil Service and the Department of Correctional Services was upheld in Matter of Gordon C. Melville v. The State of New York Department of Correctional Services and the State of New York Department of Civil Service (Supreme Court, Tompkins County, November 16, 1978).

In my view, the decision in Matter of Gordon C. Melville, supra, is not relevant to a request for examination raters' names under the Freedom of Information Law. That case was an Article 78 proceeding brought for the purpose of appealing a particular rating assigned to the petitioner under the Interim Selection Procedure for Correction Sergeants. The petitioner also requested review of a

motion in which a request for the names of his examination raters and members of the Appeal Review Board were refused. The court held that the petitioner had inappropriately sought further review of his testing and dismissed the petition without releasing the names of the raters.

There is no indication, however, that the names sought by Melville were requested under the Freedom of Information Law. Consequently, the denial of access in the Melville litigation should not in my view be equated to a request for similar information under the Freedom of Information Law. As a general rule, once a lawsuit is initiated, a party involved in the litigation may obtain evidence from the opposing party that is material or relevant to the litigation by means of a procedure known as discovery. In particular, §3101(a) of the Civil Practice Law and Rules authorizes full disclosure of any information that is "material and necessary". It is possible that the denial of Melville's motion to obtain the raters' names could have been based on a finding that the names were not "material and necessary" to the litigation. Under the Freedom of Information Law, however, there is no requirement that an applicant for records demonstrate that records are relevant or necessary. On the contrary, it has been held that accessible records should be made available, notwithstanding the status or interest of an applicant (see Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165).

Further, 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached). As such, it is my view that a denial may be justified only if it is based upon the ground for denial appearing in the Freedom of Information Law.

Another reason cited as supporting Civil Service's position to withhold is a distinction made between types of exams where raters are required. I have been advised that a so-called performance evaluation examination requires the review by the performance rater after the examinee has submitted the material on which he or she is rated. In this respect, the performance evaluation differs from certain oral examinations administered by the Department of

Civil Service where the raters are physically present and identifiable to the examinee. The Office of Counsel has cited that factor as another basis on which to deny the raters' names in cases where the examinees and raters never have any direct contact.

Additionally, it would appear to be inconsistent to deny access to raters' names for performance evaluation tests when the names of raters for oral examinations are available. To the best of my knowledge, prior to an oral examination, candidates and raters are generally introduced by name and, in addition, candidates are required to affirm that they have no relationship with the raters. In my view, if the raters' names are disclosed with respect to one type of exam, it would be inconsistent to withhold the same information with respect to a different type of exam, for the effect of disclosure in terms of privacy would not likely be different.

Lastly, based upon the information provided by Mr. Snyder, it appears that your time to appeal the first denial has expired, for an appeal must be made within thirty days after receipt of the denial. Therefore, it is suggested that you might want to submit another request in order to ensure your capacity to appeal an initial denial.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations regarding the procedural implementation of the Law, 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

cc: Harold Snyder

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2113

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

July 22, 1981

Ms. Judy Braiman-Lipson
Empire State Consumer
Association, Inc.
345 Clover Hills Drive
Rochester, NY 14618

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Braiman-Lipson:

I have received your letter of July 14 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, the Superintendent of the Brighton Central Schools denied access to a report prepared for the Board by an architectural firm. Although you stated that you are interested in a problem concerning asbestos in school buildings that is considered in the report, the report apparently deals with additional, unrelated matters. While the Superintendent granted access to portions of the report related to safety, it was contended in his determination to deny access that the remainder of the document could justifiably be withheld on the ground that it constitutes "pre-decisional advisory" material.

It is noted at the outset that I have spoken with Felice Harris, Records Access Officer for the District, in an effort to gain additional information regarding the report and to explain my points of view with respect to rights of access.

To the extent that I am aware of the contents of the report, it appears that it should be made available to you, even though it may be "pre-decisional" or advisory, and even if the members of the Board have not yet digested its contents.

My opinion is based upon the following observations.

First, during our conversation, Ms. Harris asked when a report, such as the one in which you are interested, becomes available to the public. In response, I cited §86(4) of the Freedom of Information Law, which defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 language quoted above, I believe that a record becomes subject to rights of access as soon as it is kept or held by the District. Further, even though the Board of Education has not determined its stance with respect to the report, it would in my opinion nonetheless constitute a "record" subject to rights of access.

Second, as indicated to Ms. Harris, 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, 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 (see attached).

Third, in some instances, I would agree that pre-decisional or advisory materials may justifiably be withheld under the Freedom of Information Law.

The ground for denial that is cited most often regarding the capacity to withhold such materials 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 noted 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Conversely, portions of such materials consisting of advice or recommendation, for example, may be withheld.

From my perspective, since the report in question was prepared by an architectural firm, it could not be considered as either inter-agency or intra-agency material. In my view, inter-agency material consists of records transmitted between or among two or more agencies. Intra-agency materials consist of records transmitted between or among officials of a single agency.

Since the definition of "agency" found in §86(3) of the Freedom of Information Law includes entities of state and local government, I do not believe that the architectural firm could be considered an "agency". Therefore, I do not believe that the report in question could be characterized as inter-agency or intra-agency material.

If indeed §87(2)(g) of the Freedom of Information Law could not be cited as a basis for withholding the report in question, it would appear that none of the remaining grounds for denial would be applicable. However, it is reemphasized that I am not familiar with the contents of the report, and it is possible that one or more grounds for denial might be applicable with respect to portions of the report. As such, it is my view that the District officials should likely review the report in its entirety to determine the extent, if any, to which its contents fall within the scope of one or more of the grounds for denial listed in §87(2) of the Freedom of Information Law.

As indicated to Ms. Harris, in good faith, a copy of this opinion 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

cc: Felice Harris
Dr. John Washburn, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2114

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

July 22, 1981

Frank L. Schneider, Ph.D.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Schneider:

I have received your letters of July 14 and 16.

In brief, you requested records from the Village of Sands Point and Nassau County Health Department relative to the addition of chemicals in your local water supply. Your letter of July 16 indicates that the Superintendent of the Water Department of the Village of Sands Point has furnished the information sought. However, Mr. Dawson, Deputy Commissioner for Administration of the County Health Department, has apparently not responded to your request.

According to your letter to Mr. Dawson, you requested:

> "[A]ll orders, directives, etc., issued to the Village of Sands Point or its Water Department or any employee thereof, requiring the Village or tis Water Department to treat the water supply with sodium hexametaphosphate or equivalent when this water supply did not contain an excess or inorganic contaminants as specified in New York State Sanitary Code 5-152."

I would like to offer the following observations with respect to the situation.

First, your requests to both the Village and the County were made, according to your letter, under the New York and federal Freedom of Information Acts. In this regard, please be advised that the federal Freedom of Information Act is applicable only to records in possession of federal agencies. The New York Freedom of Information Law is applicable to records of units of state or local government in New York. As such, the federal Freedom of Information Act would in my view be irrelevant to your request. Since, however, the Village and the County fall within the definition of "agency" appearing in §86(3) of the New York Freedom of Information Law, that statute is in my view applicable.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a village or a county, 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.

Third, it would appear that only one of the grounds for denial is relevant to the records in which you are interested. It is noted that the ground for denial in question in my opinion provides direction to the effect that the records in which you are interested should be available. Specifically, §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..."

I would like to stress that 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.

Under the circumstances, it would appear that orders or directives, for example, might be reflective of either factual information, instructions to staff that affect the public, or the policy or final determination of an agency, Nassau County. As such, I believe that the orders or directives in which you are interested are accessible under the Freedom of Information Law.

Fourth, it is important to point out that, as a general rule, an agency need not create records in response to requests. Consequently, if, for instance, there are no records consisting of orders or directives relating to the subject matter of your inquiry, the County would be under no obligation to create such records on your behalf.

And lastly, you wrote that as of July 16 you had not received a response to your request of July 7 directed to the County. 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 ot 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. Dawson.

I hope that 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: Martin Dawson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2115

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

July 22, 1981

Leonard J. Klaif, Esq.
Jay, Klaif & Morrison
1032 Ellicott Square
Buffalo, New York 14203

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Klaif:

I have received your letter of July 14 and the correspondence appended to it.

You have asked that the Committee "take whatever steps" it is "empowered to take" with regard to a request for records that has been denied by the New York State Police.

First, it is emphasized that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. As such, the Committee has no authority to render a determination of a binding nature or compel an agency to comply with the Law.

Second, your inquiry concerns a request for records of the State Police "which show that the Akwesasne Police of the St. Regis Mohawk Tribal Counsel is a duly constituted agency". Further, your request to the Superintendent of the Division of State Police makes reference to a letter indicating that the Akwesasne Police is an agency. That letter was sent by Charles LaBelle, Counsel to the Division of State Police, to Steven Tullberg of the Indian Law Resource Center. In response to your request, the records in question were denied under §87(2)(g) of the Freedom of Information Law.

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 noted that 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 policies or determinations must be made available. Conversely, inter-agency or intra-agency materials consisting of advice, recommendation, suggestion, or impression, for example, would in my opinion be deniable.

Lastly, I have discussed the matter with Charles LaBelle, who informed me that the records in question consist of inter-agency communications between the Division of State Police and various other law enforcement agencies. Without an opportunity or the capacity to review the materials in question, it is all but impossible to render specific advice regarding the propriety of the denial.

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: Charles LaBelle

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2116

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

July 23, 1981

John Devine
77A-4053
354 Hunter Street
Ossining, New York 10562

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Devine:

I have received your letter of July 15 in which you raised a series of questions regarding a request directed to the Division of Parole.

According to your letter, you transmitted requests to the records access officer of the Division on June 20 and July 9. However, no responses had been received as of the date of your letter to this office. In brief, you requested the parole file concerning yourself, the names and qualifications of members of the Board of Parole, reports of the Board for the years 1978-1980, and the rules of conduct adopted by the Board of Parole during the years 1978-1980.

I would like to offer the following observations regarding your inquiry.

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 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Second, with regard to your parole file, although §259-a of the Executive Law makes reference to records maintained by the Division of Parole, not all of the records pertaining to an inmate are in my opinion available. While records consisting of statement of the crime in which the inmate has been sentenced, the circumstances of the crime, the nature of the sentence, the court that rendered the sentence, and the name of the judge and district attorney would in my opinion be available, other aspects of the records might justifiably be withheld. For instance, a presentence report is generally available only from a court in accordance with §390.50 of the Criminal Procedure Law (see attached). As such, while I believe that some of the information in possession of the Division is likely available to you, other aspects of that information could likely be withheld.

Third, I believe that the other areas of your request concern records that are accessible under the Freedom of Information Law due to the direction provided in the Executive Law. For instance, as you indicated, §259-b(2) of the Executive Law specifies the qualifications of members of the Board of Parole. Since the qualifications are relevant to the performance of their official duties, it is my view that the names and qualifications would be available, for disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy.

With respect to reports of the Board of Parole, §259-c(13) requires that the Board of Parole "transmit a report of the work of the State Board of Parole from the preceding calendar year to the Governor and the Legislature annually". I believe that the annual reports would be available under both §87(2) of the Freedom of Information Law pertaining to agency records and §88(2) concerning records of the State Legislature.

Similarly, the rules of conduct would be reflective of the policy of an agency and, therefore, would in my view be available under §87(2)(g)(iii) of the Freedom of Information Law.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2117

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

July 23, 1981

Mr. Sidney Cymbalsky
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cymbalsky:

I have received your recent letter in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, you requested records reflective of the results of an investigation by Suffolk County. The event to which the investigation relates involved criminal mischief that allegedly occurred at the home of a neighbor on July 5, 1977. The County has denied your request on the ground that the information consists of records compiled for law enforcement purposes which if disclosed would interfere with a law enforcement investigation. Further, the County indicated that the investigation is "still active", and the records were withheld following your initial request to the Police Department and your appeal directed to the County Attorney.

I would like to offer the following observations with respect to your inquiry.

First, it is emphasized that the Freedom of Information Law states that, as a general rule, an agency need not create records in response to a request [see attached, Freedom of Information Law, §89(3)]. As a consequence, if, for example, there are no records relative to a so-called "investigation", the County would be under no obligation to create such records on your behalf.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records in possession of an agency, such as Suffolk County, 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.

Third, the majority of the grounds for denial are based upon potentially harmful effects of disclosure. From my perspective, in most instances, if disclosure of records would "hurt" somebody or hamper a governmental process, it is likely that the records would fall whole or in part in one or more of the grounds for denial. Conversely, if disclosure would not result in harm to an individual or a governmental process, it is likely that no ground for denial would be applicable. In my opinion, under the circumstances, the cited ground for denial, §87(2)(e), could not likely be justified.

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."

Unless the records of the investigation are more complex than they would appear to be in a case such as yours, it is my view doubtful that the harmful effects of disclosure described in §87(2)(e) would arise.

Further, as you indicated, the statute of limitations for the prosecution of a misdemeanor is two years. According to the field report prepared by the Police Department, the incident involved criminal mischief in the

fourth degree. Section 145.00 of the Penal Law states that criminal mischief in the fourth degree is a Class A misdemeanor. Section 30.10(2)(c) of the Criminal Procedure Law states that "[A] prosecution for a misdemeanor must be commenced within two years after the commission thereof". Since the event in question occurred in 1977, the two year limitation upon the capacity to prosecute has expired. Consequently, I cannot envision how disclosure would interfere with a criminal investigation or judicial proceedings or how the investigation could be considered active.

And fourth, since you have received a final determination on appeal rendered by the County Attorney, your only legal recourse would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. It is emphasized that in an Article 78 proceeding brought 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 the Law [see Freedom of Information Law, §89(4)(b)]. Moreover, 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 demonstrate that the records would if disclosed indeed result in the harmful effects of disclosure envisioned by 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)].

I hope that I have been 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: Frederic Foster

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

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

April 18, 1978

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

Dear Mr. King:

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

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

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

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

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: City of Long Beach

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2119

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

July 23, 1981

Mr. Kenneth H. Holcombe
Holcombe & Dame
Attorneys and Counsellors at Law
Medical Arts Building
62 Brinkerhoff Street
P.O. Box 600
Plattsburgh, New York 12901

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Holcombe:

I have received your letter of July 15 and thank you for your kind words.

You have requested assistance in obtaining copies of applications for licenses and license renewals from the Department of Motor Vehicles. Specifically, information in which you are interested regarding disabilities of applications for drivers' licenses and renewals was denied on the basis of §89 of the Freedom of Information Law. Additionally, upon denial, you were advised that the reason for withholding the information, which previously had been available to you, is that such records are now considered confidential.

I would like to offer the following observations with regard to the situation you have described.

First, §508 of the Vehicle and Traffic Law entitled "Administrative Procedures", indicates an intent to make available for public inspection a record of all licenses and applications when licenses are issued. Section 508(3) states that:

> "[T]he commissioner shall keep a record of every license issued which record shall be open to public inspection during reasonable business hours. Neither the commissioner nor his agent shall be required to allow the

> inspection of an application, or to furnish a copy thereof, or information therefrom, until a license has been issued thereon".

Based upon the direction provided in the language quoted above, I believe that the license and renewal applications are available, so long as such records pertain to licenses that have been issued.

Second, it is noted in this regard that the Freedom of Information Law preserves rights of access to records granted by means of other provisions of law or judicial determination. Specifically, §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 rights of access at law or in equity of any party to records".

In view of the provision quoted above, I do not believe that any of the grounds for denial appearing in §87(2) of the Freedom of Information Law could be cited to withhold records or portions thereof that are required to be available for public inspection and copying under the Vehicle and Traffic Law.

Having contacted the Department of Motor Vehicles on your behalf, a representative of the Legal Bureau indicated that the information you are seeking is considered confidential as a matter of policy. In my view, a claim of confidentiality can be invoked only where a statute specifically precludes an agency from disclosing records [see Freedom of Information Law, §87(2)(a)]. As such, to the extent that a "policy" of confidentiality conflicts with the direction provided by the Freedom of Information Law or any other applicable statute, it would in my view be invalid.

Lastly, it is assumed that the reference to §89 of the Freedom of Information Law, which was offered as the basis for withholding by the Department, concerns the provisions pertaining to unwarranted invasions of personal privacy found in §89(2). From my perspective, it appears that the provision of the Vehicle and Traffic Law cited earlier is based implicitly upon a finding that disclosure of approved applications and licenses would constitute a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Joyce Wrenn

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2120

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

July 23, 1981

Mr. Michael J. Gabel
81-D-93
Clinton Correctional Facility
Box B
Dannemora, New York 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gabel:

I have received your letter of July 17 in which you requested assistance from this office.

You have asked for a reason from this office for a denial by the property clerk in the facility in which you are housed with respect to legal forms, a personal and legal address, envelopes, and personal effects. You also indicated that legal mail directed to you by an attorney was prevented from reaching you.

I would like to offer the following observations with respect to the situation that you have described.

First, it is emphasized that the responsibility of this office involves providing advice with respect to the Freedom of Information and Open Meetings Laws. This office has no expertise with respect to rules and regulations applicable within correctional facilities. As such, much of your inquiry has no connection with the duties of this office.

Second, to the extent that you believe that you have been denied access to records pertaining to you, it is suggested that you review applicable portions of the regulations adopted by the Department of Correctional Services. I have enclosed those regulations for your consideration.

And third, if you continue to have problems within the facility, it is suggested that you seek the aid of Prisoners' Legal Services or a similar organization whose funtion is to provide legal assistance to inmates.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2121

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

July 24, 1981

Mr. Frank Cappelluzzo
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cappelluzzo:

I have received your letter of July 27 in which you explained that, despite several attempts, you have been unsuccessful in obtaining the minutes of your Workers' Compensation case.

Having reviewed my letter addressed to you dated May 8, in all honesty, I doubt that I can suggest anything more than I advised in May.

As indicated in my earlier correspondence with you, an agency must respond to requests within the time limits prescribed under the Freedom of Information Law and the regulations promulgated by the Committee. Further, if you have not appealed a denial based upon a failure to respond within the appropriate time limits, it is suggested that you do so. It is noted in this regard that with my response to you, a copy of an explanatory pamphlet was sent to you. The pamphlet contains a sample letter of appeal. In the event that you transmit an appeal to the Workers' Compensation Board and no response is given within the statutory time limit of seven business days from its receipt, it would appear that you could initiate a proceeding under Article 78 of the Civil Practice Law and Rules to attempt to obtain the records in which you are interested.

The only other suggestion that I would offer is that you telephone the Workers' Compensation Board and attempt to resolve the matter by means of an oral reminder of your request. Once again, it is suggested that you attempt to contact Ms. Diana Farrell of the Workers' Compensation Board at Two World Trade Center in New York City.

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: Diana Farrell

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2122

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

July 24, 1981

Ms. Irene A. Scanlon, Director
Bureau of Vital Records
The City of New York
Department of Health
125 Worth Street
New York, New York 10013

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Scanlon:

I have received your letter of July 17 regarding an advisory opinion of July 6, 1981 rendered by this office at the request of [redacted] Your comments seek to clarify three points that may be unclear with respect to the inspection of death certificates held by the New York City Bureau of Vital Records.

I would like to offer the following observations in regard to the concerns you have raised.

First, with regard to the medical examiner's certificate, please note that in my letter of July 6 on page two, the last paragraph confirms that a medical examiner's certificate was not the type of certificate sought for review by [redacted] The opinion dealt with a request to inspect a death certificate.

Second, you have offered to furnish [redacted] with a copy of the "legal portion of the certificate", which does not indicate the cause of death. However, she wrote that her objective is to verify that the cause of death originally listed on her husband's death certificate has indeed been amended as she has been advised verbally. Her interest is in viewing what you have termed "confidential medical portions of a certificate."

Third, it is apparently your position that"§205.07 of the New York City Health Code which prohibits inspection of the confidential medical portion of a certificate is not open to interpretation". In my view, a claim of confidentiality can be invoked only where a statute specifically exempts records from disclosure [see Freedom of Information Law, §87(2)(a)]. As such, to the extent that a municipal health code which imposes confidentiality conflicts with the direction provided by the Freedom of Information Law or any other applicable statute, it would in my view be invalid. Further, although the language of the code might not be "open to interpretation", its validity is in my view questionable, for an agency cannot unilaterally establish rules of confidentiality without a statutory basis for so doing.

Lastly, I would like to reemphasize my contention regarding the scope of §205.07 of the Health Code. It is my belief that both the "legal portion" and the "confidential medical portion" of a death certificate other than a medical examiner's certificate should be available under the "proper purpose" clause of §5.67-4.0(b) of the New York City Administrative Code. Based upon the "proper purpose" standard appearing in the cited provision, I believe that requests for review of death certificates must of necessity be made on a case by case basis. Further, if one were to agree with the interpretation that you have offered, any request would be reflective of an "improper" purpose. From my perspective, if the "proper purpose" standard is to be meaningful, there must be situations in which a request would indeed be considered "proper".

Thank you for your comments in regard to this matter. If I can be of assistance to you, please feel free to call.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

RJF:ppb:jm

cc: [redacted]

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2123

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

July 24, 1981

Mr. Gerald A. Scotti
Mohawk Valley Community College
Professional Association
1101 Sherman Drive
Utica, New York 13501

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scotti:

I have received your letter of July 17 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you requested and were denied access to:

> "[T]he monthly billings to Mohawk Valley Community College by Mr. Robert Gray pursuant to Mr. Gray's contract with the College dated 10 December 80".

Although the contract between the Community College and Mr. Gray was made available to you, the records reflective of the monthly billings were denied by the President of the College, George H. Robertson, due to the "current state of negotiations".

In my opinion, to the extent that the records in which you are interested exist, they are available under the Freedom of Information Law.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a community college, 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 Law.

In my view, although three of the grounds for denial might be relevant, none could justifiably be cited to withhold the records in question.

One of the grounds 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 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 policy or determinations must be made available. Under the circumstances, if the records in question could be considered inter or intra-agency materials, I believe that they would be available, for they would constitute "statistical or factual tabulations or data".

A second ground for denial 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 my opinion, §87(2)(b) could not justifiably be cited as a basis for withholding, for the contract between Mr. Gray and the Community College has all ready been made available. Further, based upon case law, it is clear that records of expenditures by a public corporation, such as a county, are available, even though the expenses may be paid to a private contractor or consultant.

The third potentially relevant ground for denial 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..."

From my perspective, the key word in the language quoted above is "impair". Once again, since the contract, including its terms and conditions, have already been disclosed, it is difficult to envision how disclosure of monthly billings relating to the contract without more could possibly "impair" present or imminent contract awards or collective bargaining negotiations.

Finally, it is noted that the Freedom of Information Law preserves rights of access granted by other provisions of law or by means of judicial determinations. Specifically, §89(5) states that:

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

In view of the language quoted above, it is clear that if records are available under some other provision of law, nothing in the Freedom of Information Law may be cited to limit or abridge those rights of access.

In this regard, §51 of the General Municipal Law states in relevant part that:

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

Further, it has been held judicially that, since a community college operates within a county government, a community college is subject to §51 of the General Municipal Law [see Cline v. Schenectady Community College, 351 NYS 2d 81 (1973)]. As such, I believe that books of account, as well as bills, vouchers or checks in possession of the Mohawk Valley Community College are available under §51 of the General Municipal Law.

Finally, you inferred in your letter and stated directly in a recent telephone conversation that the administration of the Community College does not comply with the Freedom of Information Law unless and until an advisory opinion is rendered by this office. It is my hope that the advisory opinions rendered by this office regarding the Community College are studied, for they are in my view essentially of educational value. I would hope, further, that as educators, the administrators learn the parameters of the Freedom of Information Law and their responsibilities thereunder. From my perspective, disclosures made in compliance with the Freedom of Information Law are in the best interests of all parties concerned. Further, familiarity with the Law in my opinion results in the avoidance of unnecessary disputes and controversies such as those in which you have been 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:jm

cc: George H. Robertson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2124

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

July 24, 1981

John Devine
77A-4053
354 Hunter Street
Ossining, NY 10562

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Devine:

I have received your letter of July 21, in which you requested an advisory opinion under the Freedom of Information Law.

Your question concerns a failure to respond to a request by an agency and the process by which an applicant may appeal a constructive denial of access to 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 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 may be appealed 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 direction provided by §89(4)(a) of the Freedom of Information Law, it is suggested that appeals be sent to the head or governing body of an agency. If a specific name is unknown, an appeal addressed to the head or governing body by title would in my view be sufficient.

I would also like to point out that it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that 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-2125

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

July 24, 1981

Roger Macon
78-A-3200
Drawer B
Stormville, NY 12582

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Macon:

I have received your letter of July 20 in which you requested assistance in gaining access to records under the Freedom of Information Law.

Specifically, you wrote that, having been convicted in a criminal proceeding, there is certain material that you need in order to appeal.

In this regard, although some of the records in question that you are seeking might be available under the Freedom of Information Law, I have enclosed a copy of a recent judicial determination in which it was held that a petitioner seeking to appeal should not use the Freedom of Information Law as a vehicle for gaining records, but rather Article 240 of the Criminal Procedure Law. Article 240 of the Criminal Procedure Law establishes the procedures for criminal discovery with respect to DD5's, UF61's, and similar investigatory materials that you are seeking.

It is suggested that you study the provisions of Article 240 of the Criminal Procedure Law and seek to use those provisions as a means of obtaining the records in question.

It is also suggested that you might want to contact an organization such as Prisoners' Legal Services in order to assist you in your 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:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2126

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

July 24, 1981

Mr. James Thomas
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Thomas:

I have received your recent letter in which you requested copies of various materials, including medical, criminal and military records.

It is noted at the outset that the Committee on Public Access to Records is responsible for advising with respect to the New York Freedom of Information Law. Consequently, this office does not have possession of records generally, such as those in which you are interested, nor does it have the authority to compel an agency to comply with the Freedom of Information Law.

Nevertheless, I would like to offer the following suggestions regarding the records sought.

First, it is noted that the New York Freedom of Information Law is applicable to records in possession of units of state and local government in New York. Further, the Law is based upon a presumption of access. Stated differently, all records of an agency subject to the Law are available, except to the extent that records fall within one or more grounds for denial listed in §87(2)(a) through (h) (see attached).

Consequently, if, for example, the medical records that you are seeking are in possession of a private hospital or physician, the Freedom of Information Law would not apply.

It is also noted that there is a federal Freedom of Information Act that applies to records in possession of federal agencies. In this regard, since you are interested in obtaining military records, it is suggested that you direct your request to the federal agency, such as the Department of the Army, for instance, that would have possession of the records in question. To locate the records, it is suggested that you contact the nearest federal Freedom of Information Center. Federal information centers are listed in your telephone book under United States Government. By calling a federal information center, you should be able to track down the location where your military records are kept.

With respect to medical records, even though such records might not be subject to the Freedom of Information Law, there may be an indirect way in which you may obtain the records. Section 17 of the Public Health Law states in brief that at the request of a patient, a physician designated by a patient may request and obtain medical records pertaining to you from a hospital or another physician. Consequently, it is suggested that you contact the physician of your choice, who may request that medical records be furnished to him on your behalf.

Lastly, with respect to criminal history records, you may obtain a copy of your criminal record by writing to:

The Division of Criminal Justice Services
Identification Services
Executive Park Towers
Stuyvesant Plaza
Albany, NY 12203

In addition, if you were involved in a criminal proceeding, perhaps the best way in which you can obtain records of the proceeding would involve making a request to the clerk of the court in which the proceeding was conducted.

I hope that 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
Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2127

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

July 24, 1981

Rev. Robert Walker
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Reverend Walker:

Your letter of July 17 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.

According to your letter, you unsuccessfully requested records from the New York City Department of Correction regarding its Associate Chaplian Program at the Brooklyn House of Retention. You indicated that you requested:

> "[H]andwriting, typewriting, printing, phototaking, photographs and even means of recording, including letters, words, pictures sounds, symbols or combination thereof and all papers, maps magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents".

I would like to offer the following observations with respect to your inquiry.

First, it is emphasized that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". In view of the breadth of your request, it appears that you are interested in obtaining virtually all records regarding the program in question. As such, it would appear that you have not requested records "reasonably described". It is suggested that in making a request, you provide as much identifying information as possible, such as names, dates, file designations, subject headings and any other information that may assist the agency in locating the information sought.

Second, it is suggested that you renew your request and transmit it to the "records access officer" of the Department of Correction. I believe that you should send your request to Director of Public Affairs, Department of Correction, 100 Centre Street, New York NY 10013. The records access officer has five business days from the receipt of the request to provide a response by granting access, deny access to records in writing, or in the event that more than five business days are needed to locate or evaluate records sought, the receipt of the request may be acknowledged in writing.

It is also noted that an agency may assess fees for copying records. Further, since §89(3) of the Freedom of Information Law states that copies of accessible records must be made "[U]pon payment of, or offer to pay" the requisite fees, an agency may in my view require the payment of fees before making copies of records.

Lastly, 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2128

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

August 10, 1981

Mr. David E. Dudenhoefer
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dudenhoefer:

I have received your letter of July 21 and apologize for the delay in response.

According to your letter, you have requested information from the New York State Insurance Department on three occasions. However, in your correspondence you indicated that you had not received any response to your inquiries. As such, you have requested advice regarding your right to the information under the Freedom of Information Law.

I would like to offer the following observations in regard to your inquiry.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, §87 (2) of the Law states that all records of an agency, such as the Insurance Department, 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 appears that you believe that the information in which you are interested exists in the form of a regulation. In my view, none of the grounds for denial could be cited as a basis for withholding regulations promulgated by an agency.

Second, as a general rule, an agency need not create a record in response to a request [see Freedom of Information Law, §89(3)]. As such, if the information sought does not exist in the form of a record, i.e., a regulation, there is no requirement under the Freedom of Information Law that the Insurance Department prepare such a record on your behalf.

Third, the New York Code of Rules and Regulations in 11 NYCRR 2.1 requires that the Insurance Department promulgate regulations in accordance with the Insurance Law. Specifically, §2.3, entitled "Recording and indexing" requires that:

> "[A]ll regulations shall be signed by the superintendent in duplicate and the duplicate originals shall be kept in two loose-leaf books of which one shall be kept in the offices of the Insurance Department in Albany and in the city of New York. These copies are not to be taken from the Insurance Department except under order of court. It shall be the duty of the department counsel, or of a deputy superintendent designated for that purpose, to see that all regulations are consecutively numbered, properly recorded and indexed by reference to subject matter and to the section or sections of the Insurance Law. The regulations and index shall be open to public inspection."

And lastly, I have contacted the Insurance Department on your behalf. A representative of the Counsel's Office has advised me that there is no statute or regulation which either specifically requires or prohibits the type of insurance coverage in which you are interested. Consequently, it appears that the regulation you are seeking does not exist. If you remain interested in reviewing the regulations of the Department, it is suggested that you request the subject matter index as indicated in §2.3 quoted above from the following address:

Consumer Services
New York State Department of Insurance
Two World Trade Center
New York, New York 10047

Also, enclosed for your consideration are copies of the regulations promulgated by the Committee, which govern the procedural implementation of the Law, 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
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2129

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

August 10, 1981

Mr. Vincent Joseph Zarrelli

[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zarrelli:

I have received your letter of July 30, in which you requested various records from this office under the Freedom of Information Law.

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, such as those in which you are interested. Further, the Committee does not have the authority to compel an agency to comply with the Freedom of Information Law. In short, the Committee neither has possession of nor the capacity to gain access on your behalf to the records that you are seeking.

It is suggested that requests for records be directed to the agencies that would likely have possession of such records. Further, it is important to point out that §89 (3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records in which he or she is interested. Consequently, when a request is transmitted to the designated records access officer of an agency, as much information as possible should be included, such as dates, file designations, index numbers and similar information that will assist agency officials in locating the requested records.

Lastly, you also made reference to records that may be in possession of agencies in the State of New Jersey. In this regard, please note that the New York Freedom of Information Law is applicable only to units of government in New York. Although New Jersey has enacted a statute regarding access to records, I regret that I am unfamiliar with it.

Enclosed for your consideration are copies of the New York Freedom of Information 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2130

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

August 10, 1981

Michael Bootke
80-A-4586
A-1-11
Box 51
Comstock, NY 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bootke:

As you are aware, I have received your letter of July 26. Please accept my apologies for the delay in response.

You have requested from this office a "master index" as well as records pertaining to you.

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 or control of records generally, such as those in which you are interested. Further, the Committee does not have the authority to compel an agency to comply with the Freedom of Information Law. In short, the Committee neither has possession of nor the capacity to gain access on your behalf to the records that you are seeking.

Further, it is noted that you cited the provisions of the federal Freedom of Information Act, which appears in 5 USC §552. The federal Act is applicable to records in possession of federal agencies. To request records from an agency of government in New York, it would be appropriate to cite the New York Freedom of Information Law, which is found in Article 6 of the Public Officers Law, §§84-90 (see attached).

Nevertheless, I would like to offer the following suggestions.

The Department of Correctional Services has promulgated regulations concerning access to Department records. In this regard, I have enclosed a page from the regulations containing §5.20 entitled "Examination of inmate record by subject or his attorney". According to the regulations, "[A] present inmate shall direct his request to the facility superintendent or his designee".

Further, in the event that the superintendent or his designee denies access to the records, you may appeal the denial to Counsel to the Department of Correctional Services.

In view of the foregoing, it is recommended that you submit a new request to the superintendent at the Downstate Correctional Facility.

I hope that 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-2131

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

August 10, 1981

Ahmad Abd'al Muntaqim
P.O. Box 51, 77C638
Comstock, NY 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Muntaqim:

As you are aware, I have received your letter of July 23. Please accept my apologies for the delay in response.

You have indicated that there is "certain information" that you would like to receive, but that you would first appreciate having a list of information that is accessible to you under the Freedom of Information Law.

First, there is no "list" indicating the specific records or types of records that are available under the Freedom of Information Law. On the contrary, the structure of the Law is based upon the presumption that records are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in the Law [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Second, as a rule, the exceptions are based upon potentially harmful 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 and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures".

If, for example, a request is made for records compiled for law enforcement purposes while an investigation is being conducted, it is possible that premature disclosure would "interfere" with the investigation. In such a case, the records could justifiably be withheld. However, if an investigation has been terminated, it is possible that disclosure would no longer interfere with an investigation. As such, even though records might justifiably be withheld today, the same records might become accessible in the future.

In view of the structure of the Law, again, it is all but impossible to create a list of records that must be made available. It is suggested that you review the grounds for denial appearing in the Freedom of Information Law in order to familiarize yourself with the Law.

Enclosed for your consideration is a copy of an explanatory pamphlet that 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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2132

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

August 11, 1981

Ms. Linda Lipton
Attorney at Law
Better Government Association
230 N. Michigan Avenue, Suite 1710
Chicago, Illinois 60601

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Lipton:

I have received your letter of August 6 and appreciate your interest in the Committee on Public Access to Records. In addition, I found the materials that you forwarded interesting and informative.

You have raised a number of questions regarding the history of the Committee and its operation. As you may be aware, the Committee was created by the enactment of the Freedom of Information Law in 1974. Initially it consisted of seven members, including three ex officio government officials and four members of the public appointed by the Governor. Among the four gubernatorial appointees, at least two were required to be representatives of the news media. A series of amendments to the Law went into effect on January 1, 1978. The amendments included an expansion of the Committee to ten members. Most recently, the Governor signed legislation increasing the membership to eleven. The Committee now consists of five representatives of government and six members of the public. Among the five government members, four are ex officio state agency heads and the fifth will be an elected official of a local government appointed by the Governor. Among the six public members, four are appointed by the Governor and one each is designated by the Majority Leader of the Senate and Speaker of the Assembly. The requirement that at least two of the Governor's appointees must be representatives of the news media remains in effect. There are currently four news media representatives on the Committee.

In terms of staffing and costs, until recently, the staff of the Committee consisted of three, myself and two secretarial assistants. In January of this year, an attorney was added to the Committee. The salaries of the four staff members combined come to a total of $71,689. Committee members receive no salary. However, public members are reimbursed for actual expenditures incurred in the performance of their official duties.

I have included a portion of the Committee's budget submission for the coming fiscal year which includes a breakdown of all expenditures other than salaries. The figures under 1980-1981 represent actual expenditures for the current fiscal year. The projections for 1982-1983 represent request increases based upon an inflation rate of ten percent.

In sum, notwithstanding increases in salary and inflation, the expenditures for the operation of the Committee for the coming fiscal year will likely be under $100,000.

With regard to the forces behind the creation of the Committee, there were several attempts to enact a Freedom of Information Law in New York in the early 1970's, and the major proponents were members of the news media. The legislative proposals were based largely on the provisions of the federal Freedom of Information Act. At the time, the political leadership was apparently unwilling to enact a statute as broad as the federal Act. Consequently, the original Law was completely different from the current Law. In brief, the original law granted access to specified categories of records to the exclusion of all others. As such, if an applicant could not conform a request to one or more of the categories of available records, that person had no rights. News media organizations, and particularly the New York State Society of Newspaper Editors, believed that the bill that became the original law was deficient. However, the media was willing to accept the Law if it included a committee that guaranteed news media representation. The news media representation on the Committee proved to be significant and effective, for the amendments to the Law, which were based upon Committee proposals, completely reversed its logic. Rather than providing access to specefied categories of records, the Law now is based upon a presumption of access and 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).

As indicated in the third annual report, members of the news media are heavy users of the Freedom of Information Law and the services provided by the Committee. I like to think that the advice given by the Committee is often persuasive, and the use of the Law by the news media has in my view significantly enhanced its effectiveness.

I would also like to point out that although the New York Law is similar in structure to the federal Act, the 1978 amendments were devised in an effort to avoid many of the apparent deficiencies in the federal Act. For instance, the New York Law contains a broad definition of "record" [see §86(4)]; the federal Act contains no such definition. Similarly, the exceptions to rights of access regarding trade secrets, records compiled for law enforcement purposes, and inter-agency and intra-agency materials are in my view clearer than their federal counterparts.

Throughout its existence, the Committee has strenuously avoided partisan politics and the appearance of any political party favoritism. As such, I believe that this office has come to be trusted and relied upon by numerous "good government" groups, the public, the press, and perhaps most importantly, by government itself. As indicated in its annual report, the Committee receives a significant percentage of inquiries from representatives of state and local government. I do not feel that the Committee engages in an adversary relationship with government; on the contrary, the primary functions of the Committee have become education and mediation.

Lastly, you raised a question in relation to a lawsuit in which your organization is involved in the State of Illinois. In my view, if the same situation arose in New York, the records in question, materials submitted to a city by a consulting firm, would likely be available.

From my perspective, none of the grounds for denial would be applicable. Although it has been contended that materials submitted by a consultant hired on a contractual basis by a municipality constitute "inter-agency or intra-agency materials", it has consistently been advised that a consultant or a consulting firm is not an "agency" as defined by §86(3) of the Law and that, therefore, the records could not be characterized as inter-agency or intra-agency materials.

Moreover, under the New York Freedom of Information Law, the definition of "record" makes clear that any information "kept, held, filed, produced or reproduced by, with or for an agency..." constitues a "record" subject to rights of access. Consequently, as soon as any city official "held" information produced by the consultant for the city, that information would fall within the scope of the Freedom of Information Law.

As requested, enclosed are the advisory opinions that you cited. In addition, I have enclosed judicial determinations that deal with materials submitted to government by a consultant or a consulting firm. In each instance, the materials were found to be available.

Also enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the Law, an explanatory pamphlet that you may find interesting and a "pocket card" that summarizes the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2133

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

August 11, 1981

James I. DePoint, Esq.
Police Commissioner
Village of Palmyra
Palmyra, New York 14522

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Commissioner DePoint:

I have received your letter of July 20, which was forwarded to the Committee on Public Access to Records by the Department of Law. Please accept my apologies for the delay in response.

You have requested advice regarding rights of access to records reflective of "voluntary breathalyzer results". During our conversation last week, you indicated that the official breathalyzer form contains the test results which have been the subject of several requests made under the Freedom of Information Law. You also noted that the contents of the form in question were not obtained subsequent to an arrest or other condition precedent set forth in §1194(1) of the Vehicle and Traffic Law. Specifically, the results of this chemical test were recorded after the subject of the test had voluntarily consented to the administration of the test. Consequently, you expressed concern that the release of this breathalyzer test result may infringe the constitutional rights of the test subject.

Although the Committee does not have jurisdiction to render an opinion in the area of constitutional rights, I would like to offer the following observations regarding rights of access to records of breathalyzer test results.

First, §86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the definition quoted above, I believe that the test results of the breathalyzer analysis constitutes a "record" subject to rights of access granted by the Freedom of Information Law. The fact that the test was not administered in conjunction with the Vehicle and Traffic Law is in my view of no moment. If the documentation exists, it would in my view constitute a "record" subject to the Law.

Second, 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 relevant to the records in question, I do not believe that any 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. In my view, the invasion of personal privacy is not a significant concern in this situation due to the fact that publicity surrounding the taking of the breathalyzer test has identified the subject of the test. Consequently, the release of the name of the subject would not result in any greater invasion of personal privacy than has occurred to date. Further, in your correspondence and during our conversation you stressed that the subject of the test voluntarily and without coercion agreed to the administration of the breathalyzer examination.

A second ground for denial that would 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 belive 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 you have stated that no law enforcement investigations and/or judicial proceedings have been commenced, or are in the offing, none of the first three bases for withholding set forth in §87(2)(e) are in my view applicable. Further, the last basis for withholding in §87(2)(e) in my opinion indicates an intent on the part of the Legislature to make the records in question 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 at issue.

In sum, if the records sought are in possession of a municipality, they are records of an "agency" subject to the Freedom of Information Law in all respects. Further, based upon the factual circumstances that you presented, 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

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2134

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

August 11, 1981

Louis T. Oster
Truck & Refuse Equipment
of Syracuse, Inc.
207 E. Hiawatha Blvd.
Syracuse, NY 13208

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Oster:

I have received your letter of August 7 in which you requested copies of vouchers submitted regarding a particular contract and checks paid under the contract.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the New York 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 an agency to provide access to records.

Under the Freedom of Information Law and the regulations promulgated by the Committee, each agency is required to designate one or more records access officers responsible for ensuring compliance with the Law by his or her agency. Consequently, it is suggested that you renew your request and transmit it to the records access officer of the agency that has possession of the records in which you are interested.

If I recall our conversations accurately, I believe that the information that you had been seeking some time ago was in possession of either the Office of General Services or the Department of Parks and Recreation. If the records in question are related to those that were the subject of our discussions, I recommend that you forward your requests to the records access officer of the appropriate agency.

If you believe that the records are in possession of the Office of General Services, it is suggested that you direct your request to Earl Kent, Director of Administration, Tower Building, Empire State Plaza, Albany, New York 12242. If you feel that the records are in possession of the Department of Parks and Recreation, your request should be directed to Linda Fisher, Communications Officer, Agency Building #1, Empire State Plaza, Albany, New York 12238.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-664
FOIL-AO-2135

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

August 12, 1981

Ms. Loretta Prisco
Parents Action Committee
for Education
30 Westbury Avenue
Staten Island, NY 10301

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Prisco:

As you are aware, I have finally received your letter of July 23. As I explained to you in our telephone conversation today, this office did not receive your initial communication, and your second letter, which is dated July 15, reached us on July 27. Please accept my apologies for the delay in response.

You have raised a series of issues regarding the implementation of the Open Meetings Law by Community School Board #31 on Staten Island. I will attempt to deal with each of them in the following paragraphs.

You indicated that the Board conducts two types of meetings, which are known as "discussion meetings" and "regular meetings". Apparently, the so-called "discussion meetings" are held for the purpose of discussion only, and no agenda is published with respect to those meetings. Further, according to your letter, the Board's by-laws state that "official action of the Board must be taken at regular meetings..." You also wrote that members of the public cannot address the Board at discussion meetings, but that time is allotted for the public to raise questions at the "regular meetings". In this regard, it is your view that the procedure described above

> "...is contrary to the spirit and intent of decentralization and the Open Meetings Law inasmuch 1) The public has no prior notification of the agenda for Discussion Meetings and 2) the public has no opportunity at these Discussion Meetings to address the Board on issues prior to the Board taking what they may consider to be 'official actions'."

With respect to your contentions, it is important to point out that the Open Meetings Law confers a right upon the public 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]. The Open Meetings Law does not grant a right upon the public to speak or otherwise participate at meetings of public bodies. Consequently, it has consistently been advised that a public body may but need not permit public participation at its meetings. However, if a public body chooses to permit public participation, it should do so by means of reasonable rules that treat members of the public equally. As such, it is my view that the failure of the Board to permit public participation at its discussion meetings does not constitute a violation of the Open Meetings Law.

Further, with respect to agendas, there is no law of which I am aware that requires a public body to prepare an agenda prior to a meeting. Therefore, if no agendas are prepared with regard to the discussion meetings, again, I do not believe that any provision of law would be violated.

Nevertheless, if agendas for the discussion meetings are prepared but are not distributed, there may be another vehicle by which you may gain access to the agendas. Here I direct your attention to the Freedom of Information Law. That Law states in brief 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 grounds for denial appearing in the Law [see attached, Freedom of Information Law, §87 (2)(a) through (h)]. Assuming that agendas are prepared in advance of the discussion meetings, they would in my view constitute records subject to rights of access granted by the Freedom of Information Law. Moreover, if the agendas merely consist of a factual listing of the general subject matter to be considered at the discussion meetings, I believe that they would be available under the Freedom of Information Law [see §87(2)(g)(i)].

Next, despite the distinction made in the by-laws between regular meetings and discussion meetings, I do not believe that there is any distinction between the two under the Open Meetings Law. In this regard, it is noted that the state's highest court held in 1978 that so-called "work sessions" and similar gatherings during which there is an intent only to discuss and no intent to take action are "meetings" subject to the Open Meetings Law in all respects [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NYS 2d 947 (1978)]. As such, both the discussion meetings and the regular meetings fall within the requirements of the Open Meetings Law.

You noted that officials of the Board informed you that they contacted this office and that my advice was that the Board may "vote at a Discussion Meeting, ANNOUNCE the vote at a Regular Meeting without taking a roll-call vote at said Regular Meeting and still have that vote be valid and considered an 'official action'" (emphasis yours). It is possible that I advised that since there is no legal distinction between a regular meeting and a discussion meeting under the Open Meetings Law, there would be no prohibition imposed upon the Board with respect to its capacity to conduct a vote or take action at a discussion meeting. Nevertheless, if that advice was indeed given, it was likely given without knowledge of the by-law to which you made reference in your letter. If indeed the by-law prohibits the Board from taking action at any gathering other than a regular meeting, I do not believe that it can take action at a discussion meeting and thereafter announce its vote at a regular meeting. Although the deliberations of the Board at discussion meetings might serve to coalesce the feelings of the Board regarding a particular issue, any official action must, according to the by-laws, be taken at a "regular meeting". As such, I believe that official actions as well as roll-call votes must be taken during regular meetings of the Board.

I would also like to point out that the Freedom of Information Law requires that each agency, including a board of education, maintain:

> "a record of the final vote of each member in every agency proceeding in which the member votes..." [see §87 (3)(a)].

As such, in every instance in which a vote is taken, a voting record must be compiled which identifies each member who voted and the manner in which that person voted.

You have also raised questions concerning the subjects that may be considered during an executive session. Specifically, you wrote that the Board conducts executive sessions "when discussing and holding elections for Chairperson and officers, and when discussing construction matters." As you are aware, §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. In my view, a discussion of the election of officers of the Board would not likely constitute a proper subject for executive session for no ground for executive session could appropriately be cited. Without a greater description of the subjects involved in "construction matters", it is difficult to provide specific direction concerning the propriety of holding an executive session. If you would provide greater specificity, perhaps I could provide greater direction.

Lastly, you inferred that the Board of Education votes during executive sessions. In this regard, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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

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

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In 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 frel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2136

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

August 12, 1981

Joseph M. Rosenthal
Commander, U.S. Naval Reserve
Judge Advocate General Corps
Department of the Navy
Navy Recruiting District New York
1975 Hempstead Turnpike
East Meadow, New York 11554

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Commander Rosenthal:

As you are aware, I have received your letter of July 23. Please accept my apologies for the delay in response.

According to your letter, since the advent of the concept of an All Volunteer Force, it has become increasingly important that the Armed Services seek out qualified graduating high school seniors for recruitment. Consequently, you have requested an opinion regarding the availability of lists of high school seniors and their addresses from schools within and outside of the City of New York.

It is noted at the outset that the issue in my view must be determined not on the basis of the New York Freedom of Information Law, but rather pursuant to the provisions of the federal Family Educational Rights and Privacy Act (20 USC §1232g), which is commonly known as the Buckley Amendment.

Further, I would like to emphasize that the issue has arisen in the past and that I have discussed it on several occasions with representatives of the United States Department of Education, which is responsible for administering and advising with respect to the Buckley Amendment.

In brief, the Buckley Amendment is applicable to any educational agency or institution that receives funding directly or indirectly through a program administered by the United States Department of Education. As such, virtually all public educational agencies or institutions in the nation, as well as many private institutions of higher education, are subject to the provisions of the Act. Further, the Buckley Amendment states that "education records" identifiable to a particular student or students are confidential to all but the parents of students under the age of eighteen years and that only the parents may waive confidentiality.

However, there are provisions concerning what is known as "directory information". The phrase "directory information" is defined in §99.2 of the regulations promulgated by the then United States 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".

While "directory information" may be disclosed by an educational agency or institution subject to the provisions of the Buckley Amendment, such an agency or institution may do so only after having followed procedures specified in the regulations cited earlier. Specifically, §99.37 of the regulations, entitled "conditions for disclosure of directory information", states that:

> "(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in §99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student".

Based upon discussions with officials of the U.S. Department of Education as well as a review of the Act and the regulations, an education agency or institution subject to the Act cannot in my view disclose directory information unless and until it has met the conditions for disclosure of directory information prescribed in §99.37 of the regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2137

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

August 13, 1981

Mr. David Such
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Such:

I have received your letter of July 30.

You have requested an advisory opinion regarding rights of access under the Freedom of Information Law to a petition presented to the Watervliet Zoning Board of Appeals during an open meeting of that body. It is your contention that the application under consideration by the Board on July 16 was denied on the basis of the petition presented during that meeting. After requesting a copy of the petition from the City Clerk, you were advised that the material would not be available on the basis that its release would constitute an unwarranted invasion of personal privacy under the Freedom of Information Law. You have requested an advisory opinion regarding the denial of access to the petition.

I would like to offer the following comments in regard to your inquiry.

First, 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 listed in §87(2)(a) through (h) of the Law.

Second, §87(2)(b) of the Law, which is relevant to your inquiry, provides that an agency may withhold records or portions thereof which if disclosed would constitute "an unwarranted invasion of personal privacy..." The cited provision makes reference to §89, which in subdivision

(2)(b) lists examples of unwarranted invasions of personal privacy. It is noted that the examples are in my opinion merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy.

In order to more accurately determine the factual situation that occurred during the Zoning Board of Appeal meeting on July 16, I have spoken with an attorney for the City, Thomas Breslin. He indicated that during the meeting in question, a petition containing the signatures of approximately 60 residents of the City of Watervliet was presented to the Zoning Board of Appeals. Additionally, Mr. Breslin informed me that a record has been maintained which listed the persons who spoke during the meeting after identifying themselves by name and address. Apparently, five of the seven individuals who spoke at the meeting signed the petition in which you are interested.

Third, as noted earlier, it is emphasized that the Freedom of Information Law permits an agency, such as the City of Watervliet, to withhold "records or portions thereof" falling within one or more of the grounds for denial. Based upon that language, it is clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. It is also clear that an agency in possession of records has the responsibility of reviewing records sought in their entirety to determine which portions, if any, might justifiably be withheld. Under the circumstances described, it is my view that the names of any individuals on the petition who spoke at the July 16 meeting should be made available to you under the Freedom of Information Law. In §89(3)(c)(ii), disclosure does not constitute an unwarranted invasion of personal privacy "when the person to whom a record pertains consents in writing to the disclosure". In my view, when a person chooses to identify himself or herself by name and address and then proceeds to speak at an open meeting, that action essentially constitutes consent to disclosure. Under such circumstances, it would appear that the invasion of personal privacy by the release of the name and address of a speaker whose name is also contained on the petition would constitute a permissible rather than an unwarranted invasion of personal privacy. Stated differently, you should be able to inspect and copy those names and addresses on the petition of any individuals who chose to speak at the July 16 meeting.

With respect to the remainder of the petition, which identifies persons who signed the petition but chose not to address those in attandance at the meeting, I believe a more substantial argument can be made concerning privacy. While it might be contended that the signature of a petition submitted to a public body constitutes a waiver of one's privacy, it is also possible that those who signed the petition may have had no intention to have their identities disclosed. Particularly in the case of an issue that is controversial and perhaps emotional, one might contend that the disclosure of the names of those who signed the petition could result in an unwarranted invasion of personal privacy due to the possibility of personal hardship that could arise by means of disclosure.

When dealing with the subject of personal privacy, attempts to balance interests and subjective judgments must often of necessity be made. When viewing a single record, one reasonable individual might contend that disclosure would be innocuous and, therefore, result in a permissible invasion of personal privacy. Nevertheless, an equally reasonable person might view the same record and contend that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy.

In sum, I believe that it would be inappropriate to inject a judgment regarding the privacy of the individuals who signed the petition, but who did not speak at the meeting. By so doing, I would be expressing my personal sentiments, which might differ from those of other reasonable people. Consequently, it would appear that only a court could render a determination regarding the issue of privacy of the individuals in question in this case.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro
Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Paul S. Murphy
Thomas Breslin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2138

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

August 13, 1981

John J. Sheehan
Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

As you are aware, I have received your letter of July 22. In addition, I recently received your letter of August 7. Please accept my apologies for the delay in response.

Your initial inquiry dealt with a request directed to the Sheriff of Chemung County, who in turn referred the matter to Louis Mustico, the County Attorney. At the time of your correspondence, Mr. Mustico had not responded. However, since July 22, I have received a copy of a letter sent to you by Mr. Mustico indicating that the records in which you are interested were transmitted to the Office of the District Attorney. Consequently, it appears that neither Mr. Mustico nor the Sheriff has possession of the records in question. It is suggested that you direct a new request to the agency that does have possession of the records, the office of the District Attorney. If you believe that, after having directed a request to the District Attorney, the response is inappropriate, I would be pleased to provide advice at that time.

Your second letter concerns a request to the Windsor Fire Department made on June 24. As of August 7, you had not received a response.

In this regard, I would like to offer the following observations.

First, I believe that the Fire Department was required to respond to your request long ago. 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Fire Department, are available, except to the extent that one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law may appropriately be asserted.

Third, although I am not familiar with the specific contents of the report in which you are interested, I would like to point out that it was held under the original Freedom of Information Law that a chief's report is accessible [see Matter of Dwyer, 378 NYS 2d 894 (1975). As such, it would appear that the report is available, unless disclosure would interfere with an investigation or otherwise fall within the exceptions to rights of access appearing in the Freedom of Information Law.

And fourth, I would like to point out that the Court of Appeals, the state's highest court, held in Westchester-Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)] that volunteer fire companies are subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: M. Bates Davidson
Chief, Windsor Fire Department
Louis Mustico

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2139

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

August 14, 1981

Josephine Kent
Assessor
Town of Deerpark
Drawer A
Huguenot, NY 12744

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kent:

As you are aware, I have received your letter of July 24. Please accept my apologies for the delay in response.

Your inquiry concerns a form developed by the Division of Equalization and Assessment in conjunction with §574 of the Real Property Tax Law. The cited provision states in relevant part that:

> "[F]orms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board".

The question that you have raised concerns the meaning of the term "administrative".

I am familiar with §574 of the Real Property Tax Law, for numerous questions have arisen regarding its scope. Although I am unsure of the reason for its enactment, I believe that the term "administrative" is intended to pertain to an administrative review of an assessment. For

instance, if an individual is notified that his or her real property assessment has been increased, that person has the capacity to file a grievance. In my view, a grievance proceeding, which may or may not be followed by judicial review, is administrative in nature. Further, I do not believe that one can initiate a certiorari proceeding unless he or she has exhausted his or her administrative remedies by completing the grievance procedure. Consequently, if an individual seeks a form in conjunction with a grievance, I believe the form would be sought for the "administrative...review" of an assessment and that the prohibition regarding disclosure would not apply.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2140

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

August 14, 1981

Ms. Smith
c/o Kipata
Room 1414
1051 Broadway
New York, NY 10036

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Smith:

As you are aware, I have received your recent letter. Please accept my apologies for the delay in response.

According to your letter, you are attempting to obtain your deceased grandfather's social security number in order to complete personal family records. However, you have been unable to locate a death certificate and you do not know where your grandfather died.

I would like to offer the following suggestions with respect to your inquiry.

First, if your grandfather died in New York, there are two possible sources of his death certificate. With respect to persons who die in New York City, death certificates and related documents are maintained by the New York City Health Department, which is located at 125 Worth Street in Manhattan. If you would like to obtain information by telephone, you can reach the appropriate office by calling 247-0130.

If your grandfather died anywhere in New York State outside of New York City, the source of death certificates is the Bureau of Vital Records at the New York State Health Department. That office maintains possession of all death

certificates regarding persons who died in New York outside of New York City. If you would like to write to that office, it is suggested that you transmit a letter to the following address:

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

If you would like to contact the office by phone, it can be reached at (518)474-3038.

Assuming that your grandfather died outside of New York, in all honesty, I could not give specific advice, for the laws of the fifty states vary regarding access to death records.

With respect to the social security number, it is noted that social security is administered by the federal government. In this regard, the Committee on Public Access to Records is responsible for advising with respect to the New York Freedom of Information Law. Since social security is a federal responsibility, this office would have no jurisdiction with respect to the subject matter.

Nevertheless, I would like to offer the following two suggestions. First, it might be worthwhile to contact the Social Security Administration office in New York City. That office can be reached at 432-3232. Second, the federal government maintains a series of "Federal Information Centers" which offer advice and information that may help you to locate your grandfather's social security number. The nearest Federal Information Center to you is in the Federal Building at 26 Federal Plaza in Manhattan. You can telephone that office at 264-4464. Perhaps an employee of the Federal Information Center can assist you in locating the source of your grandfather's social security 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
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2141

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

August 14, 1981

S. Zoe Cornwall
Field Representative
Human Rights Commission
419 West Onondaga Street
Syracuse, NY 13202

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Cornwall:

As you are aware, I have received your letter of July 28. Please accept my apologies for the delay in response.

You have requested an advisory opinion under the Freedom of Information Law concerning a policy adopted by the Syracuse School District under which the District generally prohibits former employees from gaining access to their employment records, unless a court order so prescribes. You indicated further that the records access officer of the District informed you of the policy without stating any ground for denial appearing in the Freedom of Information Law.

In my opinion, the policy to which you made reference is unduly restrictive and fails to comply with the Freedom of Information Law for the following reasons.

First, it is emphasized that 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, 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, §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, even if records pertain to former employees, they nonetheless fall within the scope of rights of access granted by the Law.

Third, the fact that an individual may no longer be employed by the District is in my view irrelevant in terms of that person's rights of access. The Committee has long 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, affirmed 51 AD 2d 673, 378 NYS 2d 165). Consequently, when an agency receives a request under the Freedom of Information Law, the only question that should arise involves the extent, if any, to which the records sought fall within one or more of the grounds for denial.

Fourth, in terms of rights of access, it would appear that two of the grounds for denial might be relevant to a request by a former employee for records pertaining to him or her.

The first potentially relevant ground 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 some instances, it is possible that employment records might identify individuals other than the specific subject of the records. In those instances, if disclosure would result in an unwarranted invasion of personal privacy, the names or identifying details of the other persons could be deleted. It is also important to point out that §89(2)(c)(iii) 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:
>
> ii. when the person to whom a record pertains consents in writing to disclosure..."

Therefore, if a person requests records pertaining to himself or herself, disclosure would not constitute an unwarranted invasion of personal privacy. Further, the records must be made available, unless a different ground for denial is applicable.

Barring unusual circumstances, the only other ground for denial that would likely be appropriate 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 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 policies or determinations must be made available. The records that may be withheld under §87(2)(g) would involve those containing advice, suggestion, or impression, for example. However, to reiterate, those aspects of inter-agency or intra-agency materials containing statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Lastly, when responding to a request, a blanket ground for denial without more would not in my view constitute an adequate basis for withholding. In this regard, I direct your attention to 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. Specifically, §1401.2(b)(3)(ii) requires that the records access officer in the case of denial "explain in writing the reasons therefor". When an applicant appeals a denial, the appeals person or body must "fully explain in writing... the reasons for further denial..."

Enclosed for your consideration are copies of the Freedom of Information Law, the Committee's procedural 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

cc: School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2142

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

August 17, 1981

Richard Akbar Salahuddin
#76A1400
Box 149
Attica Correctional Facility
Attica, New York 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Salahuddin:

I have received your letter of August 11 in which you requested copies of records indicating the legislative intent or practice commentary regarding each section of the Freedom of Information Law.

As you may be aware, the Freedom of Information Law was passed initially in 1974. However, due to its deficiencies, the Committee recommended a series of changes in the Law that were enacted in 1977. The amendments to the Freedom of Information Law, which completely altered its provisions, became effective on January 1, 1978.

The bill that became the current Freedom of Information Law was not debated in either house of the Legislature. Moreover, there are no legislative reports or studies of which I am aware concerning the amendments. It is also noted that the Committee under the original Law was not required to submit an annual report, as it is required to do under existing law. As such, there are no specific reports of this Committee pertaining to the intent of the current Freedom of Information Law.

Further, I know of no specific commentaries that have been written with respect to the intent of the Law.

The one document that may be of some utility to you is a memorandum drafted by the Committee entitled "Problems and Solutions". That memorandum was circulated to all units of government in the state after the passage of the amendments to the Freedom of Information Law, but prior to its

effective date. The memorandum makes reference to the original Freedom of Information Law as "the existing law". The provisions of the current law are referred to as the "amendment". Perhaps that memorandum will provide an indication of the intent behind the amendments to the Law passed in 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2143

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

August 17, 1981

Honorable Hugh T. Farley
Member of the Senate
Room 903
Legislative Office Building
Albany, New York 12247

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Senator Farley:

As you are aware, I have received your recent letter concerning a list of five hundred parcels of real property that has been denied by the Division of Equalization and Assessment in response to requests made under the Freedom of Information Law by two of your constituents. Having contacted your office to obtain a clarification regarding your inquiry, as requested, it will be treated as a request for an advisory opinion.

I am familiar with the situation, for one of the constituents, Mr. Elmer Gayder, and another legislator have contacted this office with respect to the controversy. In addition, in accordance with the provisions of §89(4)(a) of the Freedom of Information Law, the appeals officer for the Division of Equalization and Assessment, William J. Ryan, has transmitted to the Committee copies of Mr. Gayder's appeal and the determination thereon which affirmed the denial of access by the Division's records access officer.

Mr. Ryan denied access on the basis of three provisions of law. Although I appreciate the Division's position with respect to the possible effects of disclosing the records in question, it is in my view doubtful that the records may justifiably be withheld under the Freedom of Information Law.

The first basis for denial offered by Mr. Ryan is §1200 of the Real Property Tax Law. The cited provision states that:

> "[A]t least once in every five years the state board shall, as part of its procedure for establishing state equalization rates pursuant to this article, sample the ratio of assessments to market values for each major type of taxable real property as of the same date or period of time in all cities, towns and villages. Upon completion of each state-wide study, the results thereof shall be filed in the office of the state board as a public record".

The last sentence of the provision quoted above indicates that the results of a study completed for the purpose of establishing equalization rates or market values shall be filed in the Office of the State Board of Equalization and Assessment "as a public record". In this regard, it might be argued that only a completed study is available and that the records developed or used in the process of preparing the study are, by implication, deniable. However, I would disagree with such a construction.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Division, 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)(g) through (h) of the Law.

In conjunction with §1200, the only ground for denial that I can envision as applicable is §87(2)(a), which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute..." Section 1200 of the Real Property Tax Law does not specifically exempt from disclosure any records; with respect to rights of access, it merely states that the results of studies shall be public records. Consequently, although the only reference to access to records in §1200 pertains to the results of completed study, I do not believe that it can be inferred that other records used

or created in the development of a study could be characterized as exempted from disclosure by statute. Therefore, I do not believe that §1200 of the Real Property Tax Law provides a basis for denial upon which the Division can rely.

The second ground for denial offered by Mr. Ryan is §87(2)(g) of the Freedom of Information Law, for Mr. Ryan characterized the record sought as "intra-agency material which is not a statistical or factual tabulation or data, instructions to staff that affect the public, or final agency policy or determination..." With due respect to Mr. Ryan, I disagree with his conclusion. 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..."

It is noted that 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.

Under the circumstances, it would appear that a list of five hundred parcels of real property, whether randomly selected or otherwise, constitutes factual information that is available. From my perspective, a list that identifies particular parcels of real property is not advisory or deliberative in nature, nor would it reflect anything akin to the thought processes of agency officials. On the contrary, such a list could in my view be characterized only as factual information, and therefore would be available under §87(2)(g)(i).

The third ground for denial offered by Mr. Ryan is based upon provisions in the Freedom of Information Law that enable an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. The standard regarding the protection of personal privacy in the Freedom of Information Law is flexible and, of necessity, subjective judgments must often be made regarding privacy. However, it is clear that if there can be "unwarranted" invasions of personal privacy, there must also be "permissible" invasions of personal privacy. Therefore, not every record that identifies an individual may justifiably be withheld. Moreover, while one reasonable person might view a record containing personal information and contend that disclosure would be innocuous, thereby resulting in a permissible invasion of privacy, an equally reasonable person might view the same record and contend that disclosure would be offensive and therefore result in an unwarranted invasion of personal privacy.

Nevertheless, assessment rolls and the records used in their development have long been available. As stated recently in Szikszay v. Buelow [436 NYS 3d 558 (1981)]:

> "[E]ven prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law §66, repealed L.1974, c. 478, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S. 2d 711; Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 67-672)".

Moreover, in Szikszay, supra, it was found that disclosure of assessment rolls contained in computer tape format would not if disclosed result in an unwarranted invasion of personal privacy, for the same information had long been available in the form of the traditional assessment book.

In this situation, it appears that the names and addresses relative to the five hundred parcels selected at random may be found in an assessment roll, which, again, has long been available.

It is also noted that §89(2)(b) of the Freedom of Information Law lists five examples of unwarranted invasions of personal privacy. However, it is in my opinion doubtful that any of the five examples would be applicable. For instance, §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..."

It does not appear that the list in question would be used for a commercial or fund-raising purpose. Similarly, §89(2)(b)(iv) states that an unwarranted invasion of personal privacy includes:

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

Mr. Ryan suggested that the release of the list "could subject the owners of these parcels to harrassment or annoyance by special interest groups". Although such an eventuality could occur, it is unknown at this juncture whether disclosure would indeed result in harassment. Moreover, in conjunction with the specific language of §89(2)(b)(iv), it is clear that the information is "relevant to the work of the agency requesting or maintaining it". As such, one of the conditions precedent to nondisclosure i.e., that a record is not relevant to the work of the agency, could not be met.

In view of the foregoing, it does not appear that any of the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) of the Freedom of Information Law could appropriately be cited to withhold the information sought.

In sum, while I am sympathetic to the point of view of the Division of Equalization and Assessment, I do not believe that there are any grounds for denial in the Freedom of Information Law that could justifiably be cited 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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Stephen Harrison
Elmer Gayder
William Ryan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2144

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

August 17, 1981

Mr. John Devine
77A-4053
354 Hunter Street
Ossining, NY 10562

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Devine:

As you are aware, I have received your letter of July 24. I apologize for the delay in response.

According to your letter, you have encountered difficulty in determining the custodian of particular records maintained by the Department of Correctional Services and required to be forwarded to the Commission of Correction on a monthly basis in accordance with §853 of the Correction Law. Specifically, you made a request under the Freedom of Information Law for approximately 39 monthly reports. The records access officer for the Department of Correctional Services, Donald W. Maloney, initially advised you that §5.20 of the Department's regulations (see attached) requires you to direct a request to your "facility superintendent or his designee". Having spoken with your senior counselor, you were advised that the monthly reports in question could only be obtained from the central office of the Department of Correctional Services. However, despite informing Mr. Maloney of the new information obtained from your senior counselor, you have not received any further communication.

I would like to offer the following observations in regard to your request for assistance.

First, Mr. Maloney is correct in stating that §5.20 requires an inmate to initiate a request through the facility superintendent or his designee. However, if your senior

counselor has been designated to act for the facility superintendent, it would appear that you have complied with the regulation.

Second, since you have not heard from Mr. Maloney since redirecting your request to his office, you could consider three alternative courses of action to obtain the monthly reports you are seeking.

One option would be to appeal what you believe has been a "constructive" denial by Mr. Maloney in regard to your second request. Section 5.45 of the regulations sets forth the address of the person to whom you should direct an appeal. In addition to using the sample appeal letter on page 8 of the Committee's pamphlet, you should consider including a chronology of your correspondence and conversations leading to the appeal.

A second option would involve requesting assistance from your senior counselor, who might be able to verify with Mr. Maloney that the "central office" of the Department of Correctional Services is the location where the records you are seeking are maintained.

A third possible course of action would involve directing a request for the same records to the Commission of Correction, which apparently receives the reports on a monthly basis.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive
Director

PPB:RJF:ss

Enclosure

cc: Donald Maloney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2145

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

August 17, 1981

Honorable Glenn H. Harris
Member of the Assembly
Minority Whip
Legislative Office Building
Room 521
Albany, New York

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Assemblyman Harris:

I have received your letter of August 11 and appreciate your interest in the Freedom of Information Law.

You have asked for a review of a situation in which Mr. Elmer Gayder of Amsterdam has unsuccessfully requested a list of some five hundred parcels of real property in Montgomery County that will be used by the Division of Equalization and Assessment for a market value study.

I am familiar with the situation, for Mr. Gayder and another legislator have contacted this office with respect to the controversy. In addition, in accordance with the provisions of §89(4)(a) of the Freedom of Information Law, the appeals officer for the Division of Equalization and Assessment, William J. Ryan, has transmitted to the Committee copies of Mr. Gayder's appeal and the determination thereon which affirmed the denial of access by the Division's records access officer.

Mr. Ryan denied access on the basis of three provisions of law. Although I appreciate the Division's position with respect to the possible effects of disclosing the records in question, it is in my view doubtful that the records may justifiably be withheld under the Freedom of Information Law.

The first basis for denial offered by Mr. Ryan is §1200 of the Real Property Tax Law. The cited provision states that:

> "[A]t least once in every five years the state board shall, as part of its procedure for establishing state equalization rates pursuant to this article, sample the ratio of assessments to market values for each major type of taxable real property as of the same date or period of time in all cities, towns and villages. Upon completion of each state-wide study, the results thereof shall be filed in the office of the state board as a public record".

The last sentence of the provision quoted above indicates that the results of a study completed for the purpose of establishing equalization rates or market values shall be filed in the Office of the State Board of Equalization and Assessment "as a public record". In this regard, it might be argued that only a completed study is available and that the records developed or used in the process of preparing the study are, by implication, deniable. However, I would disagree with such a construction.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Division, 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 Law.

In conjunction with §1200, the only ground for denial that I can envision as applicable is §87(2)(a), which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute..." Section 1200 of the Real Property Tax Law does not specifically exempt from disclosure any records; with respect to rights of access, it merely states that the results of studies shall be public records. Consequently, although the only reference to access to records in §1200 pertains to the results of completed study, I do not believe that it can be inferred that other records used or created in the development of a study could be characterized as exempted from disclosure by statute. Therefore, I do not believe that §1200 of the Real Property

Tax Law provides a basis for denial upon which the Division can rely.

The second ground for denial offered by Mr. Ryan is §87(2)(g) of the Freedom of Information Law, for Mr. Ryan characterized the record sought as "intra-agency material which is not a statistical or factual tabulation or data, instructions to staff that affect the public, or final agency policy or determination..." With due respect to Mr. Ryan, I disagree with his conclusion. 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..."

It is noted that 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.

Under the circumstances, it would appear that a list of five hundred parcels of real property, whether randomly selected or otherwise, constitutes factual information that is available. From my perspective, a list that identifies particular parcels of real property is not advisory or deliberative in nature, nor would it reflect anything akin to the thought processes of agency officials. On the contrary, such a list could in my view be characterized only as factual information, and therefore would be available under §87(2)(g)(i).

The third ground for denial offered by Mr. Ryan is based upon provisions in the Freedom of Information Law that enable an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law,

§§87(2)(b) and 89(2)(b)]. The standard regarding the protection of personal privacy in the Freedom of Information Law is flexible and, of necessity, subjective judgments must often be made regarding privacy. However, it is clear that if there can be "unwarranted" invasions of personal privacy, there must also be "permissible" invasions of personal privacy. Therefore, not every record that identifies an individual may justifiably be withheld. Moreover, while one reasonable person might view a record containing personal information and contend that disclosure would be innocuous, thereby resulting in a permissible invasion of privacy, an equally reasonable person might view the same record and contend that disclosure would be offensive and therefore result in an unwarranted invasion of personal privacy.

Nevertheless, assessment rolls and the records used in their development have long been available. As stated recently in Szikszay v. Buelow [436 NYS 2d 558 (1981)]:

> "[E]ven prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law §66, repealed L.1974, c. 478, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S. 2d 711; Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 67-672)".

Moreover, in Szikszay, supra, it was found that disclosure of assessment rolls contained in computer tape format would not if disclosed result in an unwarranted invasion of personal privacy, for the same information had long been available in the form of the traditional assessment book.

In this situation, it appears that the names and addresses relative to the five hundred parcels selected at random may be found in an assessment roll, which, again, has long been available.

It is also noted that §89(2)(b) of the Freedom of Information Law lists five examples of unwarranted invasions of personal privacy. However, it is in my opinion doubtful that any of the five examples would be applicable. For instance, §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..."

It does not appear that the list in question would be used for a commercial or fund-raising purpose. Similarly, §89(2)(b)(iv) states that an unwarranted invasion of personal privacy includes:

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

Mr. Ryan suggested that the release of the list "could subject the owners of these parcels to harrassment or annoyance by special interest groups". Although such an eventuality could occur, it is unknown at this juncture whether disclosure would indeed result in harassment. Moreover, in conjunction with the specific language of §89(2)(b)(iv), it is clear that the information is "relevant to the work of the agency requesting or maintaining it". As such, one of the conditions precedent to nondisclosure i.e., that a record is not relevant to the work of the agency, could not be met.

In view of the foregoing, it does not appear that any of the examples of unwarranted invasions of personal privacy appearing in §89(2)(b) of the Freedom of Information Law could appropriately be cited to withhold the information sought.

In sum, while I am sympathetic to the point of view of the Division of Equalization and Assessment, I do not believe that there are any grounds for denial in the Freedom of Information Law that could justifiably be cited 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:ss

cc: William J. Ryan
Elmer Gayder
Stephen Harrison

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2146

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

August 17, 1981

Michael Borden, Jr.
80A3841 C-217
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Borden:

As you are aware, I have received your letter of July 28. Please accept my apologies for the delay in response.

According to your letter, on March 21, 1979, you made a phone call from the Orange County Jail to Ohio. You are now attempting to obtain the phone bill regarding that call from an Ohio phone company.

In this regard, I do not believe that the New York Freedom of Information Law can be of any utility to you. The Law includes within its scope records in possession of governmental entities in New York. Consequently, it does not grant access to records in possession of a private corporation, such as a telephone company, nor does it apply to records kept outside of New York.

I have reviewed a volume published in 1978 containing the freedom of information statutes of various states. Although I do not know whether the Ohio law has been updated since 1978, at that time, it was applicable to governmental units. Consequently, it is unlikely that the Ohio open records law would be applicable to records of a phone company operating in the state. There may, however, be other laws or perhaps policies applicable to an Ohio phone company that could result in your gaining access to a telephone bill. It is suggested that you write directly to the telephone company in Ohio.

Lastly, you requested sample letters devised for the purpose of making requests under freedom of information statutes. I have enclosed for your consideration a pamphlet published by the Committee concerning the New York Freedom of Information Law that contains model letters of request and appeal, as well as a copy of a federal publication entitled "Your Right to Federal Records", which also contains a model letter of request for the purpose of seeking records 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:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2147

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

August 18, 1981

Lorraine Liebowitz
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Liebowitz:

As you are aware, I have received your letter of August 3, 1981.

You have requested a "comment" regarding a draft that you sent concerning public access to law libraries and materials.

As I indicated during our previous conversation, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law and the Open Meetings Law. In this regard, it is noted that the Freedom of Information Law applies to records of an "agency". As such, the Law does not include within its scope records held by private universities, colleges and/or law libraries. Moreover, the definition of "agency" specifically excludes the courts and court records. Therefore, the Freedom of Information Law would not apply to court libraries, for example.

However, my personal experience with public libraries leads me to believe that some have New York statutory law compilations such as McKinney's or the Consolidated Law Services. Additional legal materials can often be obtained for reference use by inter-library loan. As such, while it may often be difficult to obtain legal materials, I believe that such materials can be located if one is willing to persevere.

I regret that I cannot provide you with further assistance in your area of interest.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive
Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2148

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

August 18, 1981

Gary Kennerknecht
Producer, WHEC TV
191 East Avenue
Rochester, NY 14604

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kennerknecht:

As you are aware, I have received your letter of July 15 in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, a film of state police activities was made during the assault on the Attica Correctional Facility on September 13, 1971. You have indicated that portions of the film have been made public, but that, upon request for the film, you were informed by the New York State Police that it would be withheld on the ground that it is "internal" and for Department use only.

I have made several inquiries on your behalf in order to obtain further information regarding the film in question. As I understand the situation, the State Police maintains a videotape of the assault. The videotape is used for training purposes regarding the possibility of inmate riots.

I would like to offer the following observations with respect to rights of access to the videotape.

First, the videotape is in my view unquestionably a "record" subject to rights of access granted by the Freedom of Information Law. Section 86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

In view of the breadth of the definition, since the State Police has in its possession the videotape in which you are interested, the tape is a "record" that falls within the scope of the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Division of State Police, 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.

Third, from my perspective, based upon statements made in your letter and a conversation with Col. Francis Stainkamp, Records Access Officer for the Division of State Police, it appears that only one ground for denial is applicable or relied upon by the State Police. Specifically, §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 noted that 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 policies or determinations must be made available.

Under the circumstances, I believe it is clear that the videotape in question could be characterized as intra-agency material. On one hand, it might be argued that the videotape constitutes either factual information accessible under §87(2)(g)(i) or instructions to staff that affect the public accessible under §87(2)(g)(ii). On the other hand, Col. Stainkamp has contended that although the videotape is used for training purposes, any instructions that may be given based upon the tape do not affect the public. He specified that the tape is not used to give instructions with respect to a public demonstration, or rioting, for example, in a public place. On the contrary, Col. Stainkamp informed me that the videotape is used for training only with respect to rioting within a correctional facility. Since training based upon the tape involves only situations concerning inmates within correctional facilities, it has been contended that any instructions to staff derived from the videotape do not affect the public.

In all honesty, I cannot conjecture as to the view that a court might adopt with respect to rights of access to the videotape. While, as Col. Stainkamp has indicated, the use of the tape for training purposes is restricted to situations occurring within the walls of a correctional facility, it is possible that the instructions given to staff do not affect the public. Nevertheless, since correctional facilities are public institutions, since events occurring in correctional facilities may be of substantial public interest, and since any instructions to staff derived on the basis of the videotape could indirectly affect the public in terms of policy and security, it is possible that a court might find that the videotape falls within the scope of rights of access granted by §87(2)(g)(ii). Moreover, it has been held that the exceptions to rights of access found in the Freedom of Information Law should be construed narrowly [see e.g. Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979)].

In sum, to the extent that I am familiar with the videotape and its use, it would appear that rights of access to the tape are dependent upon the manner in which a court views §87(2)(g) of the Law. While it is possible that a court might view the film as solely "internal" and not directly affecting the public, it is also possible that a court would follow the trend in case law, construing the grounds for denial narrowly, and find that the videotape is available, for it is used for training purposes and, therefore, is reflective of instructions to staff that affect 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

cc: Col. Stainkamp

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-1137

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

May 17, 1979

Mr. Joseph Medford
[redacted]

Dear Mr. Medford:

I have received your letter of May 15 regarding your unsuccessful attempts to gain access to an assessment card from the Nassau County Department of Assessment for housing plans that you submitted to the Department.

In my opinion, the assessment card is clearly available.

First, the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law provides that all records in possession of an agency are accessible, except those records or portions thereof that fall within one or more categories of deniable information enumerated in paragraphs (a) through (h) of the cited provision (see attached). None of the grounds for denial may in my view be appropriately asserted.

Moreover, since the assessment card consists of factual data, it is available under §87(2)(g)(i) of the Law, which requires that agencies provide access to "statistical or factual tabulations or data" found within "intra-agency" materials.

Second, §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abridge rights of access previously granted by other provisions of law or judicial determinations. In this regard, the courts have long held that the assessment information in which you are interested is available. In

Sears, Roebuck and Company v. Hoyt, 107 NYS 2d 756 (1951), it was held that cards and records contained in a "Kardex System" as well as applications made by taxpayers for revisions of real property assessments are available to the public for inspection and copying. Similarly, in Sanchez v. Papontas, 303 NYS 2d 711 (1969), an appellate court found that pencil-marked data cards in possession of a board of supervisors used by county assessors to reappraise real property are publicly accessible, even though the cards were prepared by a third party, a private company.

In sum, I believe that there is no justification for a denial of access.

In terms of procedure, §89(3) of the Law permits an agency to require that an applicant submit a request in writing. The request need only "reasonably describe" the records sought. The agency then has five business days from its receipt of a request to grant or deny access, or acknowledge receipt of the request if a determination cannot be made within five business days. When a request is acknowledged, a grant or denial of access must be made within ten business days of the date of the acknowledgment. If for any reason a request is denied, the denial must be in writing, provide the reasons for the denial, apprise the applicant of his or her right to appeal and inform the applicant of the name of the person to whom an appeal should be directed. Further, the Freedom of Information Law, §89 (4)(a), requires that an agency transmit copies of appeals and the determinations that ensue to this Committee.

As noted earlier, a copy of the Freedom of Information Law is attached. In addition, enclosed are regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law, and an explanatory pamphlet on the subject.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF/kk

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2150

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

August 19, 1981

Mr. Bill Hoffmann
The Reporter Dispatch
147 Gramatan Avenue
Mount Vernon, NY 10550

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hoffmann:

As you are aware, I have received your recent letter. Please accept my apologies for the delay in response.

Your inquiry concerns the nature of information that you may obtain from the State Education Department regarding hearings held under §3020-a of the Education Law concerning tenured teachers against whom charges have been made. According to your letter, in your attempts to determine the status of a case involving a Scarsdale teacher, you contacted Vito Longo of the State Education Department. After raising questions concerning whether the hearing had been commenced and the names of the three member panelists, you were informed that the panelists had been selected but a chairman had not yet been chosen. However, Mr. Longo refused to provide the names of the panelists. You also indicated that Mr. Longo informed you that you are not entitled to know when the hearing would be held. It is your contention that it is unfair to be denied access to the date upon which a hearing is scheduled, for a hearing may be open if a teacher chooses to have a public hearing.

I would like to offer the following observations with respect to your inquiry.

First, although many of the records involved in a tenure proceeding brought under §3020-a of the Education Law might justifiably be withheld, I would agree with your contentions that the names of the panelists and the date of a hearing should be available under the Freedom of Information Law. In short, the names of the panelists and the date of a hearing constitute factual information that is in my view available under §87(2)(g)(i) of the Freedom of Information Law. Further, since neither the date nor the names of the panelists would directly identify a teacher or charges that are the subjects of a hearing, it is difficult to envision how the disclosure of such information would constitute an unwarranted invasion of personal privacy under the provisions of §87(2)(b) of the Freedom of Information Law.

Second, I agree that a failure to disclose the date of a hearing might be "unfair". Section 82.9 of the regulations promulgated by the Commissioner of Education states that:

> "[U]nless the employee or his attorney shall have served a written demand for a public hearing upon the chairman of the panel or if no chairman of the panel has yet been designated, upon the commissioner, at least five days before the date set for the hearing, the employee will be deemed to have waived his right to a public hearing and the hearing will be private."

In view of the foregoing, since an employee who is the subject of a proceeding or his or her attorney may demand a public hearing, in the event that such a demand is made, it is my opinion that the employee would have essentially waived whatever privacy protection there may exist under §3020-a, and that the date of such a hearing would clearly be available. Further, unless the date of a hearing is known, it would be impossible to determine whether or not an employee has demanded a public hearing. Consequently, it is reiterated that, in my view, a record indicating the date upon which a tenure proceeding is scheduled is available under the Freedom of Information Law.

Lastly, you asked that I describe "just how much information" to which you are entitled with respect to a tenure proceeding.

Based upon extant case law, it appears that little, if any, information other than that which has been described in the preceding paragraphs is required to be made available prior to a hearing. Although it had been advised by this office in the past that charges based upon a finding of probable cause made against a tenured teacher should be made available, the only judicial determination of which I am aware held to the contrary [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Although I disagree with the court's finding, in good faith, I feel compelled to report it to you.

It is also noted that subdivision (4) of §3020-a of the Education Law states that:

> "[W]ithin five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty or punishment if one is warranted, to the employee and to the clerk or secretary of the employing board. Within thirty days of receipt of such hearing report the employing board shall implement the recommendations thereof, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record."

As I understand the provision quoted above, the results of a hearing are available only if the charges made against a teacher have been upheld. If, for example, a teacher is acquitted, reference to charges are expunged from his or her record.

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: Vito Longo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2151

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

August 19, 1981

Jules S. Greenberg
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Greenberg:

I have received your letter of August 7 and appreciate your interest in compliance with the Freedom of Information Law. Please accept my apologies for the delay in response.

You have raised questions regarding the length of time in which an agency may "hold" a request for information before responding.

First, it is noted that the title of the Freedom of Information Law is somewhat misleading, for the Law does not grant access to "information", but rather to existing records. Further, as a general rule, an agency need not create a record in response to a request for "information" that does not exist in the form of a record or records [see attached Freedom of Information Law, §89(3)].

Second, in brief, 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law. Since the Law envisions situations in which a single record might be both available and deniable in part, it is possible that some aspects of particular records might justifiably be deleted, while the remainder is made available.

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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that I have been 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

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 668
FOIL-AO- 2152

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

August 19, 1981

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

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Eisner:

As you are aware, I have received your letter of August 4. Please accept my apologies for the delay in response.

You have indicated that you are a member of the Nassau County Cultural Development Board, which was created by provisions of Nassau County Local Law 5-1978. In this regard, you have asked for an advisory opinion with respect to whether the Board in question is:

> "...subject to the provisions of the Freedom of Information Law and the Open Meetings Law? If so, are there any circumstances whereby the deliberations of the Board, when considering applications for funding by cultural groups which have applied at the Board's invitation, could be discussed and/or decided upon other than at a public, open session of the Board?"

I would like to offer the following observations with respect to your questions.

In my opinion, the Nassau County Cultural Development Board is both an "agency" subject to the Freedom of Information Law and a "public body" subject to 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".

From my perspective, it is clear that any municipality or component of a municipality falls within the scope of the definition quoted above. Nassau County is itself a public corporation, and the entity in question is a municipal board created by the County. Further, based upon a review of the Local Law that created the Board, it is in my view clear that the Board is a governmental entity performing a governmental function for a municipality, Nassau County.

Section 97(2) of the Open Meetings 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 or such public body".

By viewing the definition in terms of its components, I believe that each condition necessary to a finding that the Board is a public body can be met. First, the Board consists of nine members. Second, it is in my view required to conduct its business by means of a quorum, even though there may be no specific reference to a quorum requirement in the Local Law that created the Board. It is noted that §41 of the General Construction Law has for decades provided that any group of three or more public officers or persons charged with any public duty to be performed or carried out

by them collectively, as a body, may do so only by means of a quorum, a majority of the total membership. Third, the Board, according to the description of its duties in the Local Law, clearly conducts public business. And fourth, the Board in my view performs a governmental function for Nassau County, which, as indicated previously, is a public corporation. In addition, under the definition of "public body" as amended on October 1, 1979, specific reference is made to committees, subcommittees and similar bodies of other public bodies, such as the County Board of Supervisors.

In view of the foregoing, I believe that the Board clearly falls within the provisions of both the Freedom of Information and Open Meetings Laws.

The second question is whether there are any circumstances in which the Board, when considering applications for funding by cultural groups that have applied at the Board's invitation, may deliberate or make decisions "other than at a public, open session of the Board".

As you are aware, the Open Meetings Law states that all meetings of public bodies shall be open to the public. However, the Law permits a public body to enter into closed or "executive" sessions to discuss subjects specified in the Law as appropriate for executive session, and §100(1)(a) through (h) identifies eight grounds for executive session. From my perspective, there is but one ground for executive session that might be applicable with respect to the deliberations that you have described.

Specifically, §100(1)(f) of the Open Meetings Law permits a public body to 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..."

In some instances, perhaps the Board in its deliberations may consider the financial or employment history of a particular person or corporation. To that extent, it would appear that an executive session may appropriately be convened.

Lastly, as a general rule, the Open Meetings Law permits a public body to take action during a properly convened executive session, unless the action is to appropriate public monies, in which case its action would have to be accomplished during an open meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2153

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

August 19, 1981

Mr. Michael Scott
#80-B-589
P.O. Box 149
Attica Correctional Facility
Attica, New York 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scott:

I have received your letter of August 14 in which you directed a request under the Freedom of Information Law to this office.

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 maintain possession of records generally, such as those in which you are interested, nor does it have the authority to compel an agency to make records available under the Freedom of Information Law.

Nevertheless, I would like to offer the following advice.

Under the Freedom of Information Law, each agency, such as the Department of Correctional Services, is required to adopt regulations of a procedural nature in conformity with those promulgated by the Committee. In this regard, the Department of Correctional Services had adopted such regulations. Enclosed for your consideration is §5.20 of the regulations promulgated by the Department of Correctional Services, entitled "Examination of inmate record by subject or his attorney".

Based upon a review of those regulations, an inmate may seek records by directing a request to the facility superintendent or his designee. In the event that a request is denied by the superintendent, you have the right to appeal to Counsel to the Department of Correctional Services in accordance with §5.20(c).

Based upon the provisions cited above, it is suggested that you submit a new request to the superintendent at the facility in which you are housed.

I hope that 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-2154

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

August 19, 1981

Mr. Carl B. Raymo
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Raymo:

I have received your letter of August 2. Please accept my apologies for the delay in response.

Your letter concerns an earlier advisory opinion addressed to you regarding a denial of access by the Gouverneur Central School District to a letter of recommendation pertaining to you. In your most recent correspondence, you suggested that I was unaware of all the facts, for you indicated that the letter in question had been displayed to you. In terms of background, a letter of recommendation pertaining to you had been written by the former superintendent of the District and sent to the Upstate Transportation Consortium. In response to your earlier inquiry, I advised that the School District could likely deny access to the letter of recommendation on the basis of the privacy provisions of the Freedom of Information Law [see §§87(2)(b) and 89(2)(b)(i)]. In view of your statement that you have read the letter of recommendation, you have requested a reconsideration of my earlier opinion.

I have contacted the new Superintendent of Schools, Bonnie Bettinger, to learn more of the controversy. Ms. Bettinger informed me that no representative of the School District had shown you a copy of the letter of recommendation. She told me that she had been informed that the letter was shown to you by an official of the Upstate

Transportation Consortium. Ms. Bettinger also indicated that she has no way of knowing that you have indeed viewed the letter of recommendation in possession of the Consortium. Consequently, I do not feel that my earlier opinion should be altered.

It is noted that the Upstate Transportation Consortium is a private employer and, as such, is not an "agency" subject to the Freedom of Information Law. If representatives of the Consortium seek to make a letter of recommendation pertaining to you available for inspection and copying, such action would be in its discretion. With respect to the School District, I believe that its obligations remain the same, even though a copy of the letter may have been displayed to you by representatives of the Consortium. In short, the District has neither custody nor control over a letter of recommendation in possession of a private employer, such as the Consortium. Further, as indicated above, even though the Consortium may have permitted you to inspect the letter in question, I do not believe that its activity alters your rights of access to records under the Freedom of Information Law with respect to a record in possession of the School District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Bonnie Bettinger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2155

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

August 20, 1981

Mario Ferrera
81A862
Box B
Dannemora, NY 12929
E-3-6

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ferrera:

As you are aware, I have received your letter of July 28. Please accept my apologies for the delay in response.

You requested advice regarding your capacity to obtain photographs taken of a crime scene and of yourself at a police precinct. You indicated that you believe that the photographs will assist you in presenting information to a court that was withheld at your trial.

I would like to offer the following observations in regard to your inquiry.

First, there are two relevant statutes under which records may be available, the Criminal Procedure Law (CPL) and the Freedom of Information Law. The former pertains to the release of particular information by motion of a defendant against whom an accusatory instrument is pending. The Freedom of Information Law pertains generally to records in possession of government in New York and states that all records are available, except to the extent that records or portions of records fall within one or more of the exceptions to rights of access [see attached, Freedom of Information Law, §87(2)(a) through (h)]. Further, rights of access granted by the Freedom of Information Law are not dependent upon the status or interest of an applicant (see e.g., Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165).

Of possible relevance to your inquiry is §240.20 of the Criminal Procedure Law, which describes the material required to be disclosed upon demand by a defendant. Further, §240.20(d) authorizes disclosure of "any photograph or drawing relating to the criminal action or proceeding made or contemplated by a public servant engaged in law enforcement activity". However, the time period within which a demand for discovery may be made under Criminal Procedure Law §240.20 may have expired in your case.

With respect to the time in which a demand for discovery may be made, the factual circumstances of a recent case appear to be relevant to your inquiry. The petitioner, an inmate, brought an Article 78 proceeding under the Civil Practice Law and Rules in order to obtain information under the Freedom of Information Law which included a request for photographs.

The court held that the Freedom of Information Law could not be invoked since the petitioner had failed to make a timely discovery motion under Article 240 of the Criminal Procedure Law. The court stated that "The purpose of the Freedom of Information Law is not to allow a litigant to circumvent normal procedures for discovery" [see attached, People & C. v. Billy Billups, Sup. Ct., Queens Cty., NYLJ, (July 13, 1981)]. Therefore, in my view, you might encounter a similar situation by attempting to obtain the photographs you are seeking under the Freedom of Information Law.

Third, it is possible that some of the photographs you are seeking could be located by means of a review of court records. Although the Freedom of Information Law does not include within its scope the court or court records [see definition of "judiciary" and "agency" in §§86(1) and (3) respectively], many court records are available by applying to the clerk of the appropriate court. 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, it is suggested that you apply for records in possession of the court in which you were tried.

Fourth, I am unable to advise you with certainty that a request for photographs under the Freedom of Information Law could not be made due to restrictions imposed by the discovery provisions of the Criminal Procedure Law. Therefore, it is suggested that you consult your attorney or a representative of Prisoners' Legal Services if possible in order to determine your rights under the discovery provisions of the Criminal Procedure Law.

Lastly, I have enclosed an explanatory pamphlet which may be useful to you should you decide to make a Freedom of Information Law 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2156

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

August 20, 1981

Chris Salamone
Reporter
Tonawanda News
435 River Road
North Tonawanda, NY 14120

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Salamone:

I have received your letter of August 11 regarding a request that you directed to the Kenmore Volunteer Fire Company.

According to your letter, you requested various items of financial information in possession of the Fire Company on two occasions. Apparently the first request was misunderstood. The second request, which was dated July 1, was not answered. Consequently, you submitted an appeal based upon the failure to respond, which constituted a "constructive" denial of access pursuant to the regulations promulgated by the Committee [see attached regulations, §1401.7(c)].

You have requested advice regarding the manner in which you may proceed if the records are denied on appeal.

I would like to offer the following advice with respect to your inquiry.

First, although rights of access to records in possession of volunteer fire companies had been unclear, the Court of Appeals, the State's highest court, last year rendered a decision in which it was held that a volunteer fire company and its records are subject to the Freedom of

Information Law in all respects [see attached, Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. It is noted that the records sought in the case cited above appear to have been somewhat similar to those in which you are interested.

Second, since your request concerns financial records, including books of account and records generally indicating amounts received and expended, I believe that such records are clearly available under the Freedom of Information Law. Relevant in this regard 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 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.

Under the circumstances, I believe that the financial records that you are seeking could clearly be characterized as inter-agency or intra-agency materials. However, the financial information that you are seeking would appear to consist solely of "statistical or factual tabulations or data" that would be accessible.

Third, since the fire company in question has a relationship with one or more municipalities, it is possible that duplicate records of those that you are seeking might be in possession of those other units of government. Consequently, it might be worthwhile to request similar information from the municipalities with which the fire company has a financial relationship.

Fourth, 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

And fifth, in the event that you are denied access to the records sought on appeal, and if this opinion is not persuasive, your only means of redress would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. As a general rule, in an Article 78 proceeding, the petitioner has the burden of proving that an agency's determination was unreasonable. However, §89(4)(b) of the Freedom of Information Law specifies that in an Article 78 proceeding brought under that statute, the agency has the burden of proving that the records withheld fall within the scope of the grounds for denial appearing in §87(2) of the Law.

In order to attempt to mediate in this controversy, copies of this opinion as well as the determination rendered in Westchester Rockland Newspapers v. Kimball, supra, will be sent to the chief of the Fire Company.

I hope that 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: John Beaumont

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2157

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

August 20, 1981

[redacted]
79-A-3222
Box 51
Comstock, NY 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]:

As you are aware, I have received your letter of August 3. Please accept my apologies for the delay in response.

You have requested advice regarding your rights of access to records regarding your admittance to a detoxification unit on Rikers Island. Specifically, you have indicated that you are attempting to prepare a writ of habeas corpus.

I would like to make the following comments in regard to your request.

First, 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.

I am unable to determine the exact nature of the records you are seeking. The Department of Correctional Services pursuant to §29 of the Correction Law has promulgated rules and regulations for access to Department records. Enclosed is a copy of the relevant regulations for

your review. Specifically, §5.20 indicates that an inmate or former inmate can direct a request for inspection and copying of records pertaining to him to the facility superintendent. If you are seeking medical records, please note that such information may be considered departmental records under §5.5(h) of the regulations.

Second, if the information you require includes documents contained within a presentence report in accordance with the Criminal Procedure Law (CPL), §390.20, you should be aware that such information is confidential under CPL, §390.50. Therefore, it is suggested that you contact your attorney or a representative of Prisoners' Legal Services for advice regarding access to a presentence report.

In order to assist you in making a request under the Freedom of Information Law, I have enclosed an explanatory pamphlet for your review.

I hope that 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-2158

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

August 20, 1981

Reverend Robert Walker, Ph.D.
Allenwood Federal Prison Camp
P.O. Box 1000
Montgomery, PA 17752

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Reverend Walker:

I have received your letter of August 18, in which you appealed a denial of access to records requested from the New York City Department of Correction regarding its Volunteer Associate Chaplain program at Brooklyn House of Detention.

It is noted at the outset that your appeal should not have been directed to this office. The Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. Consequently, it does not have possession of records generally, such as those in which you are interested, nor does it have the authority to compel an agency to make records available.

Further, although you made reference to letters of request attached to your correspondence of August 18, none of those letters were included with your correspondence.

Nevertheless, assuming that requests were made but unanswered within the requisite periods of time, you may consider yourself constructively denied. As such, you may appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. In relevant part 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 view of the foregoing, it is suggested that you direct an appeal to the person designated to determine appeals by the New York City Department of Correction. According to an index that identifies New York City agencies, you should direct your appeal to the General Counsel, Department of Correction, 100 Centre Street, New York, New York 10013.

Lastly, I have reviewed my original response to you of July 24. At that time, a pamphlet regarding the Freedom of Information Law was sent to you. With respect to the appeal procedure, it is suggested that you review pages five and eight of the 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
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2159

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

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 20, 1981

Jim Callaghan
Editor
Staten Island Register
2100 Clove Road
Staten Island, NY 10305

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Callaghan:

I have received your letter of August 11 and the materials attached to it. You have asked for an advisory opinion with respect to a request directed to the Office of Richmond County District Attorney under the Freedom of Information Law.

In a letter dated August 4, you requested from the District Attorney:

> "1. All records and files pertaining to the 1978 arson case against Paul Yanofski.
>
> 2. All records and files for completed arson investigations from the period June 1, 1979 through August 1, 1981, inclusive".

In response to the first area of request, the District Attorney, Thomas R. Sullivan, denied access to the records citing §87(2) of the Public Officers Law. With respect to the second request, the District Attorney indicated that the records of his office are not compiled "according to the nature of the crime" and he inferred that the records are not filed in a manner that permits them to be found in accordance with your request. In addition, the District Attorney stated that his response constituted a final determination.

I would like to offer the following observations and suggestions with respect to your request and the response offered by the District Attorney.

First, I would like to address what may be characterized as procedural issues. In this regard, §89(1)(b)(iii) requires the Committee to promulgate procedural rules and regulations in conformity with the Freedom of Information Law. In turn, §87(1) of the Law requires each agency, including Richmond County, to adopt its own procedures under the Freedom of Information Law consistent with and no more restrictive than those promulgated by the Committee. Consequently, Richmond County should have adopted regulations under the Freedom of Information Law based upon those promulgated by the Committee. It is suggested that you seek to determine whether such regulations have indeed been promulgated.

Under the Committee's regulations, each agency is required to designate one or more "records access officers" who have the duty of coordinating an agency's response to requests for records made under the Freedom of Information Law [see attached, regulations, §1401.2(a)]. The records access officer is also responsible for assuring that agency personnel "assist the requester in identifying requested records, if necessary" [see regulations, §1401.5(b)(2)]. In view of the foregoing, I believe that an agency and its personnel have a duty to assist an applicant in locating records sought, if necessary, as in the case of your second request.

It is also noted that the Freedom of Information Law provides a two-step procedure regarding requests. If a request is initially denied, an applicant has the right to appeal to the head or governing body of an agency or whomever has been designated to determine appeals [see Freedom of Information Law, §89(4)(a)]. Under the circumstances, it appears that the District Attorney by means of his initial response to your request has prohibited any further appeal. If that is so, it is my view that the procedure under which the Office of the District Attorney operates fails to comply with the procedural requirements imposed by the Freedom of Information Law. In short, if the District Attorney's initial determination constitutes a final determination, he has essentially removed your capacity to appeal a denial of access.

Next, the District Attorney indicated that you may request records after "identifying the particular file you wish". In my opinion, an applicant need not "identify" with particularity records in which he or she is interested. Although the original Freedom of Information Law enacted in 1974 required an applicant to seek "identifiable" records, the current Freedom of Information Law, effective January 1, 1978, requires that an applicant seek "a record reasonably described" [see Freedom of Information Law, §89(3)]. Moreover, it has been held judicially that if the agency can determine what an applicant is seeking, even though it may not be specifically identified, 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).

Finally with respect to procedure, it is noted that §87(3)(c) of the Law requires that each agency maintain:

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

It is suggested in this regard that you request and review the subject matter list prepared by the Office of the District Attorney. Perhaps after reviewing its subject matter list, you will be in a better position to request records reasonably described or identify categories of records in which you are interested by means of file designations, for instance.

Second, with respect to rights of access, it is emphasized 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 among eight grounds for denial appearing in §87(2)(a) through (h) of the Law.

I would like to stress that the introductory language of §87(2) states that an agency may withhold "records or portions thereof" falling within the exceptions to rights of access. Based upon that language, I believe that it is clear that the State Legislature envisioned situations in which a single record might be both available and deniable in part. It is also in my view clear that an agency is required to review records sought in their entirety to determine which portions, if any, fall within the grounds for denial. As such, it would appear that the blanket denial offered with regard to your first area of request is inappropriate.

Under the circumstances, there are several grounds for denial that might be relevant. However, the extent to which they may be relevant is at this juncture unknown to me.

Perhaps the most relevant ground for denial 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".

The language quoted above is based upon potentially harmful effects of disclosure. For instance, if the District Attorney is currently investigating a crime, it is possible that records compiled for law enforcement purposes would if disclosed interfere with investigation. However, if the investigation has been concluded, many of the harmful effects of disclosure described in §87(2)(e) might no longer justifiably be cited. There may be situations in which records identify confidential informants. In such cases, it is possible that portions of such records identifying informants may be deleted, while providing access to the remainder.

A second ground for denial of possible relevance is §87(2)(f), which states that an agency may withhold records or portions thereof when disclosure would "endanger the life or safety of any person". In my opinion, §87(2)(f) is similar in intent to §87(2)(e)(iii) regarding confidential sources. Again, if disclosure of the identity of an individual would endanger that person's life or safety, perhaps identifying details could be deleted.

A third ground for denial of potential 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". As in the case of other situations described above, identifying details might be deleted to protect privacy, while the remainder of the record might be available, if it does not fall within any other grounds for denial.

The last relevant ground for denial would in my view be §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 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. While many records in possession of the District Attorney might be characterized as inter-agency or intra-agency materials, substantial portions of such records likely consist of factual data that would be available under §87(2)(g)(i).

Finally, it is important to point out that the burden of proof in a judicial proceeding brought under the Freedom of Information Law is on the agency that denied access [see §89(4)(b)]. Further, as noted earlier, an applicant has the right to appeal an initial denial of access. Under §89(4)(a) of the Law, upon receipt of an appeal, the person or body 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".

Although the District Attorney rendered a written denial, I do not believe that any reasons for the denial were offered other than a blanket assertion that the records could be withheld. Consequently, I do not feel that the District Attorney's denial "fully" explained the reasons for the denial.

Also with regard to the burden of proof, it is noted that the Court of Appeals has held that an agency cannot merely assert a ground for denial and prevail; on the contrary, an agency must demonstrate 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); Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979); Doolan v. BOCES, 48 NY 2d 341 (1979)].

A copy of this opinion will be sent to the District Attorney in an effort to mediate in this controversy.

I hope that 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: Thomas Sullivan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2160

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

August 20, 1981

Mr. Ernest A. Kaarsberg
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kaarsberg:

I have received your letter of August 14.

Our previous correspondence dealt with rights of access to records pertaining to you in possession of the City University of New York (CUNY). However, in your most recent letter, you indicated that you received a letter from Mr. Arthur Plutzer of CUNY, who informed you that documents that you submitted to CUNY were not received and, consequently, cannot be made available. Further, apparently there are two types of files concerning an employee, administration files and non-administration files. The records that allegedly do not exist would apparently have been kept in the non-administration file.

I would like to offer the following observations and suggestions regarding the situation that you described.

First, the Freedom of Information Law is applicable with respect to existing records. Consequently, if records no longer exist, an agency, such as CUNY, has no obligation to create records on behalf of an applicant.

Second, you may request a certification from an agency regarding the existence of records. Specifically, §89(3) of the Law states in relevant part that an agency, on request for records, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." It is suggested that you request such a certification with respect to the records in which you are interested.

And third, it is noted that an agency cannot destroy or otherwise dispose of its records at will. There are several provisions of law that deal with the capacity to destroy and dispose of records that come into possession of government in New York. Applicable to CUNY is Local Law No. 49 of 1977, which appears as Chapter 72 of the New York City Charter. The cited provision created the New York City Department of Records and Information Services, which has many functions, including the preparation of schedules for the orderly disposal of particular types of records in possession of New York City agencies. Further, a New York City agency cannot destroy or otherwise dispose of records without the consent of the Department. In this regard, it is suggested that you attempt to determine whether the records in question have been destroyed and, if so, whether they have been destroyed in accordance with applicable provisions of the City Charter.

I hope that 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: Arthur Plutzer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2161

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

August 21, 1981

Matthew Chachere
Legal Coordinator
Hiltopia, Inc.
3 Steuben Drive
Jericho, NY 11753

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chachere:

I have received your letter of July 24, which arrived at this office on August 14. Please accept my apologies for the delay in response.

You have raised a series of questions regarding requests for records directed to the Jericho Union Free School District. Having reviewed the materials that you sent, including the determination on appeal rendered by David Nydick, the Superintendent of Schools, I do not substantially disagree with the response given by the Superintendent. My view is based upon the assumption that the Superintendent responded in good faith and that all the records that you requested were indeed considered.

Nevertheless, I would like to offer the following observations with respect to the materials.

First, your letter indicates a belief on your part that various types of information that should exist do not exist, according to the Superintendent's response. In this regard, I have no way of knowing of the existence of particular records. However, §89(3) of the Freedom of Information Law enables an applicant for records to seek a certification in which a school district official would assert in writing that records sought are not in possession of the District or that they are in possession of the District but cannot be found after having made a diligent search. Specifically, §89(3) of the Freedom of Information Law states in relevant part that, on request, an agency:

> "...shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Further, the same provision states that, as a general rule, an agency need not prepare or create a record in response to a request.

Second, you have questioned whether the District has created a "subject matter list". As you are aware, §87(3)(c) of the Freedom of Information 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".

In view of the provision quoted above, it is clear that each agency, including a school district, has an affirmative duty to create a list of its records, in reasonable detail, by subject matter. Nevertheless, I agree with Superintendent Nydick's statement that "[T]he District is not required to topically index each and every document contained in its Nike file". From my perspective, the subject matter list required under §87(3)(c) should indicate the categories of records in possession of an agency; it is not in my view required to constitute an index that identifies each and every record of an agency. Moreover, in response to a similar request for a breakdown of records within a particular subject heading, it was held judicially that such steps are not required to be taken (see D'Alessandro v. Unemployment Insurance Appeal Board, 56 AD 2d 962).

Third, with respect to the denial of access to records reflective of the identities of individuals, and other personal details, who may have expressed an interest in the purchase of a parcel of land, it is possible that such information might justifiably be withheld. In the determination that we discussed and which you cited in your letter, Murray v. Troy Urban Renewal Agency (Sup. Ct., Rensselaer Cty., April 24, 1980), there was no issue of personal privacy involved. Further, in the Murray case, the process under which the Urban Renewal Agency was to sell real property had clearly begun. That does not appear to be the

case in the situation that you have described. It further appears that it is unknown whether or not the parcel of land in question will indeed be sold by the District. As indicated by the Superintendent, if such an eventuality occurs, presumably all persons will be given an equal opportunity to purchase and records prepared or received in relation to such an offering would become available when it is determined that the parcel will indeed be sold.

In short, under the circumstances, I do not believe that I can offer significant direction in terms of further action that you might take regarding your capacity to gain access to additional records in possession of the District.

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: Mr. David Nydick

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2162

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

August 21, 1981

Mr. Chris Voultsos
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Voultsos:

I have received your letter of August 8.

Having reviewed your lengthy correspondence and the attachments to it, several questions regarding access to various types of records have been raised. Specifically, you are seeking access to any medical and non-medical records which include "official" action pertaining to you. To date, you have contacted and received copies of records from local, state and federal offices, as well as some information from private entities. However, you have contended that some of the personal information contained in these records is incorrect. Consequently, you have requested advice regarding the procedures by which you might have the capacity to amend misinformation.

I would like to offer the following comments in response to your inquiry.

First, the Freedom of Information Law pertains to records in possession of government agencies in New York State. Specifically, §86(3) of 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."

Therefore, the private institutions to which you have written, e.g., New York County Medical Society and a parochial school which you attended, would not be considered agencies under the definition quoted above. Nevertheless, by using the sample request letter contained in the enclosed pamphlet, entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", you can request records from any governmental agencies in New York State which you believe possess the records you are seeking.

Second, with respect to access to medical records, §17 of the Public Health Law authorizes physicians acting on behalf of a patient to request and obtain records pertaining to that patient from another doctor of hospital. If you have encountered difficulty in obtaining medical records in possession of a hospital, you could request a physician of your choice to obtain the records from a hospital on your behalf.

Third, as indicated above, the New York Freedom of Information Law applies only to records in possession of governmental agencies in New York State. However, if you are seeking records from an agency of the federal government, the federal Freedom of Information Act would be applicable. I have enclosed for your review a pamphlet entitled "Your Right to Federal Records" which describes the proper procedure for requesting records under the federal Act.

Fourth, with respect to the misinformation which you believe is contained in some of the records pertaining to you, the federal Privacy Act may be of particular interest. It is suggested that you review the material contained in the pamphlet "Your Right to Federal Records" regarding the Privacy Act, which begins on page five. Under that legislation, an individual can contact the appropriate federal agency to review many types of records regarding himself or herself in order to determine the accuracy of the information. If you feel that records are incorrect, you can write to the agency to request an amendment. If you are denied the requested amendment, you may submit a statement indicating why you believe the records are incorrect.

Lastly, there is no legislation in New York State analogous to the federal Privacy Act under which you have a right to seek to correct or amend records pertaining 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

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 669
FOIL-AO-2163

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

August 21, 1981

George H. Bull
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bull:

I have received your letter of August 12 and appreciate your interest in compliance with the Open Meetings Law. You have raised a series of questions regarding the implementation of the Open Meetings Law by the Sodus Village Board of Trustees. In conjunction with your questions, you attached a copy of the minutes of meetings held by the Board on July 14 and July 20.

I would like to offer the following observations with respect to your letter and the minutes.

First, you questioned the length of time in which the Board makes available the minutes of its meetings. Specifically, you wrote that minutes are generally available or prepared until prior to the ensuing meeting. In this regard, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) of §101 prescribes the minimum requirements concerning the contents of minutes of open meetings. Subdivision (2) requires that minutes of executive sessions must include reference to any action taken during an executive session. Subdivision (3) specifies that minutes of open meetings must be compiled and made available within two weeks of such meetings and that minutes of executive sessions must be compiled and made available within one week of the meetings during which action was taken during an executive session. Consequently, if, for example, minutes are not approved or made available until a month after a meeting, I believe that the Board would have failed to comply with the Open Meetings Law.

It is noted that the requirement that minutes of open meetings be compiled and made available within two weeks represents an amendment to the Open Meetings Law that became effective on October 1, 1979. Prior to the effective date of that requirement, the Committee recognized that public bodies might not meet within two weeks to approve minutes. As such, the Committee by means of a memorandum distributed to all public bodies prior to the effective date of that amendment (see attached) recommended that unapproved minutes be made available within two weeks as required by the Law, but that they be marked as "unapproved", "draft", or "non-final", for example. By so doing, the public has the ability to learn generally what transpired at a meeting, and concurrently, notice is effectively given that the minutes are subject to change, thereby giving members of public bodies a measure of protection.

A second area of inquiry concerns complaints made against Village employees. You indicated that during one of the Board's meetings, "the Village Attorney stated that if the village board was going to discuss personnel, it would have to be a closed meeting". In this regard, I would like to make several comments.

First, it is noted that the Open Meetings Law is permissive. Stated differently, although a public body may in some instances enter into an executive session, there is no requirement that an executive session be held, even if the subject matter under consideration may appropriately be discussed behind closed doors. This point is confirmed by means of a review of the procedure prescribed by the Open Meetings Law that must be followed prior to entry into an executive session. Section 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..."

The language quoted above indicates that three steps must be taken before a public body may enter into an executive session. First, a motion to go into an executive session must be made during an open meeting. Second, the motion must identify in general terms the subject matter to be considered. And third, the motion must be carried by a majority of the total membership of a public body. In view of these requirements, it is possible that a motion to enter into an executive session may be defeated, for it might not be carried by a majority of the total membership. Similarly, I do not believe that an executive session can be scheduled in advance of a meeting, for, in a technical sense, it can never be known in advance whether a motion to enter into an executive session will indeed be carried.

It is also emphasized that not every matter that deals with "personnel" may be discussed during an executive session. In the series of amendments to the Open Meetings Law to which reference was made earlier, the so-called "personnel" exception for executive session was clarified. Under the original Open Meetings Law that went into effect in 1977, a public body could under §100(1)(f) enter into an 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..."

Many public bodies under the language quoted above entered into executive sessions to discuss matters pertaining to policy related to personnel or matters concerning personnel in general. Nevertheless, the Committee consistently contended that the personnel exception was largely intended to protect privacy, and not to shield matters of privacy under the guise of privacy. Consequently, the Committee recommended a clarification of §100(1)(f) which was passed by the Legislature and signed into law. Currently §100(1)(f) of the Open Meetings Law permits a public body to enter into an 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).

Due to the insertion of the term "particular", it is clear that a public body may enter into an executive session only to discuss matters pertaining to a particular person. Moreover, §100(1)(f) identifies specific subjects that may relate to particular individuals and, in my view, only those subjects as they pertain to a particular individual may appropriately be discussed behind closed doors.

At this juncture, I would also like to offer a comment regarding the Freedom of Information Law. That statute is based upon a presumption of access and states in brief that all records of an agency, such as a village, 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 Law.

With respect to complaints made against public employees, it has consistently been advised that a complaint is available, but that identifying details regarding the identity of the person who made the complaint may be deleted if disclosure of those identifying details would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)].

Further, although a complaint may relate to a particular public employee, the courts have generally found that public employees enjoy a lesser degree of privacy than members of the public, for it has been determined that public employees have a greater duty to be accountable than any other group. In addition, in cases pertaining to records identifiable to public employees initiated under the Freedom of Information Law, it has been held on several occasions that records relevant to the performance of a public employee's official duties are available, for disclosure in such instances would constitute a permissible rather than an unwarranted invasion of 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, if a record is irrelevant to the performance of a public employee's official duties, it may justifiably be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977). In the case of a complaint, at least one case held that complaints made against public employees are relevant to the performance of official duties and, therefore, are available (see Montes, supra).

Next, the minutes of the special meeting of the Board held on July 20 indicate that a discussion was held during an executive session regarding "possible litigation". In my opinion, "possible" litigation does not constitute an appropriate basis for entry into an executive session. Section 100(1)(d) of the Law states that a public body may enter into an executive session to discuss "proposed, pending or current litigation". From my perspective, virtually any discussion held by a public body could involve "possible" litigation. To be characterized as "proposed" litigation, there must in my view be a real threat or imminence of litigation to qualify for executive session under §100(1)(d).

Lastly, provisions concerning minutes appearing in §101 of the Open Meetings Law and the Freedom of Information Law require that a voting record be compiled in each instance in which a public body votes. Section 87(3)(a) of the Freedom of Information Law requires that a record of votes be compiled in every instance in which a vote is taken in which each member who voted and the manner in which that person voted is recorded.

I hope that 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

Attachment

cc: Vilage Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2164

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

August 24, 1981

Jerome S. Cohen
Cohen, Ravoso, Weinstein & Fox
Attorneys at Law
24 Front Street
Port Jervis, NY 12771

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cohen:

I have received your letter of August 6 in which you requested an advisory opinion under the Freedom of Information Law. Your interest in complying with the Freedom of Information Law is much appreciated.

Your inquiry concerns a request for the names and addresses of persons who have applied for grants and loans from the Port Jervis Urban Renewal Agency. The grants and loans in question are made under a program administered by the federal Department of Housing and Urban Development (HUD). In a letter addressed to the Urban Renewal Agency attached to your correspondence, you indicated that:

> "[I]n order to qualify for a 312 loan or grant, the individuals involved must show an income or economic level less than the maximum level determined by H.U.D. for the program".

As a consequence, you have denied the request on the ground that disclosure would result in an "unwarranted invasion of personal privacy" under the provisions of §§87(2)(b) and 89(2)(b) of the Freedom of Information Law.

I concur with your opinion. I would, however, like to offer the following observations with respect to the situation.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Port Jervis Urban Renewal Agency, 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 Law.

Second, as indicated above, the Freedom of Information Law enables an agency to withhold records or portions of records the disclosure of which would result in an unwarranted invasion of personal privacy. While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view seek to enable government to prevent disclosures concerning the personal details of individuals' lives. As such, the central question involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

Third, from my perspective, a disclosure that permits the public to determine the general income level of a participant in the program would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy.

Lastly, it is emphasized that when dealing with privacy, attempts to balance interests and subjective judgments must of necessity be made. Therefore, although I might believe that disclosure of particular information would be offensive and result in an unwarranted invasion of personal privacy, another person might feel that disclosure would be innocuous, thereby resulting in a permissible invasion of personal privacy. In short, I do not feel that there are any specific rules that one may follow in determining issues relative to personal privacy. However, based upon the Freedom of Information Law and the direction provided in the Tax Law, it would appear that records reflective of the identities of individuals who receive grants or loans under the program in question could justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2165

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

August 24, 1981

Charles E. Wright
80 A 2724
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wright:

I have received your letter of August 10.

According to your letter, you made a request under the Freedom of Information Law for the master index of the Department of Correctional Services. A representative of that Department, Mr. Donald W. Maloney, notified you that the charge for a copy of the master index is five dollars. You are seeking to determine whether this fee is required by law.

I would like to offer the following comments with respect to your question.

First, I direct your attention to §87(1)(b)(iii) of the Freedom of Information Law, which states that the fees for photocopies of records:

> "...shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law".

The Department of Correctional Services, in §5.36 of its regulations, has promulgated a twenty-five cent fee per page for photocopies not in excess of nine by fourteen inches. I have been advised that the master index in question contains thirty-nine pages. As such, the five dollar charge does not violate the twenty-five cent per page maximum.

Second, it is possible that the institution in which you are housed may possess a copy of the master index that you could inspect, presumably at no charge.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2166

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

August 24, 1981

Richard Ryan
Staten Island Register
2100 Clove Road
Staten Island, NY 10305

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ryan:

I have received your letter of August 13 concerning a request directed to the New York City Fire Department. After having been initially denied access to the records sought, you have asked for a "ruling" from this office.

It is emphasized at the outset that the Committee on Public Access to Records does not have the capacity to issue what may be characterized as a "ruling". On the contrary, the Committee is responsible for advising with respect to the Freedom of Information Law.

In terms of background, you sent a letter to the Fire Department on August 4 in which you requested:

> "[A]ll records and files for completed arson investigations on Staten Island from the period June 1, 1980 through July 31, 1981 inclusive. This should include the names and addresses of all property owners as well as the addresses of the buildings involved".

In response, Dennis R. Hawkins, Counsel to the Department, denied access, stating that:

> "[T]he records and files you have requested are exempt from disclosure under the terms of the Freedom of Information Law, since they have been compiled for law enforcement purposes.

> Disclosure of these files and records would interfere with law enforcement investigations or judicial proceedings, identify confidential sources or disclose confidential information and reveal criminal investigative techniques or procedures".

I would like to offer the following observations with respect to the situation.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Fire Department, 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 Law.

Second, it is emphasized that the introductory language of §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. Consequently, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Furthermore, I believe that it is clear that an agency is required to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, the language of the denial offered by Mr. Hawkins indicates that the denial is based upon §87(2)(e) of the Freedom of Information Law. 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, §87(2)(e), as in the case of several other grounds for denial appearing in §87(2), is based upon potentially harmful effects of disclosure. For instance, if an arson investigation is ongoing and disclosure would interfere with the investigation, §87(2)(e)(i) would be applicable as a basis for withholding. Nevertheless, if an investigation has been concluded, the cited ground for denial might no longer be applicable. In short, if an investigation has been terminated, it is possible that the harmful effects of disclosure envisioned by §87(2)(e)(i) through (iv) might have all but disappeared.

Moreover, as noted previously, the Fire Department is in my view obliged to review the records sought in their entirety to determine which portions fall within the scope of the grounds for denial. In some cases, for example, some records might identify a confidential source. Nevertheless, perhaps those aspects of the records in which confidential sources are identified could be deleted, while the remainder would be available. Similarly, some of the records in question might be reflective of "non-routine" criminal investigative techniques and procedures that would be deniable under §87(2)(e)(iv). However, it is also likely that many of the criminal investigative techniques or procedures described in the records were routine in nature and, therefore, would not fall within the scope of §87(2)(e)(iv).

Lastly, if your request is denied on appeal, you have the capacity to initiate a proceeding under Article 78 of the Civil Practice Law and Rules. In this regard, as a general rule, a petitioner has the burden of proving in an Article 78 proceeding that an agency acted unreasonably. However, §89(4)(b) of the Freedom of Information Law specifies that the burden of proof in an Article 78 proceeding brought under that statute rests upon the agency. In such a proceeding, an agency must prove that the records withheld in fact fall within one or more of the grounds for denial. Further, it has been held by the Court of Appeals, the state's highest court, that an agency cannot merely assert a ground for denial and prevail; on the contrary, it must demonstrate that disclosure would result in the harmful effects envisioned by 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) and Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (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:ss

cc: Commissioner Charles J. Hynes
Dennis R. Hawkins, Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2162

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

August 24, 1981

Theodore G. Frank
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Frank:

I have received your letter of August 13 in which you requested an advisory opinion under the Freedom of Information Law.

Your first area of inquiry concerns rights of access to written evaluations made by supervisors who consulted with Assistant Commissioner Mazursky of the Real Property Assessment Bureau of the New York City Department of Finance. In this regard, you attached a copy of the letter sent to you by Assistant Commissioner Mazursky, who indicated that he requested from supervisors for whom you have worked in the past ten years "an evaluation of your performance and their advice in regard to your reinstatement".

In my view, written evaluations transmitted to Commissioner Mazursky regarding your reinstatement may likely be withheld.

In brief, the Freedom of Information Law states that all records of an agency, such as the Department of Finance, 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.

Relevant under the circumstances 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 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. Concurrently, those portions of inter-agency or intra-agency materials consisting of advice, suggestion, impression and the like may in my view justifiably be withheld. Under the circumstances, since the communications sent to the Assistant Commissioner were advisory in nature, I believe that they would fall within the scope of the ground for denial cited above.

Your second area of inquiry involves a letter directed to the New York City Department of Investigation. In conjunction with that letter, you asked whether the Department is "required to answer any of the sixteen questions" you raised.

I would like to point out with respect to your second question that the title of the Freedom of Information Law is somewhat misleading. The Freedom of Information Law is an access to records law. It is not a vehicle by which individuals may essentially cross-examine public officials. Further, §89(3) of the Law states in part that, as a general rule, an agency need not create a record in response to a request for "information".

There may, however, be existing records reflective of some of the information in which you are interested. For instance, there may be statutes, rules, regulations, statements of policy, administrative staff manuals and similar records that may contain information responsive to several of the questions that you raised. By means of

example, in one of your questions, you asked how long after an assessor retires must he wait before he may engage in real estate transactions with the City of New York. Perhaps there is a code of ethics, a regulation, or a policy determination that would be responsive to that question.

It is suggested that you might want to transmit another letter to the Department in which you request records reflective of or containing the information that you are seeking. I have enclosed for your consideration copies of the Freedom of Information Law and an explanatory pamphlet on the subject. 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
Executive Director

RJF:ss

Enclosures

cc: Assistant Commissioner Mazursky

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2168

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

August 25, 1981

Theodore Baker
76 A 4121
135 State Street
Auburn, NY 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Baker:

I have received your letter of August 23, copies of which were sent to three officials at the Department of Correctional Services.

In your letter, you indicated that a request was made under the Freedom of Information Law on August 11 to your counselor at the Auburn Correctional Facility. However, you wrote that the counselor has ignored the request. Consequently, you have requested from this office records pertaining to you, including your personal and correctional supervision history records.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. This office does not have possession of records generally, such as those in which you are interested, nor does it have the capacity to compel an agency to provide access to records.

Nevertheless, I would like to offer the following advice.

The Freedom of Information Law requires the Committee to promulgate regulations of a procedural nature. In turn, each agency, such as the Department of Correctional Services, is required to adopt its own regulations consistent with those promulgated by the Committee.

In this regard, the Department of Correctional Services has promulgated regulations under the Freedom of Information Law. Enclosed for your consideration is a copy of §5.20 of the Department's regulations, entitled "Examination of inmate record by subject or his attorney". Under those regulations, in inmate is required to direct a request under the Freedom of Information Law to the facility superintendent or his designee. Since your request was sent to your counselor, it would appear that it was directed to the wrong person. It is suggested that you renew your request and direct it to the facility superintendent. In the event that the superintendent denies access to the records, according to §5.20(c) you may appeal a denial to Counsel to the Department of Correctional Services.

Enclosed for your consideration is an explanatory pamphlet regarding the Freedom of Information Law 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-2169

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

August 25, 1981

Mrs. Pearl Michaels
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Michaels:

As you are aware, I have received both your letter and a blank copy of what is characterized as a "pupil participation sheet". It is noted that, on the top of the form that you sent, the words "Bilingual Instructional Programs" appear.

Your question is whether the so-called "pupil participation sheet" is accessible.

It is emphasized at the outset that rights of access to the record in question are not in my view determined by the New York Freedom of Information Law, but rather by the provisions of the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment" (20 U.S.C. §1232g). Further, in terms of specific interpretations of the Buckley Amendment, the regulations promulgated by the then United States Department of Health, Education and Welfare, which is now the Department of Education, are most relevant and provide substantial guidance.

In brief, the Buckley Amendment states that any "education records" identifiable to a particular student or students are confidential to all but the parents of such students under the age of eighteen. Further, records deemed confidential under the Buckley Amendment may be disclosed only with the consent of the parents.

I believe that the pupil participation sheet is subject to the provisions of the Buckley Amendment, for it identifies specific students by name, ID number and date of birth. The form includes reference to contact hours spent by students in reading, math and English as a second language. It also contains percentile scores regarding tests administered to students over a length of time.

I believe that the personally identifying details, such as the name, ID number and date of birth could be deleted under the provisions of the Buckley Amendment, for the inclusion of those details could identify specific students to whom reference is made on the sheet.

It is in my view questionable whether the remainder of the sheet is available after deleting the personally identifying details. According to the regulations to which reference was made earlier, the phrase "personally identifying" means:

> "...that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable".

From my perspective, the question in this case is whether, after deleting a name, ID number and date of birth, the identities of the students could be "easily traceable". If, for example, a class is large, after deleting identifying details, it might be all but impossible to identify the students. If, on the other hand, a class is small and its members are known to you, notwithstanding the deletion of identifying details, the identities of the students by means of the other information found on the sheet might be "easily traceable". As such, a determination of the capacity to deny must in my view be made upon additional facts of which I am not aware.

During our recent telephone conversation, you informed me that you are a teacher. In this regard, I would like to point out that there are certain situations in which prior consent for disclosure is not required under the Buckley Amendment. For instance, §99.31 of the regulations cited earlier states in relevant part that:

> "[A]n educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is--
>
> (1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests..."

If, as a teacher, you have "legitimate educational interests" in the records, it is possible that you may have the capacity to gain access to 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:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 670
FOIL-AO- 2170

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

August 25, 1981

Ms. Jane Barton
Vice President
Montgomery County Land and
Home Owners Association
Windy Hill Farm
R.D. 1 - Box 713
Esperance, NY 12066

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Barton:

I have received your letter of August 14 in which you requested an opinion regarding the applicability of the Freedom of Information Law.

According to your letter, on June 24, your group, the Montgomery County Land and Home Owners Association, requested a copy of a tape recording of a meeting held on the preceding evening. You indicated that:

> "[I]t has been the policy of the Clerk of the Board to tape record the proceedings of the Board meeting, as well as the public segment of the meeting to use in assisting him in preparing the minutes of the meeting".

In response to your request for the tape recording and its preservation, you were denied access based upon a 1968 opinion of the Comptroller in which it was advised that a tape recorder owned by a clerk and used as an aid in the preparation of minutes does not constitute a public record.

In my opinion, the tape recording in which you are interested is available.

First, as you intimated, when the Comptroller's opinion was written, the Freedom of Information Law did not exist. Since the initial enactment and subsequent amendment of the Freedom of Information Law, rights of access to records have been broadened and clarified.

Second, §86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

In my opinion, since the Clerk of the Board uses a tape recorder in the performance of his official duties, I believe that the tape recording constitutes a "record" subject to rights granted by the Law, for it represents information produced for an agency.

To further bolster such a contention, two questions might be raised: Would the Clerk employ a tape recorder if he was not the Clerk? Would a tape recording be prepared by the Clerk of he was not acting in the performance of his official duties? In short, it appears that the Clerk used the tape recorder and prepared a tape recording in the performance of his official duties. Therefore, again, I believe that the tape recording was produced for the Board and is a "record" subject to the Freedom of Information Law.

Third, there are two judicial determinations which in my view strengthen the contentions offered above. In Zaleski v. Hicksville Union Free School District Board of Education (Sup. Ct., Nassau Cty., NYLJ December 27, 1978), it was held that tape recordings of a school board meeting constitute "records" that are available under the Freedom of Information Law. However, the decision did not make clear whether the tape recording was made through public funding or otherwise. Further, however, a similar argument was made in Warder v. Board of Regents of the State of New York [410 NYS 2d 742 (1978)]. In Warder, the Secretary to

the Board of Regents contended that personal notes taken at meetings, which were also used as an aid in compiling minutes, were the personal property of the Secretary. The Court found that the notes were not personal property, but rather were "records" prepared in the course of official duties that were available after having made an in camera inspection to determine rights of access.

It is important to point out, however, that the tape recording need not in my view be preserved for posterity. In this regard, §65-b of the Public Officers Law prohibits a municipality from destroying records without the consent of the Commissioner of Education. In conjunction with §65-b, the Department of Education has developed schedules for the retention and disposal of records. Based upon conversations with representatives of the Education Department, I believe that a tape recording may be destroyed or erased, for example, shortly after its creation and when it has no further utility. However, I do not believe that it would be appropriate to destroy or erase a tape recording while a request for a tape recording is pending under the Freedom of Information Law.

Third, 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 the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

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.

I hope that I have been 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: Montgomery County Board of Supervisors

William Moore, County Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2171

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

August 25, 1981

Marvin Datz
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Datz:

I have received your letter of August 13.

According to your letter, you submitted a written request under the Freedom of Information Law and subsequently appealed to the New York City Department of Employment of the Human Resources Administration. Among other things, you requested the name of the records access officer for that Department, as well as any regulations adopted by the Department in accordance with the Freedom of Information Law. Nevertheless, as of the date of your letter, you have apparently not received any response to either the request or the appeal.

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 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 may be appealed 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)]. A review of our files indicates that the Committee has not received a copy of an appeal from the Department of Employment.

Further, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Second, §87(1)(a) of the Law requires that all agencies promulgate regulations in accordance with the regulations of the Committee on Public Access to Records (see attached). As such, the Department should have adopted regulations, or perhaps it operates under regulations promulgated under the Freedom of Information Law by the Office of the Mayor.

Lastly, in an effort to promote compliance with the Freedom of Information Law by the Department, a copy of this opinion, the Law and the Committee's procedural regulations will be sent to Commissioner Gault.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss
Enclosure
cc: Ronald T. Gault

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2172

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

August 25, 1981

Louis Nicolella
Mayor
City of Gloversville
City Hall
Gloversville, NY 12078

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mayor Nicolella:

I have received your letter of August 19 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and our recent telephone conversation, you have unsuccessfully requested records in possession of the Gloversville Water Department, which is administered by the Gloversville Board of Water Commissioners. Specifically, you requested records indicating the total production of water for the month of July, the total amount of billings for the same period, the percentage of users during July in every rate category, the names of the eighteen largest users to which reference was made during a public presentation, and the total amount billed during 1980 to the eighteen largest users in the District. Having directed your request to the Clerk of the Board, you were informed that the information sought had been prepared and is in existence. However, the Clerk and the President of the Board advised you that the Board voted to deny access to the records in question.

In my opinion, the records in which you are interested are clearly available under the Freedom of Information Law for the following reasons.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, as a general rule, an agency is not required to create a record in response to a request. However, during our telephone conversation, as well as an ensuing conversation with the City Attorney, Mr. Geraghty, you indicated records do exist containing the information sought in your request. Therefore, it is clear that you requested existing records, rather than information that would involve a new compilation.

Third, in my view, there is but one ground for denial that may be applicable. However, due to the structure of that ground for denial, I believe that it may be cited as a basis for disclosure. 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..."

It is noted that 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.

Under the circumstances, it would appear that the records in question may properly be characterized as "intra-agency materials". Nevertheless, it also appears that they consist solely of statistical or factual information that is available under §87(2)(g)(i).

And fourth, the Freedom of Information Law preserves rights of access granted by other provisions of Law. Section 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".

As such, if records are available under some other provision of law or by means of judicial determination, nothing in the Freedom of Information Law may be cited to limit or abridge those rights of access. In this regard, I direct your attention to §51 of the General Municipal Law, which states in part that:

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

Therefore, I believe that the records in which you are interested are available not only under the Freedom of Information Law, but also under §51 of the General Municipal Law.

In order to inform the Water Board of this opinion, a copy will be sent to 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:ss

cc: Frank LaPorta, President

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 2123

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

August 26, 1981

Larry O'Sullivan
Branch Manager
AM Jacquard Systems
1535 Western Avenue
Albany, NY 12203

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. O'Sullivan:

I have received your letter of August 18, as well as the materials attached to it.

According to your letter, you have questioned a denial of access by the Office of General Services with respect to records reflective of the recommendations and comments of specification writers at the Office of General Services. The denial rendered by Commissioner Egan cited a provision concerning inter-agency or intra-agency materials as the basis for withholding the records in question.

Based upon the description of the materials in which you are interested, I concur with the Commissioner's response.

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 Office of General Services, are available, except those records that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

From my perspective, there is but one ground for denial that could appropriately be cited. Specifically, §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..."

Under the circumstances, it appears that the records sought could properly be characterized as "intra-agency materials", since they were transmitted between employees of the Office of General Services. Further, since they are reflective of recommendations and comments, I do not believe that the records could be considered as statistical or factual data, instructions to staff that affect the public, or final agency policies or determinations. It is noted in this regard that the sponsor of the Freedom of Information Law indicated that §87(2)(g) was intended to enable government to withhold inter-agency and intra-agency materials consisting of advice, recommendations, suggestions, impressions and the like. A recommendation, for example, is advisory in nature and may be accepted or rejected by a supervisor or other decision-maker.

In view of the foregoing, it appears that the records sought fall within the scope of the ground for denial envisioned by §87(2)(g) of the Freedom of Information Law and that the Commissioner's determination was consistent with the Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

cc: Commissioner Egan

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2174

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

August 26, 1981

Marcos Rivera #79-A-2700
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rivera:

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 member.

In your letter, you have requested from the Department of State and/or the Committee various records, such as a presentence report, a certificate of evidence of imprisonment and a district attorney's report.

In this regard, as indicated earlier, the Committee is responsible for giving advice under 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 require an agency to disclose records. As such, the Department of State and the Committee simply do not have possession or control of the records sought.

Nevertheless, I would like to offer the following suggestions and advice with respect to your request.

First, you cited the federal Freedom of Information and Privacy Acts, which appear in 5 USC §552 and 5 USC §552a respectively. Those Acts apply only to records in possession of federal agencies. As such, they are not applicable to the records that you are seeking. Applicable to records in possession of New York State agencies is the New York Freedom of Information Law, a copy of which is attached.

Second, under the Freedom of Information Law, a request for records should be made to the "records access officer" of the agency that maintains possession of the records. For instance, if you are interested in obtaining a copy of a district attorney's report, a request for that record should be directed to the appropriate district attorney's office. Similarly, I believe that a certificate of evidence of imprisonment is maintained by the Department of Correctional Services. As such, a request for that record, under the Department's regulations, should be directed to the superintendent of the facility in which you are housed.

With respect to presentence reports and related records, it is noted that such reports are generally deemed confidential under §390.50 of the Criminal Procedure Law. It is possible, however, that a court may in some instances disclose the contents of a presentence report in whole or in part to a defendant or his attorney. Therefore, it is suggested that you request the presentence report and related materials from the court in which you were tried.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Attachment

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2175

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

August 26, 1981

Joseph Medford
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Medford:

I have received your letter of August 14 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, your assessment has been increased by the Nassau County Department of Assessment. Having researched other properties in your area, you indicated that you found a property similar and adjacent to your own assessed at approximately sixty percent less than your property. Thereafter, you requested copies of the Department's "pricing chart for different grades of assessment". You indicated that the charts are used by the assessors to determine the valuation of property. In response to your request, however, the Department indicated that the record is "classified and not available under the Freedom of Information Act". You wrote further that without the information in question, there is no way to determine the method of assessment or to verify the manner in which different parcels and improvements are valued.

Based upon the facts as you have described them, I believe that records in which you are interested are accessible under the Freedom of Information Law.

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 Assessment, 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, it appears that there is but one ground for denial that may be applicable with respect to the records in question. Nevertheless, due to the structure of that ground for denial, I believe that it may be cited as a basis for disclosure. 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..."

It is noted that 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.

Under the circumstances, the records in question could likely be characterized as "intra-agency" materials. Nevertheless, it would appear that the pricing charts in question constitute factual information available under §87(2)(g)(i). Further, it is possible that the pricing charts are reflective of instructions to staff that affect the public or the policy of an agency and, therefore, would be accessible under §§87(2)(g)(ii) and (iii) respectively.

Third, long before the passage of the Freedom of Information Law in 1974, it had been held judicially on several occasions that virtually any records used in the process of developing assessments are available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951) and Sanchez v. Papontas, 32 AD 2d 948 (1969). In addition, in a recent decision, it was stated that:

> "[E]ven prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law §66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying..." [Szikszay v. Buelow, 436 NYS 2d 558, 562-563 (1981)].

Lastly, it is possible that the denial is based upon a new provision found in §574 of the Real Property Tax Law. The cited provision states in subdivision (5) that:

> "[F]orms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection or copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board".

In my view, despite the prohibition regarding disclosure described in the provision quoted above, if, for example, you seek to challenge an assessment by filing a grievance, I believe that records otherwise deniable under §574(5) become available. Stated differently, a grievance proceeding, which may or may not be followed by a judicial review, is administrative in nature. Therefore, if a request is made for forms considered deniable under §574(5) with respect to a grievance proceeding, those forms would in my view be available.

Nevertheless, if your description of the records in question is accurate, I do not believe that §574(5) of the Real Property Tax Law could appropriately be cited as a basis for withholding, for the records that you are seeking differ from those described in §574(5). Further, to reiterate, it would appear that the records that you are seeking are accessible.

To inform the Department of Assessment of this opinion, a copy will be sent to 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:ss

cc: Department of Assessment

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2176

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

August 26, 1981

Douglas E. Lee
75-A-1894
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lee:

I have received your letter of August 14.

Your inquiry concerns the application of the federal Freedom of Information Act regarding requests for records to New York State courts, offices of the districts attorney, and the Department of Correctional Services.

I would like to offer the following observations in regard to your inquiry.

First, I concur with your statement that the federal Freedom of Information Act does not require that a reason be given when making a request for records. It is also true that an applicant for records under the New York Freedom of Information Law need not indicate the purpose for which a request is made.

Second, you have indicated that your requests for records under the Freedom of Information Act may be directed to any agency which depends in part for funding upon the federal government. It is apparently your belief that any federal monies allocated to a state agency authorizes you to request records under the federal Freedom of Information Act.

I disagree with your contention. The definition of "agency" under the federal Freedom of Information Act in 5 U.S.C.A. §551(1) clearly indicates that the Act is applicable only to federal agencies. Similarly, under the New York Law, "agency" is defined to include entities of state and local government in New York.

In my view, the agency that has possession of records determines which statute is applicable. Therefore, the New York Freedom of Information Law may be cited to request records in possession of New York State agencies while the federal Freedom of Information Act is applicable with respect to records in possession of agencies of the United States government.

Third, I agree with your interpretation that the Freedom of Information Law does not authorize a court to award attorney fees to a successful litigant in an Article 78 special proceeding.

In sum, although numerous state and local government agencies receive federal funds and participate in federal programs, those criteria do not bring such agencies within the scope of 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Donald Maloney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2122

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

August 28, 1981

Louis Milburn
71-A-0356
135 State Street
Auburn, NY 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Milburn:

I have received your letter of August 17, 1981.

You have written with respect to problems you have encountered in seeking records under the Freedom of Information Law from various offices of the New York City Police Department. In this regard, you requested that the Committee "investigate" your complaints and issue a "decision".

Although the Committee does not have the authority to conduct investigations or render "decisions", but rather the capacity to advise, I would like to offer the following observations.

First, you were informed that records you requested from a police precinct were not available due to their destruction by fire. As you may be aware, there is no legal requirement that an agency create a record which does not exist [see §89(3) of the Freedom of Information Law]. However, while the records you are seeking have been destroyed by fire, it is possible that duplicates of some of those records may be available elsewhere. For example, the Department of Correctional Services, pursuant to §29 of the Correction Law, has promulgated rules and regulations for access to Department records. Enclosed is a copy of the relevant regulations for your review. Specifically, §5.20 indicates that an inmate or former inmate can direct a request for inspection or copying of records to his facility superintendent or a designee.

Second, you have made several requests for other types of records to various sections of the New York Police Department. To date your requests have been denied. It is your belief that the offices involved failed to conduct a thorough search. You did not indicate in your correspondence whether the police agencies have written to advise you of their denials or have failed to respond to your requests. Consequently, there are two courses of action you could consider. One option is to request that the agencies certify that either they do not have custody of the specific records or cannot locate the records pursuant to §89(3) of the Freedom of Information Law and §1401.2(6) of the Committee's regulations (see attached). Another option is to consider an appeal. 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Third, the Freedom of Information Law is not applicable to the courts or court records. However, some of the records that you are seeking may be available under §255 of the Judiciary Law. It is suggested that you direct a request to the court in which you were tried, providing as much identifying information as possible, including, for example, dates, file designations, index and docket numbers, etc.

Lastly, I have received a copy of a letter from the Office of the District Attorney, Bronx County, addressed to you and signed by Peter Grishman. Mr. Grishman advised you that grand jury proceedings and names of witnesses are not disclosable in accordance with provisions of the Criminal Procedure Law. Specifically, §190.25 requires confidentiality of grand jury proceeding and minutes unless a court orders to the contrary. Under §87(2)(a) of the Freedom of Information Law, an agency may deny access to records that are exempted from disclosure by state or federal statute. Therefore, in my opinion, Mr. Grishman's determination to deny access to the grand jury information and names of witnesses is likely correct.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Peter Grishman

enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2178

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

August 28, 1981

Frederic J. Gumbs
Deputy Secretary of State
Acting Supervisor of Public Records
The Commonwealth of Massachusetts
Office of the Secretary of State
1701 McCormack State Building
One Ashburton Place
Boston, Massachusetts 02108

Dear Mr. Gumbs:

Your letter of August 18 addressed to Robert Abrams, Attorney General of the State of New York, has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to and administering the New York Freedom of Information Law.

As requested, the questionnaire attached to your inquiry has been completed. In addition, I would like to offer the following comments and observations.

First, it appears that the functions of our respective offices are somewhat similar. As indicated by the Freedom of Information Law [see attached, §89(1)], the Committee is a statutory body consisting of four ex officio government members and six appointed members of the public. Although the Committee does not have the authority to render determinations of a binding nature, it does have the capacity to advise. As a matter of course, this office will render a written advisory opinion at the request of any person. Further, while the opinions are not binding, they have been cited with increasing frequency by the courts, and two among the four Appellate Divisions in the State have held that an opinion of the Committee must be upheld unless it is unreasonable.

With respect to fees, the general rule as expressed in §87(1)(b)(iii) is that an agency may charge no more than twenty-five cents per photocopy. Specifically, the cited provision states that fees for copies of records:

> "...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 language quoted above, the Law distinguishes between records that may be reproduced by traditional photocopying methods and those that require other means of duplication. For instance, if accessible information found on a computer tape is requested, an agency may charge on the basis of computer time, excluding fixed costs of the agency, such as operator salaries, overhead, and similar costs.

Further, the regulations promulgated by the Committee, which govern the procedural aspects of the Law and with which all agencies must comply by adopting consistent regulations applicable to their records, precludes the assessment of a search fee (see attached regulations, §1401.8).

In terms of the background behind the establishment of the fee of twenty-five cents, the Freedom of Information Law as originally enacted in 1974 made no reference to a specific fee to be assessed; however, the statute gave the Committee the authority to establish fees by means of regulations applicable to agencies of state and local government. Based upon a survey done by the State Office of General Services, it was found that the average cost of producing a photocopy was approximately six cents per photocopy. It was felt by the Committee that the assessment of a search fee would be inappropriate. In some instances, agencies with inefficient recordkeeping systems might charge members of the public unnecessarily high fees due to their own incapacity to locate records. Concurrently, it was assumed that in many instances, agency officials would be required to spend time to locate records and evaluate their contents to determine rights of access. As such, it was determined in 1974 that a maximum fee of

twenty-five cents per photocopy would represent considerations regarding the actual cost of photocopying as well as costs incurred by agencies in terms of locating and evaluating records.

The Law was substantially amended in 1977 and effective on January 1, 1978. As indicated previously, the Legislature saw fit to codify the general rule that the maximum fee for photocopying should be no more than twenty-five cents. It is noted also that, unlike most aspects of life, the cost of photocopying has decreased. Currently, according to the Office of General Services, there are photocopying machines for which the actual cost of reproduction is approximately one cent per photocopy. The maximum fee of twenty-five cents, notwithstanding the absence of the capacity to assess search fees, has not resulted in a substantial number of complaints by government or attempts to seek a higher statutory fee.

As you intimated, there are numerous statutes dealing with particular types of records that specify fees higher than twenty-five cents per page. For instance, the fee for reproducing most court records is one dollar per page; in New York City, the fee is four dollars per page. There are statutory fees for searching and copying birth and death records. Accident reports in possession of the Department of Motor Vehicles are available at a cost of $3.50, regardless of the number of pages.

In addition to copies of the Freedom of Information Law and the Committee's regulations, I have enclosed a copy of the Committee's latest annual report. The report includes an appendix that identifies by means of a series of more than 350 "key phrases" the subject of written advisory opinions rendered by the Committee. Page seven of the index includes fifteen key phrases regarding fees. If you are interested in obtaining copies of any of those advisory opinions, I would be most pleased to send them to you.

Lastly, I would appreciate receiving a copy of the Massachusetts Freedom of Information Law and any other materials that you believe may be of interest to me.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2179

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

August 28, 1981

Theodore W. Roth, President
Missing Heirs International, Inc.
19 West 44th Street
New York, New York 10036

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Roth:

I have received your letter of August 17, as well as the correspondence appended to it.

Once again, the correspondence indicates that the New York City Employees' Retirement System has opted to withhold records that you are seeking that identify deceased members of the System. Based upon a letter addressed to you dated August 10 by Harold E. Herkommer, Executive Director of the System, the records were withheld on the basis of §89(2)(b)(iii) of the Freedom of Information Law. As you are aware, the cited provision 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..."

Having reviewed our previous correspondence, I regret that there is little that I can do but reiterate contentions expressed in those opinions.

I assume that you continue to request records relative only to deceased members of the System. In my view, there is a significant difference in terms or privacy, and, therefore, the effects of disclosure, between the release of records identifying living beneficiaries as opposed to deceased members of the System. Although it is possible

that disclosure of lists of names and addresses relative to living beneficiaries might justifiably be withheld on the basis of the language quoted above, if a person has died, I cannot envision how one's privacy could be invaded in an unwarranted fashion.

It appears that, at this juncture, your only recourse would involve the initiation of 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:ss

cc: Harold E. Herkommer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2180

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

August 28, 1981

Mr. Barry Brown
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brown:

I have received your letter of August 18, 1981, in which you requested assistance regarding a request for records directed to the Department of Social Services.

You indicated that, of the five areas of records sought, the Department denied access to four. Additionally, you requested comments regarding the action taken by the Committee upon receipt of a copy of an appeal in accordance with §89(4)(a) of the Freedom of Information Law.

I would like to offer the following comments with regard to your inquiries.

First, I have received a copy of correspondence sent to you by Richard Chady, Records Access Appeals Officer of the Department of Social Services. In that letter, which is dated August 24, 1981, Mr. Chady granted access to four types of records that had apparently been initially denied. Mr. Chady advised you that the fee for photocopying the records in question is $5.75. You should be aware that an agency may require that fees for copying be paid in advance [see Freedom of Information Law, §89(3)].

Second, with regard to "action" taken by the Committee, it is noted that the Committee does not have the authority to enforce or otherwise require compliance with the Freedom of Information Law. However, the Committee does issue advisory opinions upon request, or if, for example, there is disagreement regarding a determination rendered following an appeal, the agency, may be contacted orally or in writing by 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Richard Chady

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2181

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

COMMITTEE MEMBERS

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[redacted]
BARBARA SHACK
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 3, 1981

Mr. Douglas E. Lee
75-A-1894
Green Haven Correctional Facility
Stormville, New York 12582

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lee:

I have received your letter of August 24 as well as the correspondence attached to it.

You have asked for an advisory opinion with respect to the fees for photocopying assessed by Guy Paquin, Albany County Clerk. According to your letter and the correspondence, Mr. Paquin is seeking to assess a fee of one dollar per photocopy. In addition, Edward S. Conway, Justice of the Supreme Court, indicated to you in a letter dated May 21 that the clerk is bound to charge a fee of one dollar per page.

Notwithstanding your situation as an inmate, I agree with the contentions expressed by Mr. Paquin and Judge Conway for the following reasons.

First, as you may be aware, the Freedom of Information Law is applicable to agencies. In this regard, the term "agency" is defined by §86(3) of the Law, and it specifically excludes the judiciary. Consequently, the Freedom of Information Law does not include within its scope the courts or court records.

Second, even if the courts fell within the scope of the Freedom of Information Law, the fee of one dollar per photocopy would nonetheless be valid. Section 87(1)(b)(iii) of the Freedom of Information Law states that an agency may assess fees for copies

> "...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."

Based upon the language quoted above, an agency subject to the Freedom of Information Law may charge no more than twenty-five cents per photocopy, unless some other provision of law prescribes a different fee. In this regard, I direct your attention to §8020 of the Civil Practice Law and Rules concerning the fees to be assessed by county clerks acting as clerks of a court. Specifically, subdivision (f)(4) of the cited provision states that a clerk shall 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 the request was directed to the Albany County Clerk as custodian of court records, he must charge a fee of one dollar per page up to nine by fourteen inches pursuant to §8020(f)(4) of the Civil Practice Law and Rules.

Third, you made reference to the fact that you are an inmate and indigent, and that the fees charged by various other courts and agencies are substantially lower than one dollar per page. I would like to point out that the records that you are seeking apparently have nothing to do with your incarceration. Further, the practices of federal courts are unrelated to the New York courts in terms of fees.

And fourth, although there are provisions in the federal Freedom of Information Act that permit an agency to waive fees under certain circumstances, there is no similar provision in the New York Freedom of Information Law. Similarly, §5.36 of the regulations promulgated by the Commissioner of the Department of Correctional Services indicates that the Department may waive fees with respect to a request for Department records. That provision, however, pertains only to records in custody of the Department of Correctional Services; it is in no way controlling with regard to court records, such as those in which you are interested.

In sum, it is reiterated that the fee of one dollar per photocopy sought to be assessed by the Albany County Clerk is in my view completely consistent with law.

Lastly, approximately two weeks ago, you requested a series of advisory opinions rendered by the Committee. Due to your transfer from the Auburn Correctional Facility to Green Haven, the materials were returned to this office. The opinions are enclosed herein.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Guy Paquin, Albany County Clerk
Honorable Edward S. Conway, Justice, Supreme Court

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2182

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

September 3, 1981

Francis T. Murray
Ulster County Attorney
P.O. Box 1800
240 Fair Street
Kingston, New York 12401

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Murray:

I have received your letter of August 19 in which you requested an advisory opinion regarding rights of access to accident reports.

Specifically, you have questioned whether police accident reports must be released to any member of the public who requests them. You have contended that §66-a of the Public Officers Law concerning motor vehicle accident reports is the governing provision and that its language limits rights of access to those individuals who have a specific "interest".

I would like to offer the following comments and observations with respect to your inquiry.

First, although §66-a makes reference to inspection of accident reports by "any person having an interest therein", there is nothing in the statute that defines the scope of what may be characterized as an "interest".

Second, the language of §66-a does not in my view preclude disclosure of accident reports to persons without an interest, legal or otherwise. Consequently, I do not believe that §66-a precludes the application of the Freedom of Information Law with respect to accident reports. Although the term "interest" is used, it does

not appear that accident reports must be withheld with respect to persons having no connection with an accident. As such, it does not appear that such records are exempted from disclosure by statute and therefore deniable under §87(2)(a) of the Freedom of Information Law on the ground that a person does not have a legal interest. Stated differently, as I read §66-a, as a general rule, accident reports must be made available to persons with an "interest", whatever that term infers, and may be made available to others.

Third, assuming that the Freedom of Information Law is applicable, it would appear that accident reports would be available to the general public, unless, as indicated in §66-a, disclosure "would interfere with the investigation or prosecution...of a crime involved in or connected with the accident". To the extent that accident reports would if disclosed interfere with the investigation or prosecution of a crime, such information could likely be withheld concurrently under §87(2)(e)(i) of the Freedom of Information Law.

The remainder of accident reports would likely consist of factual information that is available under §87(2)(g)(i) of the Freedom of Information Law. Further, although §87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy", it appears that disclosure would result in a permissible rather than an unwarranted invasion of privacy. To bolster that contention, I would like to point out that it has been held judicially that police blotters are available [see Sheehan v. City of Binghamton, 59 AD 2d 808, (1977)]. If a police blotter identifies those involved in an accident, and the blotter is accessible, it would be difficult to justify a denial on the basis of privacy with respect to identifying details that appear in an accident report.

Lastly and perhaps most importantly, in conjunction with your request for an opinion, I have contacted the State Department of Motor Vehicles. The Department of Motor Vehicles maintains in its possession copies of all police accident reports. I was informed that the accident reports maintained by that Department are copies of the reports completed by officers of municipal police departments.

Further, accident reports are made available by the Department of Motor Vehicles as a matter of course at the request of any person under §202 of the Vehicle and Traffic Law. As such, from a practical point of view, if accident reports are made available by the State Department of Motor Vehicles, I would question the basis or necessity for withholding the same records in possession of a municipal 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2183

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

September 4, 1981

Mr. Charles E. Wright
80-A-2724
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wright:

I have received your letter of August 27 in which you raised questions regarding the provisions concerning fees in the Freedom of Information Law. Your inquiry was directed to Ms. Baldasaro, who is on vacation. As such, I have prepared the following response.

Section 87(1)(b)(iii) states that an agency may assess:

> "...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."

Your question concerns the interpretation of the clause "except when a different fee is otherwise prescribed by law". You stated the belief that a different fee could be prescribed only by statute and not by regulation.

In my view, the term "law" can include a statute, a local law, an ordinance, or a regulation, for example. Regulations promulgated by state agencies based upon statutory authority have the force and effect of law and are given the status of law. Consequently, I believe that a fee established by means of regulation would constitute a "different fee...otherwise prescribed by law."

It is noted that the language that you have questioned has been the subject of legislative proposals made by the Committee. Due to the breadth of the term "law", it is possible for a town or village, for instance, to establish a fee by means of local law that far exceeds the twenty-five cent limitation contained in the Freedom of Information Law. As a consequence, the Committee recommended that the term "law" be replaced by "statute". By so doing, the only instance in which a fee for photocopying could exceed twenty-five cents would involve specific direction contained in a statute enacted by the State Legislature. The Committee's recommendation was contained within a bill which, if enacted, would have amended the Freedom of Information Law in several respects. However, that bill was vetoed by the Governor this year.

Lastly, enclosed is a copy of the regulations promulgated by the Department of Correctional Services that you requested.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2184

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

September 4, 1981

Thomas J. Bruner
Chief Negotiator
Chemung County Probation
Officers Association
P.O. Box 382
Elmira, NY 14902

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bruner:

I have received your letter of August 21 in which you requested an advisory opinion regarding Chemung County's compliance with the Freedom of Information Law in relation to your requests directed to the County.

Having reviewed the correspondence attached to your letter, I would like to offer the following observations.

First and perhaps most importantly, the Freedom of Information Law is an access to records law. Stated differently, an agency, as a general rule, is not required to create a record in response to a request for information. Further, §89(3) of the Law specifically states that, unless otherwise provided, nothing in the Law shall be construed to require an agency to prepare a record that does not exist. In the context of your requests, it appears that you sought "information" including an "agreement" that do not exist. If that is indeed the case, the County would be under no obligation to prepare such records on your behalf.

Second, in response to a request directed to R. Arden De Vore, Chemung County Treasurer and Records Access Officer, you were advised that:

> "[Y]ou may have access to our cancelled checks any time you wish to see them. You will have to search the files as we do not have the time.
>
> "You may also see any records we may have".

In my view, even though the records in question might be offered for your review, I do not believe that the response of the County Treasurer was appropriate.

As you indicated in your correspondence, the regulations promulgated by the Committee specify the duties of a records access officer. Relevant under the circumstances are provisions indicating that the records access officer is responsible for assisting an applicant in identifying requested records, if necessary, and upon locating the records sought, making them available for inspection [see attached, regulations, §1401.2(b)(2) and (3)]. Based upon the provisions of the regulations cited above, I believe that it is the duty of the records access officer to assist you in finding the specific records in which you are interested and making them available to you after having located the records.

Further, a contention that "we do not have the time" to search for records is not in my view a valid basis for requiring an applicant to search for records. Even before the passage of the Freedom of Information Law, it was held that "mere inconvenience" does not constitute a sufficient basis for withholding records [see Sorley v. Lister, 218 NYS 2d 215 (1961)]. In this instance, although the response indicates that the records are accessible, without the capacity to locate the records, you might be "constructively" denied access to the records. In addition, in a more recent decision rendered under the Freedom of Information Law, it was held that a shortage of manpower precluding compliance with the Law did not constitute a defense, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers of New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)]. In short, I believe that the Law and the regulations require the records access officer to locate accessible records and make them available to an applicant within the requisite time limits.

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

Attachment

cc: Louis J. Mustico
R. Arden De Vore

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2185

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

September 8, 1981

Mr. John Devine
77-A-4053
354 Hunter Street
Ossining, NY 10562

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Devine:

I have received your letter of August 21.

According to your letter, having directed a request to the Division of Parole, it was indicated that the records sought, to the extent that they exist, would be made available at a cost of twenty-two dollars. You wrote that you need the records for a "court action" and that you may initiate an Article 78 proceeding to seek "a Court order to release this information gratis".

To assist you and attempt to avoid the initiation of litigation, I would like to offer the following comments.

First, under §87(1)(b)(iii) of the Freedom of Information Law, an agency, such as the Division of Parole, is permitted to charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, unless a different fee is prescribed by some other provision of law. Consequently, as a general rule, an agency may charge up to twenty-five cents per photocopy for accessible records.

Second, although the federal Freedom of Information Act contains provisions under which an agency may in some circumstances waive the fees for photocopying, there is no similar provision in the New York Freedom of Information Law. Therefore, if, for example, the Division of Parole has by regulation established a fee of twenty-five cents per photocopy, I believe that it may assess a fee on that basis, payable in advance, before providing copies of accessible records [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
Executive Director

RJF:jm

cc: William Altschuller

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2176

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

September 8, 1981

Mr. Michael R. Leibowitz
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Leibowitz:

I have received your letter of August 26 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, you have to date unsuccessfully attempted to gain access to a file pertaining to you in possession of the agency by which you are employed.

In all honesty, the facts described in your letter of August 25 to Steven Kline, Inspector General, are not entirely clear. On the one hand, one response appears to indicate that there is no file pertaining to you. On the other, it was indicated that a written response to your request would be given "in a week or two".

I would like to offer the following observations with respect to the situation as I understand it.

First, the Freedom of Information Law is an access to records law. Stated differently, an agency, as a general rule, has no obligation to prepare or create a record in response to a request [see attached, Freedom of Information Law, §89(3)]. Therefore, if, for example, there is no file pertaining to you, the agency would be under no obligation to create records on your behalf.

Second, in the event that you believe that records do exist, but an agency has provided a response to the contrary, you may seek a certification from the agency

in which it is asserted either that records sought are not in custody of the agency, or that the records sought are in custody of the agency, but that they cannot be found after having made a diligent seach [§89(3)].

Third, the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states in brief that all records of an agency are available, except to the extent that records or portions of records fall within one or more of the grounds for denial appearing in paragraphs (a) through (h) of the cited provision. Moreover, §89(2)(c) states in essence that records pertaining to an individual are available to him or her, unless one or more of the grounds for denial may appropriately be cited.

Fourth, it is suggested that you review your collective bargaining agreement. Often such agreements contain provisions which grant rights of access to records to employees that exceed rights granted by the Freedom of Information Law.

Lastly, 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that 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: Steven Kline

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-677
FOIL-AO-2189

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

September 8, 1981

Mr. George E. Phelps
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Phelps:

I have received your letter of August 27 which concerns a request directed to the Middle Island Public Library.

Specifically, you directed a request to the records access officer of the Middle Island Public Library on August 7 for transcripts of hearings held in May and June. As of August 19, you had not received a response, and at a meeting held on that date you again requested the transcripts. The request, however, was denied.

I would like to offer the following observations regarding the situation that you described.

First, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, as a general rule, an agency need not create a record in response to a request [see attached, Freedom of Information Law, §89(3)]. If, for example, public hearings were held, but no transcripts were prepared, the Middle Island Public Library would be under no obligation to create a a transcript on your behalf.

Second, assuming that the transcripts in question do exist, it would appear that they are available, for their contents would have become known to any person present at the hearings.

It is noted, however, that the status of public libraries under the Freedom of Information Law has not been finally determined. In this regard, I would like to point out that there are several types of libraries that may be characterized as "public". They include library sytems, cooperative libraries, free association libraries and public libraries. In some instances, a "public library" may be an independent not-for-profit corporation that has a relationship with several units of government, but which itself is not government. In other instances, a public library may be part and parcel of a governmental entity. In the case of the latter, public libraries is my view clearly fall within the scope of the Freedom of Information Law. In the case of the former, the coverage of the Freedom of Information Law is not entirely clear. Without greater knowledge of the nature of the Middle Island Public Library, I could not conclude with certainty that it is subject to the Freedom of Information Law.

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 may be appealed 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, another provision of law might be relevant. Specifically, §260-a of the Education Law states in relevant part that:

> "[E]very meeting, including a special district meeting, of a board of trustees of a library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a purpose of one million or more, which receives more than ten thousand dollars in state aid shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Under the provision quoted above, virtually all of the types of libraries characterized as "public libraries" are subject to the provisions of Article 7 of the Public Officers Law, which is commonly known as the Open Meetings Law, if they receive ten thousand dollars or more in state aid. Therefore, if the Middle Island Public Library receives ten thousand dollars or more in state aid, it would be subject to the provisions of §260-a of the Education Law.

Under the Open Meetings Law, each public body subject to its provisions is required to create minutes. Here I direct your attention to §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 matter formally voted upon and the vote thereon."

Further, §101(3) requires that minutes of open meetings be compiled and made available to the public within two weeks of such meetings.

Lastly, it is noted that, based upon the direction given in §101(1), minutes need not consist of a verbatim transcript of all comments made at an open meeting. As indicated in the cited provision, minutes of open meetings must include references to all motions, proposals, resolutions, matters voted upon and the date and the vote.

If you could provide more specific information regarding the situations and the nature of the Middle Island Public Library, perhaps I could 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:jm

Encs.

cc: Middle Island Public Library

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2158

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

September 8, 1981

Mr. Richard Gloss
78-C-366
135 State Street
Auburn, NY 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gloss:

I have received your letter of August 23, in which you requested assistance under the Freedom of Information Law.

According to your letter, some time ago, you submitted a request for records to the Supreme Court, Monroe County. However, you were informed that the request did not meet statutory requirements and that, due to the nature of the records sought, the request should have been directed to the agencies having possession of the records in question.

I would like to offer the following observations and suggestions.

First, it is noted that the Freedom of Information Law does not apply to the courts or court records. Section 86(3) of the Freedom of Information Law defines "agency" to mean units of state and local government and specifically excludes the "judiciary". However, there are a number of statutes that grant broad rights of access to court records. 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 certificants of change therefore, 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."

Based upon the language quoted above, it is suggested that you resubmit a request to the clerk of the court in possession of the records that you are seeking citing §255 of the Judiciary Law.

Second, assuming that the court records do not include all of the records that you are seeking, you should direct additional requests to the agencies that maintain custody of the particular records in which you are interested. When making a request, you should do so in writing, reasonably describing the records sought [see Freedom of Information Law, §89(3)]. Further, to assist agency personnel in locating the records, you should provide as much identifying information as possible, such as dates, file designations, docket numbers and similar information.

Third, you have not indicated the purpose for which the request is being made. As a general rule, the status or interest of an applicant for records under the Freedom of Information Law is irrelevant [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Nevertheless, in a situation in which a petitioner initiated a proceeding under Article 78 of the Civil Practice Law and Rules to obtain records under the Freedom of Information Law, the court held that the Freedom of Information Law could not be invoked since the petitioner had failed to make a timely discovery motion under Article 240 of the Criminal Procedure Law. Article 240 of the Criminal Procedure Law establishes the proper times and procedures for criminal discovery. In this regard, the court stated that "[T]he purpose of the Freedom of Information Law is not to allow a litigant to circumvent normal procedures

for discovery" [see attached, People & C. v. Billy Billups, Sup. Ct., Queens Cty., NYLJ, (July 13, 1981)]. If your situation is similar to that of the petitioner in Billups, you might encounter difficulty in obtaining the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2189

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

September 9, 1981

Thomas R. Sullivan
District Attorney
Richmond County
36 Richmond Terrace
Staten Island, NY 10301

Dear Mr. Sullivan:

I have received your lengthy and thoughtful letter of August 28 concerning an advisory opinion prepared at the request of Jim Callaghan, Editor of the Staten Island Register.

First, I would like to point out that I am not in substantial disagreement with many of the statements made in your letter, which is detailed and which cites several provisions of law as well as judicial interpretations.

Second, however, my opinion was based in great measure upon a review of your letter of denial dated August 7 and addressed to Richard Ryan of the State Island Register. In that letter, you merely indicated that the materials requested could be withheld under the "New York Public Officers Law §87(2)". From my perspective, by citing §87(2) without more, I had no choice but to review the various provisions of the Freedom of Information Law that might have been applicable. In this regard, as you are aware, §89(4)(a) of the Freedom of Information Law states in relevant part that the person or body who renders a determination on appeal following a denial of access shall "fully explain in writing to the person requesting the record the reasons for further denial..." In my view, the letter of denial addressed to Mr. Ryan did not "fully" explain the reasons for the denial.

In addition, as you are aware, it has been held on several occasions that a determination to withhold records must be based upon a specific exception to rights of access and that a general allegation that records are deniable

under §87(2) is insufficient [see Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979); Doolan v. BOCES, 48 NY 2d 341 (1979)]. If more specificity had been provided in your letter of denial, perhaps no advisory opinion would have been requested. Similarly, while I have no knowledge of whether your denial will be challenged in court, a more specific showing of the bases for withholding could serve to avoid litigation.

Further, although I am not intimately familiar with the operations of the office of a district attorney, I am well aware of the confidentiality provisions regarding grand jury proceedings and records that may be sealed under §160.50 of the Criminal Procedure Law. If reference had been made to those provisions, I would assuredly have concurred that records sought falling within the scope of those provisions could justifiably be withheld. Nevertheless, no such references were offered.

Third, having reviewed my advisory opinion, I do not believe that it was advised that any particular records were required to be made available. The opinion merely discussed the procedural aspects of the Law and the scope of the grounds for denial. In the same vein, although reference was made to a "subject matter list" required to be compiled under §87(3)(c) of the Freedom of Information Law, nothing in the opinion indicated that such a list would have to identify the records sought by crime. On the contrary, I wrote that:

> "[I]t is suggested in this regard that you request and review the subject matter list prepared by the Office of the District Attorney. Perhaps after reviewing its subject matter list, you will be in a better position to request records reasonably described or identify categories of records in which you are interested by means of file designations, for instance".

Lastly, to be sure, I am unfamiliar with the substance of the records sought by Mr. Ryan. I would like to reiterate my belief, however, that the Freedom of Information Law permits an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial. While it is possible that all of the records sought fall within the grounds for denial, it is my view questionable whether a blanket denial with respect to all of the records sought is appropriate.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF [illegible]
COMMITTEE ON ACCESS TO RECORDS

FOIL-AO-2190

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

September 9, 1981

Walter H. Ruehle
Attorney at Law
Farmworker Legal Services
of New York, Inc.
80 West Main Street
Rochester, NY 14614

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ruehle:

I have received your letter of September 1 in which you requested an advisory opinion.

According to your letter and the attached correspondence, you directed a request on May 19 to the Wayne County Sheriff's Office for information concerning a complaint made against a particular individual on or about November 12, 1980. Since no response was given, a subsequent letter was sent on June 24 to the County Attorney, and a third request was made on July 28. You have indicated that to date, you have received no response to any of the requests. You wrote further that, to the best of your knowledge, no criminal action has been initiated.

I would like to offer the following observations with respect to your inquiry.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations regarding the procedural implementation of the Law. In turn, §87(1) requires that all agencies devise regulations consistent with those promulgated by the Committee. In this regard, §1401.2 of the Committee's regulations requires that the governing body of a public corporation, such as Wayne County, designate one or more records access officers responsible for handling requests made under the

Freedom of Information Law. It is suggested that you review the regulations developed by Wayne County to determine who the designated records access officer or officers are. It is possible that the Sheriff might not be a designated records access officer.

Second, 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

In view of the foregoing and after having determined who the designated records access officer might be, it is suggested that you renew your request and direct it to that person.

Third, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as Wayne County, 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 Law.

You stated the belief that §87(2)(e) would not be applicable, for no criminal action has to date been initiated. 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".

The language quoted above is based upon potentially harmful effects of disclosure. For instance, if the incident to which you made reference is still under investigation, the records may be withheld to the extent that disclosure would interfere with the investigation. Conversely, however, if the investigation has been terminated, if no charges have been made, and if no proceeding is in the offing, it would appear that disclosure would not interfere with an investigation or deprive a person of a right to a fair trial. In the event that the records identify a confidential source, the identifying details could be deleted, while providing access to the remainder.

Another ground for denial might be §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 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 policies or determinations must be made available.

Once again, it is suggested that you renew your request after having learned the identity or title of the designated records access officer.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, 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: Paul Byork, Wayne County Sheriff
Samuel Bonafede, Wayne County Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2191

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

September 10, 1981

James Brocato
75 C 346
135 State Street
Auburn, NY 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brocato:

I have received your letter of August 27 in which you requested assistance regarding the use of the Freedom of Information Law.

Having reviewed your letter and the correspondence attached to it, I would like to offer the following observations and comments.

First, there is a distinction between the federal Freedom of Information Act and the New York Freedom of Information Law. The federal Act (5 U.S.C. §552) is applicable to records in possession of federal agencies. The New York Freedom of Information Law (Public Officers Law, §§84-90), a copy of which is attached, is applicable to records in possession of units of government in New York, including state agencies and local governments.

Second, your requests directed to Edward C. Cosgrove, Erie County District Attorney, and Ronald C. Goldstock of the Organized Crime Task Force, involve all records pertaining to you. In this regard, it is noted that §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. From my perspective, a request for records peratining to oneself without more description might not meet the standard prescribed in the Law. It is suggested that when making further requests, you provide as much identifying detail as possible, such as dates, file designations, index or docket numbers and similar information. By so doing, agency officials might be more able to locate records sought.

Third, please be advised that the Committee is responsible for advising with respect to the Freedom of Information Law. Consequently, the Committee does not have the capacity to compel an agency to make records available or to review records on its own initiative to determine rights of access.

Fourth, although the Freedom of Information Law is not applicable to the courts and court records, most court records are available under the provisions of §255 of the Judiciary Law. I have enclosed a copy of that statute for your consideration. If you believe that a court clerk has possession of records that may be of use to you, it is suggested that you direct a request to the clerk of the court in which you were tried.

And fifth, you have not indicated whether an appeal has been taken or the extent to which you may have employed discovery devices during your trial. I would like to point out that, in a situation in which a petitioner intiated a proceeding under Article 78 of the Civil Practice Law and Rules to obtain records under the Freedom of Information Law, the court held that the Freedom of Information Law could not be invoked since the petitioner had failed to make a timely discovery motion under Article 240 of the Criminal Procedure Law. Article 240 of the Criminal Procedure Law establishes the proper times and procedures for criminal discovery. In this regard, the court stated that "[T]he purpose of the Freedom of Information Law is not to allow a litigant to circumvent normal procedures for discovery" [see attached, People & C. v. Billy Billups, Sup. Ct., Queens Cty., NYLJ, (July 13, 1981)]. If your situation is similar to that of the petitioner in Billups, you might encounter difficulty in obtaining some of 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

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2192

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

September 10, 1981

Mr. Robert Krolikowski
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Krolikowski:

I have received your letter of September 2 in which you requested information regarding certain privileged communications.

Although I am able to provide you with some of the information that you are seeking, please be advised that the Committee is responsible for advising with respect to the Freedom of Information Law. That Law deals with public access to government records. As such, it has only tangential connection with the privileges to which you made reference.

Further, the Freedom of Information Law is an access to records law. Consequently, it is not applicable to oral communications.

Based upon a review of Article 45 of the Civil Practice Law and Rules, privileges exist in New York with respect to communications with a spouse, an attorney, a physician, dentist or nurse, the clergy, a pyschologist, and a social worker. I have enclosed for your consideration copies of the appropriate provisions.

If you would like additional information regarding the scope of the privileges indicated above, it is suggested that you contact an attorney or professional organizations representing professions for which the privileges are 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:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2193

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

September 10, 1981

Louis Milburn #71-A-0356
135 State Street
Auburn, New York 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Milburn:

I have received your letter of August 28 in which you requested an advisory opinion under the Freedom of Information Law.

Your first area of inquiry concerns a request directed to Mr. Peter Grishman of the Bronx County District Attorney's Office. According to your letter, you have requested without success the names of New York City Police Officers who testified in your case by the Bronx County grand jury. It is noted that the case was dismissed. Mr. Grishman responded and stated that the information that you are seeking cannot be made available, for it is "protected" under Article 195 of the Criminal Procedure Law. Mr. Grishman did indicate, however, that:

> "If you have authority to the contrary, or an opinion by the Committee on Public Access, also to the contrary, please forward that to me".

In addition, you have contended that Article 195 of the Criminal Procedure Law does not constitute or require a blanket protection in every case, but only in cases in which the protection of the identity of a witness is necessary.

I disagree with your contention, for I believe that Article 190 of the Criminal Procedure Law requires secrecy. Specifically, I direct your attention to subdivision (4) of §190.25 of the Criminal Procedure Law, which states that:

> "[G]rand jury proceedings are secret, and no grand juror, other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony".

From my perspective, the language quoted above offers little discretion in terms of disclosure. With respect to those who may disclose the contents of grand jury proceedings, they are listed in subdivision (3) of the cited provision and include "a public servant holding a witness in custody". I would assume that such a public servant would include a district attorney.

In sum, unless a court permits disclosure of any or all of the record of proceedings conducted before a grand jury, I believe that such records are required to be kept confidential.

The second area of inquiry concerns notes prepared by a detective relative to a drug case in which you were convicted. You specified that you and your defense counsel examined the notes and that the notes were admitted into and marked by the court as evidence. You have requested that the clerk of the court and the Bronx County District Attorney produce photocopies of the notes for you under the Freedom of Information Law. However, the District Attorney indicated that his office does not have the notes, and the

clerk stated that the notes are not on file. You wrote that the clerk also stated that the "usual policy" is that "the party presenting such evidence retain the evidence after the hearing". You have asked whether the court clerk and the law enforcement agencies involved should have made copies of the notes in question, and whether you would be entitled to the notes under the Freedom of Information Law.

First, it is noted that the Freedom of Information Law does not include within its coverage the courts and court records. Consequently, as a general rule, requests for records directed to the courts or court clerks should not be characterized as requests made under the Freedom of Information Law.

There are, however, numerous provisions of law that grant substantial rights of access to court records. For instance, I have enclosed a copy of §255 of the Judiciary Law, which states in essence that a clerk of a court must search for and make available copies of records in his possession or indicate that the records cannot be found.

Second, in terms of the responsibility of the court clerk or the other agencies involved to produce photocopies of the notes, I must admit that I have no knowledge of the proper or required procedures in such situations.

Third, since the notes were introduced into evidence and made available to you and your attorney, I believe that they would be available to you from either the court clerk or a law enforcement agency. However, if such records do not exist, obviously, they cannot be made available. Further, §89(3) of the Freedom of Information Law specifically states that, as a general rule, an agency need not create a record in response to a request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss
Enclosures
cc: Peter Grishman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2194

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

September 10, 1981

Carl B. Raymo
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Raymo:

I have received your letter of September 3 in which you sought to offer additional information regarding your request for a letter of recommendation.

In your latest communication, you indicated that the Gouverneur Central School District has possession of a copy of the letter of recommendation in which you are interested. As stated in my response to you of August 19, in my opinion, even if your new employer, the Upstate Transportation Consortium, has displayed the letter of recommendation to you, that factor does not change the obligations of the School District to disclose the letter. Moreover, if the School District continues to maintain possession of the letter of recommendation, it would appear to be deniable. To reiterate, §89(2)(b)(i) of the Freedom of Information Law states that an unwarranted invasion of personal privacy includes:

> "...disclosure of employment, medical or credit histories or personal references of applicants for employment..."

If the School District does not have possession of the letter of recommendation, the District cannot make it available.

In short, whether or not the School District maintains custody of the letter of recommendation in a personnel file or a so-called "private" file, it would appear to be deniable based upon the quoted provision of the Freedom of Information Law.

If you would like your attorney to contact me to discuss the matter further, I would be pleased to speak with him.

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:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 680
FOIL-AO- 2195

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

September 11, 1981

Edward J. Backowski
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Backowski:

As you are aware, your letter of September 8 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 Open Meetings and Freedom of Information Laws.

You wrote that, at a special meeting of the Summitville Fire District Board of Commissioners, the Board adopted its present budget. However, you indicated that no notice was given and that no roll call vote was taken on the budget. Further, since the public was not present, there was no opportunity to offer comments. You have asked whether the budget is legal or whether an open meeting must be held to enable the public to comment and "see how their elected commissioners vote".

I would like to offer the following observations with respect to your inquiry.

First, I believe that a board of commissioners of a fire district is subject to the Open Meetings Law. The Board is in my view a "public body", which 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" [see attached Open Meetings Law, §97(2)].

In my opinion, each of the conditions required to be found to determine that the Board is a public body can be met. The Board is an entity consisting of more than two members. It is required to conduct its business by means of a quorum pursuant to §41 of the General Construction Law. That provision states in essence that any entity consisting of three or more public officers or persons that performs its duties collectively, as a body, can do so only by means of a quorum, a majority of its total membership. The Board clearly conducts public business and performs a governmental function [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Further, its functions are performed for a public corporation, a fire district [see Town Law, §174(6)]. Based upon the foregoing, I believe that the Board in question is a public body subject to the Open Meetings Law in all respects.

Second, since the Board is subject to the Open Meetings Law, its meetings must be convened open to the public. It is noted that the scope of the Open Meetings Law has been given an expansive interpretation by the courts. In this regard, it has been held that the definition of "meeting" [see §97(1)], encompasses any gathering of a quorum of a public body 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, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Third, a public body cannot close a meeting to discuss the subject of its choice. Section 100(1)(a) through (h) of the Law specifies and limits the subjects that may appropriately be considered in a closed or "executive" session. From my perspective, a discussion of the budget would not fall within any of the grounds for executive session. Further, it has been held that budgetary matters are not among the subjects that may properly be considered during an executive session (see Orange County Publications, Division of Ottoway Newspapers, Inc. v. the City of Middletown, The Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978).

Fourth, §99 of the Open Meetings Law prescribes the requirements concerning notice of meetings. Section 99(1) concerning meetings scheduled at least a week in advance 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 such meetings. Section 97(2) pertains to meetings scheduled less than a week in advance and requires that notice be given in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. As such, notice is required to be given to the news media and to the public by means of posting prior to all meetings, whether regularly scheduled or otherwise.

Fifth, you intimated that the public should be able to comment at a meeting. In this regard, please be advised that the Open Meetings Law permits the public to attend and listen to the deliberations of a public body; it is silent with respect to public participation. Consequently, if a public body wants to permit public participation at a meeting, it may do so; however, it need not.

Sixth, you indicated there was no roll call vote taken with respect to the budget. Here I direct your attention to the Freedom of Information Law. That Law deals generally with public rights of access to government records. As a general rule, an agency, such as the Board, need not create a record in response to a request. Nevertheless, one of the exceptions to that rule is found in §87(3)(a), which requires that each agency shall maintain:

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

Therefore, in every instance in which a public body votes, a voting record must be compiled that identifies each member who voted and the manner in which he or she voted.

And seventh, you asked whether the budget would be legal if the Open Meetings Law was violated at the meeting during which it was adopted. In my opinion, the budget is legal unless and until a court determines to the contrary. Here I direct your attention to §102(1) of the Open Meetings Law, which states that:

> "[A]ny aggireved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part".

It is noted that the cited provision also 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".

Based upon the language quoted above, it would appear that unless a court invalidates the budget due to violations of the Open Meetings Law, the budget remains in 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
Executive Director

RJF:ss

Attachment

cc: Summitville Fire District Board of Commissioners

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2195

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

September 11, 1981

Mr. Bruce H. Beckmann
Todtman, Epstein, Young
& Goldstein, P.C.
605 Third Avenue
New York, New York 10016

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Beckmann:

As you are aware, I have received your letter of September 4 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a refusal by the New York City Department of Finance to grant access to a so-called "private letter ruling". In terms of the factual background behind your request, you wrote that:

> "[C]lients petitioned the Department for a redetermination of tax due. At a preliminary conference on said petition, the Referee (who would ultimately preside at the formal hearing to be held at a later date) stated to counsel that a certain private letter ruling of which he was in possession and from which he read aloud, persuaded him against our clients' position. Said private letter ruling was apparently on point with the issues to be determined at the hearing."

The Department, however, denied access on appeal following an initial denial, stating that:

> "[U]nder §87.2(a) of the Public Officers Law an agency may deny access to records which are specifically exempted from disclosure by state statute. Section S46-42.0 of the New York City Administrative Code, which was enacted pursuant to the authority granted by state enabling legislation (Chapter 772 of the Laws of 1966), is such a statute. Under its provisions the Department of Finance is prohibited from making the document in question available for public inspection."

Also, it is noted your clients expressed no interest in learning the identity of the person who obtained the letter ruling and indicated that any identifying details could be deleted to protect privacy.

I disagree with the Department's determination for the following reasons.

First, I have reviewed the provisions of the New York City Administrative Code, §S46-42.0 as well as the enabling legislation upon which the cited provision of the Administrative Code is based, Chapter 772 of the Laws of 1966 (hereafter cited as "Chapter 772"). The cited provisions of the Administrative Code and the statute are similar and state essentially that it shall be unlawful for the Director of Finance or any of the Department's employees "to divulge or make known in any manner the amount of income of any particulars set forth or disclosed in any report or return, under this title" [see Chapter 772, §88(1)]. Further, subdivision (2) of §88 indicates that an unauthorized disclosure is punishable by a fine or imprisonment, or both, as well as dismissal from public office.

As I understand the provisions of the statute quoted above, it does not appear that the record in question, a private letter ruling, could be characterized as a report or return. Consequently, I do not believe that the secrecy provisions cited by the Department as the bases for the denial can be justified.

I would like to point out, too, that this office maintains an ongoing relationship with the Office of Corporation Counsel of New York City and an attorney who frequently deals with the City's administration of the Freedom of Information Law. Often efforts are made to mediate in disputes and to avoid the initiation of litigation. With respect to your inquiry, I contacted that attorney to discuss your request, gain additional information, and explain my opinion with respect to rights of access. He in turn contacted the Department of Finance and was informed that the "private letter ruling" was, to the best of his knowledge, prepared in response to a letter, and not in conjunction with a petition to the Director of Finance made pursuant to §80 of Chapter 772. He did not know of any additional details regarding the request for the letter ruling.

Assuming that the situation described by the attorney is accurate, I believe that it would bolster a contention that the letter ruling in question is not a report or a return required to be kept confidential under the Freedom of Information Law [§87(2)(a)], Chapter 772, or the Administrative Code.

Moreover, even if the letter ruling was issued in response to a petition to the Director, §88(1) of Chapter 772 indicates that "...the director of finance may, nevertheless, publish a copy or summary of any determination or decision rendered after the formal hearing provided for in section eighty of this part." In my view, if §88 permits the publication of determinations, or perhaps "letter rulings", the confidentiality provisions would not be applicable to such records.

In viewing the situation from a different vantage point, if the contents of the letter rulings are considered to be confidential pursuant to Chapter 772 and the Administrative Code, it would appear that the referee who read the contents aloud would be subject to the punishment described in §88(2). Again, in view of the fact that the contents of the letter ruling were read aloud, it would appear to indicate that the record in question was not considered by the referee to be a report or a return falling within the scope of the secrecy requirements found in the Administrative Code or Chapter 772.

Second, assuming that the secrecy provisions cited by the Department are inapplicable, §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute" would be equally inapplicable. Further, such a conclusion would result in the application of the remaining provisions of the Freedom of Information Law, which in my opinion requires disclosure of the record in question.

In this regard, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Department of Finance, are accessible, except to the extent that records or portions thereof fall within one or more of the grounds for denial listed in §87(2).

Perhaps most relevant under the circumstances 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 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 policy or determinations must be made available.

Under the circumstances, since the referee has apparently relied upon the letter ruling as the basis for a determination, I believe that it could be characterized either as an instruction to staff that affects the public accessible under §87(2)(g)(ii), or a "final agency policy or determination" accessible under §87(2)(g)(iii).

The intent behind §87(2)(g) as expressed by the Assembly sponsor of the amendments to the Freedom of Information Law passed in 1977 and effective on January 1, 1978, in my view bolsters such a conclusion. In discussing the intent of §87(2)(g), Assemblyman Mark Siegel in a letter addressed to me dated July 21, 1977, wrote that:

> "...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 [are] accessible."

Based upon the expressed legislative intent, it appears that the statement made by the referee indicates that the letter ruling represents the so-called "secret law" of the Department of Finance with respect to a particular issue.

The only other ground for denial that is in my view 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". You have indicated in your letter as well as our telephone conversation that you have no interest in learning of the identity of the individual who sought the letter ruling. In this regard, if disclosure of the identifying details would indeed constitute an unwarranted invasion of personal privacy, I believe that the Department may make such deletions, but that the remainder of the record is required to be made available.

I would like to point out that the introductory language in §87(2) permits an agency to withhold records "or portions thereof" that fall within one or more of the ensuing grounds for denial. As such, I believe that the State Legislature recognized that there may be situations in which a single record might be both accessible and deniable in part. Consequently, an agency must in my opinion review a record sought in its entirety to determine which portions, if any, may justifiably be withheld. In this instance, it appears that the identifying details may be deleted, but that the remainder of the letter ruling should be made available.

And third, in order to gain insight into the controversy, research has been conducted with respect to access to similar records under the federal Freedom of Information Act (5 U.S.C. §552), as well as the practices of the New York State Department of Taxation and Finance. It is noted that both the state and federal governments operate under secrecy provisions analogous to those found in the Administrative Code and Chapter 772. As you indicated in your letter, letter rulings and similar documents are routinely made available by the Internal Revenue Service after having deleted identifying details. In the first determination regarding access to letter rulings, the United States District Court, District of Columbia, determined that such records are available in Tax Analysts and Advocates v. Internal Revenue Service et al. [362 F. Supp. 1298 (1973)]. The factual circumstances surrounding the Tax Analysts and Advocates case appear to be somewhat similar to those in the instant case. The Court found that the letter rulings were reflective of interpretations adopted by the agency and therefore accessible under the Act. The Court also determined that the letter rulings did not constitute matters specifically exempted from disclosure by statute, in that instance, 26 U.S.C. §6103, stating that the rulings "are not returns, submitted by taxpayers, but documents generated by the agency" (id. at 308). It was held further that " a request letter from a taxpayer voluntarily submitting information and seeking tax guidance for his own purposes is not a return within the means of the statute. It is only correspondence" (id.).

The Court also made reference to a principle similar to the "secret law" concept expressed by Assemblyman Siegel. In its conclusion, the Court stated that:

> "...a body of 'private law' has in fact been created which is accessible to knowledgable tax practitioners and those able to afford their services. It is only the general public which has been denied access to the IRS' private rulings. The IRS' argument that publication would cause grave damage to its ruling system, then, is viewed by this Court as a specter having little basis in fact. Those taxpayers most likely to rely upon or challenge the rationale of letter rulings issued to others al-

> ready have access to many rulings through their own efforts. Publication would simply make available to all what is now available to only a select few, and subject the rulings to public scrutiny as well. Such public availability and scrutiny are the very fundamental policies of the Freedom of Information Act. For, 'one fundamental principle is that secret law is an abomination'."

Lastly, having discussed the matter with a representative of the Office of Counsel at the State Department of Taxation and Finance, I was informed that in situations similar to the facts as described to me, letter rulings and advisory opinions are generally made available to the public. In fact, I was informed that when an advisory opinion is requested, the entire opinion is disclosed without deleting identifying details.

For the reasons expressed above, I believe that the letter ruling that you are seeking is available under the Freedom of Information Law, after identifying details pertaining to the person to whom the ruling is addressed have been deleted.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Jerry Rosenthal

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2197

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

September 14, 1981

Joseph Medford
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Medford:

I have received your letters of August 31 and September 1.

The former made reference to my opinion of August 26, for which you thanked me. The latter, however, indicates that the records made available by the Nassau County Department of Assessment were "almost totally unreadable and information was left off one of the copies". You also wrote that, when you requested replacement copies as well as the "missing information", the request was denied. In addition, you unsuccessfully requested written definitions of terms that are used on the materials supplied to you.

I would like to offer the following observations with respect to the situation.

First, assuming that copies of records had been supplied to you because they are available under the Freedom of Information Law, I believe that the Department should provide new copies, so long as you are willing to pay the established fees for photocopying.

Second, with respect to the "missing information", it is suggested that you submit a new requests, specifying that the information had been sought earlier, but that it was not included among the materials that were made available.

And third, with respect to the definitions in which you are interested, it is important to point out that the Freedom of Information Law is an access to records law. Stated differently, §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. Therefore, if written definitions do not exist, the Department would be under no obligation to create such records in response to your request for information.

However, assuming that written definitions do exist in a manual, policy statement, or a guide used by the Department, for example, I believe that such records would be available to you.

If those records exist, the applicable provision of the Freedom of Information Law would be §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 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 policies or determinations must be made available.

Under the circumstances, if the definitions exist in written form, they would in my view be available under any of the three areas of accessible records listed in §87(2)(g). They would constitute factual information available under §87(2)(g)(i); they would likely constitute instructions to staff that affect the public available under §87(2)(g)(ii); and they would represent the policy of the Department and therefore be available under §87(2)(g)(iii).

A copy of this opinion will be sent to Mr. Seldin of the Department of Assessment.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Mr. Abe Seldin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2198

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

September 14, 1981

Ms. Cheryl Curran
[redacted]

Dear Ms. Curran:

Your letter of September 9 addressed to the Department of Public Records has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

According to your letter, you are interested in obtaining the death records of two individuals.

Please be advised that the Freedom of Information Law does not apply to access to death records. The applicable provisions are found in the Public Health Law, Article 41. As a general rule, death records are available only upon a showing of judicial or other proper purposes. However, with respect to genealogical searches for records as old as those in which you are interested, I believe that such records are generally made available. If the individuals in question were born or died in New York State outside of New York City, the source for the records would be the Bureau of Vital Records at the State Health Department. It is possible that the Bureau would need additional information, such as a general location in which a birth or death occurred. In addition, the Bureau of Vital Records is permitted to charge for searching and producing copies of vital records.

Since this office does not have custody or control of the records that you are seeking, your request will be sent to the Bureau of Vital Records. It is suggested, however, that you call or write to the Bureau directly

to gain additional information regarding the degree of specificity required to fulfill your request, as well as the fees that may be assessed. If you would like to write to that office, the address is:

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

Should you want to contact the Bureau of Vital Records by phone, it 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:jm

cc: Peter Carucci, Bureau of Vital Records

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2199

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

September 14, 1981

Mr. Robert A. Frank
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Frank:

I have received your letter of September 10 in which you "appealed" to this office to obtain information in possession of the New York City Department of Parks and Recreation.

Your letter indicates that you directed a request to the records access officer of the Department on August 27, but that you did not receive a response. On September 3 you appealed on the ground that the request was not answered within five business days to the Commissioner of the Department, Gordon J. Davis. Your request involves records reflective of the number of hours that you were required to have worked for a specified fifty-two week period, the amount of compensatory time that you accrued as of June 5, 1981, and the date that your period of probation ended.

I would like to offer the following observations with respect to your inquiry.

First, the Committee is responsible for advising with respect to the Freedom of Information Law. As such, it has no authority to compel an agency to make records available or otherwise enforce the Law, or to render a determination on appeal.

Second, it is possible that your appeal was premature. As you are aware, an agency has five business days from the receipt of a request to respond. In this regard, it is possible that a response was mailed within the appropriate period of time but that it did not reach you until after five business days had expired.

Third, with respect to the time limits 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 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of an appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Fourth, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, §89(3) of the Law provides that, as a general rule, an agency need not create a record in response to a request. Consequently, if, for example, no tabulations of the number of hours that you were required to work or the actual hours that you did indeed work have been compiled, the Department would be under no obligation to create such records on your behalf.

Fifth, if, however, such records do exist, I believe that they should be made available to you. Relevant under the circumstances would be §87(2)(g)(i), which grants access to statistical or factual data found within inter-agency or intra-agency materials. The information that you are seeking, to the extent that it exists, could be characterized as "intra-agency" material that is of a factual nature.

Sixth, §89(2)(c) of the Law provides that, unless some other ground for denial may justifiably be cited, disclosure would not constitute an unwarranted invasion of personal privacy when records are sought by the individual to whom records pertain.

And lastly, according to a listing of records access and appeals officers that appeared in the New York City Record in late 1979, the person designated as appeals officer by the Department of Parks and Recreation is Matthew W. Mayer, General Counsel.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2192

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

September 15, 1981

John B. King, Councilman
Town of Taghkanic
R.D. #1
Box 217
Craryville, NY 12521

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. King:

I have received your letter of September 4, as well as the correspondence attached to it.

Your inquiry concerns a situation in which you, as a member of the Town Board of the Town of Taghkanic, requested copies of four years of minutes of the meetings of the Board. The minutes comprise ninety-nine pages. Apparently, the Town does not have a photocopying machine that operates adequately, and the minutes are kept at the home of the Town Clerk, Ms. Karen Matthews. The correspondence attached to your letter indicates that the minutes are available for your inspection at the Clerk's home.

In response to your request for copies, the Town Attorney wrote that "if you wish...to remove the records for photocopying, Ms. Matthews will have to accompany them and it will be necessary for her to lose a day's work. She is willing to do so if you pay her the equivalent of a day's work". The Town Attorney also wrote that the Clerk does not wish to "present obstacles" to your ability to obtain copies of the minutes, but he cited Gannett Co., Inc. v. County of Monroe, (59 AD 2d 295, 399 NYS 2d 537), in which it was held that the Freedom of Information Law is not intended to require that agencies be presented with the expense and efforts of "preparing records".

I would like to offer the following observations and suggestions with respect to your situation.

First, I do not believe that the Gannett case, supra, is applicable, for the records in question exist. Consequently, your request does not in any way involve the "preparation" of records.

Second, having discussed the matter with you and others by telephone, it appears that the Clerk works at a governmental office in Columbia County on a daily basis in which there are photocopying facilities. While I agree with the statement made by the Town Attorney that the Clerk is responsible for maintaining custody of Town records, perhaps she could bring the records requested with her to work and make photocopies at her place of employment. By so doing, you would not be required to accompany the Clerk. Further, the Clerk would not be required to take a full day off from work to make the photocopies. Under the circumstances, the Clerk could assess a fee for photocopying based upon what she must pay for photocopies at the office where she works. In addition, it might be reasonable to assess a fee based upon the actual time that it takes to make the photocopies, based upon her salary as Clerk. It is noted, however, that if the Town maintained a working photocopy machine, no charge could be assessed for the personnel time expended in reproducing the minutes.

Third, from my perspective, it could not possibly take a full day, including transportation, to make ninety-nine photocopies. Speaking from personal experience and having used many different types of photocopy machines, even using an old, slowly operating machine, I do not believe that it should take more than fifteen minutes to a half an hour to photocopy ninety-nine pages. In short, I do not believe that payment of the equivalent of a day's work could be justified in any way.

Lastly, often I feel that many rely too heavily upon photocopy machines. Nevertheless, such machines have become commonplace and are used routinely in both the public and private sector. In this regard, perhaps it would be more economical over a period of time to have the Town's photocopy machine, which apparently does not work effectively at the present time, repaired. By so doing, when you, as well as any member of the public, seek to have photocopies of Town records, the cost and time expended to make photocopies would be erased. Further, I would conjecture that the Town itself on occasion has a need to produce photocopies, and it is possible that the Clerk may use the photocopy facilities at her place of employment for such purposes. If that is so, the Town could likely save time and effort by fixing its machine, thereby enabling either the Clerk or her Deputy to use it on an ongoing basis.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Matthews
Delavan Smith

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2201

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

September 15, 1981

Mrs. Betty Ames
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Ames:

As you are aware, your letter of September 1 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.

You have asked whether New York is "covered by the Freedom of Information Act". The question was raised due to your attempts to locate an individual who was employed by the Bethlehem Steel Corporation in Lackawanna in July, 1945.

I would like to offer the following observations and suggestions regarding your inquiry.

First, as indicated above, New York has enacted a Freedom of Information Law. The New York Law is applicable to records in possession of units of government in New York. The statute to which you made reference is likely the federal Freedom of Information Act, which applies to records in possession of federal agencies.

Second, it is emphasized that neither the state nor the federal freedom of information provisions apply to records in possession of a private corporation, such as the Bethlehem Steel Corporation. Further, there is no provision of law of which I am aware that grants the public rights of access to records of a private corporation in New York.

Third, it is possible that Bethlehem Steel may no longer maintain records concerning the employment of the individual in question, due to the length of time that has transpired since 1945. Nevertheless, it is suggested that you write to Bethlehem Steel in Lackawanna, explain your situation and request information, even though that company is not required to disclose its records.

Fourth, it is suggested that you write to the Bureau of Vital Records at the State Health Department. If, for example, the individual in question died in New York, the Bureau of Vital Records would likely have a death certificate. If you wish to write to that office, providing as much information as possible about the person in question, the address is:

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

Lastly, the United States government has offices across the country known as "Federal Information Centers" in which information and advice are given with respect to a multitude of problems and questions. Perhaps by citing the name of the individual in question, a social security number could be found. From there, it may be possible to determine where an individual is residing or by whom he is employed. The nearest Federal Information Center to you is located in Phoenix at the Federal Building, 230 North First Avenue. That branch of the Federal Information Center can be reached by telephone at (602) 261-3313.

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-2202

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

September 15, 1981

Mr. John P. Noone

[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Noone:

I have received your letter of September 9 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, your local school board employs an attorney for the purpose of defending the District in employee contractual grievances at arbitration hearings. In addition, the Board employs the same attorney for the purpose of representation in proceedings concerning the dismissal of tenured teachers under §3020-a of the Education Law. Your question is whether you are entitled "to have a copy of the individual bills submitted by the attorney for his services rendered in the above two cases..."

In my view, the bills in question are accessible in great measure, if not in toto.

Although a school board may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies 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)]. Since the attorney-client privilege does not apply to the records in question, I believe that the provisions of the Freedom of Information Law are applicable.

In this regard, it is noted that 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, 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).

From my perspective, there are two relevant grounds for denial, one of which may be cited as a basis for disclosure.

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..."

It is noted 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the bills submitted by the attorney could in my view likely be characterized as "intra-agency" materials. Nevertheless, I believe that they consist solely of factual information that is available under §87(2)(g).

The remaining ground for denial of potential 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".

With respect to grievances, a judicial determination was rendered in 1980 in which it was held that disclosure of grievances and the determinations or dispositions made thereon would not result in an unwarranted invasion of

personal privacy relative to the subjects of grievance proceedings [see United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)]. Therefore, I do not believe that bills identifying persons involved in grievances should be redacted to protect privacy, but rather that they should be made available in their entirety.

With respect to bills related to tenure proceedings conducted under §3020-a of the Education Law, I believe that bills concerning a teacher against whom charges have been upheld are available in their entirety. Nevertheless, §3020-a(4) states in part that "[I]f the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record." Since records concerning a person who has been acquitted of charges preferred against him or her is given protection by means of the expungement of records, it is suggested that bills concerning such individuals might if disclosed result in an unwarranted invasion of personal privacy, if the identities of those individuals are included. As such, I believe that bills concerning teachers who have been acquitted in tenure proceedings are available, except that identifying details regarding such teachers that appear on the bills may be deleted 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

FOIL-AO-2203

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

September 16, 1981

Mr. Joseph A. Cutro
Counsel
NYS Environmental Facilities
Corporation
50 Wolf Road
Albany, New York 12205

Dear Mr. Cutro:

I have received your letter of September 9, in which you requested my opinion regarding the scope of §1285g(3)(b)vii of the Public Authorities Law. It is your contention that information submitted to the clearing house maintained by the Environmental Facilities Corporation pursuant to that section falls outside the scope of the Freedom of Information Law.

Although I do not favor the breadth of the provision in question, I agree with your conclusion that the information falls outside the scope of the Freedom of Information Law.

Pursuant to the section cited above, the Environmental Facilities Corporation is responsible for:

> "[E]stablishment and maintenance of an information clearing house which shall consist of an ongoing record of industrial materials which may be recycled or recovered. Such record shall include, but is not limited to, the information that is provided in manifest reports required pursuant to section 27-0905 of the environmental conservation law, except that no information including the identities or other identifying information of the individual generators shall be disclosed without the express written consent of the applicable generators. The corporation

> shall make this information available to persons who desire to recycle or recover industrial materials."

The last two sentences of the cited provision state that:

> "The information shall be made available in such a manner as to protect the trade secrets of the generators. Information submitted to the clearing house shall not be subject to disclosure under the freedom of information law as set forth in article six of the public officers law."

Based upon the language quoted above, it appears that all information submitted to the clearing house would be outside the scope of rights of access granted by the Freedom of Information Law.

I question, however, the necessity of such a complete exclusion. While the information contained in the clearing house might contain trade secrets, from my perspective, it is doubtful that all of the information consists of trade secrets.

Similarly, other provisions in the bill, A. 7289-B, which was signed into law as Chapter 990 of the Laws of 1981, pertain to trade secrets and their disclosure. In my view, one of the provisions concerning the disclosure of trade secrets may be overbroad and does not provide sufficient procedures for its implementation. Specifically, §1285g(4)(c) states that:

> "[F]or the purposes of this section, due to the unique nature of the program, any generator who claims that specified data or information to be utilized pursuant to any requirement of this section contains trade secrets or other proprietary or confidential data or information of a personal nature may set forth such claims in writing to the corporation for the protection of trade secrets afforded pursuant to this subdivision. Such information shall not be subject to disclosure under the freedom of information law as set forth in article six of the public officers law."

It would appear that a generator who claims that information submitted pursuant to the section constitutes a trade secret automatically gains protection of such records, for they would fall outside the scope of the Freedom of Information Law. It does not appear that a claim of trade secret status is reviewable by the agency. In my view, the procedure created by an amendment to the Freedom of Information Law enacted recently would be far preferable. Under that provision, the agency may determine the sufficiency of a claim of trade secret status. In addition, upon receipt of a request made under the Freedom of Information Law for records characterized as trade secrets, an agency will be required to review a claim of trade secret status and initiate a procedure under which the person submitting the information would be given notification and an opportunity to reaffirm such a claim.

I have enclosed for your consideration a copy of the Freedom of Information Law as it will appear when the amendments concerning trade secrets become effective on January 1, 1982.

I hope that 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-2204

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

September 16, 1981

William Randall
78-A-1777
Drawer B
Stormville, NY 12582

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Randall:

I have received your letter of September 4 in which you raised questions concerning a request directed to the Division of Parole.

Specifically, according to your letter, you were advised by a senior attorney for the Division that a request for information relative to all positions held by a member of the Board of Parole would be withheld on the ground that disclosure would constitute an invasion of privacy. You have asked whether you may now initiate an Article 78 proceeding challenging the denial.

I would like to offer the following observations with respect to your situation.

First, it is noted that, as a general rule, an agency, such as the Division of Parole, is not required to prepare or create a record in response to a request. Therefore, if, for example, the Division does not have possession of a record or records indicating the positions held by the individual in question as a New York State employee, it would be under no obligation to create such a record or records on your behalf.

Second, one of the exceptions to the rule that an agency need not create a record is found in §87(3)(b) of the Freedom of Information Law, which 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..."

It is noted that the provision quoted above has existed in substance since the enactment of the Freedom of Information Law in 1974. Therefore, it would appear that existing payroll records developed since 1974 would indicate the positions held by public employees between that date and the present.

Third, long before the enactment of the Freedom of Information Law, it was determined by the courts that payroll information analagous to that required to be prepared and made available under the Freedom of Information Law was accessible [see e.g., Chambers v. Kent, 201 NYS 2d 439, (1960); Winston v. Mangan, 338 NYS 2d 654 (1972)].

Fourth, as you may be aware, one of the grounds for denial in the Freedom of Information Law involves records or portions thereof the disclosure of which would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

Although it may be true that disclosure of the information sought might result in an invasion of privacy, I do not believe that disclosure could be characterized as an "unwarranted" invasion of personal privacy.

Based upon case law and the clear direction given in the Freedom of Information Law, §87(3)(b), I do not believe that disclosure of records reflective of the positions held by a public employee in the course of his or her public employment would constitute an unwarranted invasion of personal privacy; on the contrary, to the extent that such records exist, I believe that they are available.

Fifth, it is emphasized that the courts have found on several occasions that public employees enjoy a lesser degree of privacy than the public generally, for it has been determined that public employees have a greater duty to be accountable than any other identifiable group. Moreover, this office has advised and the courts have upheld the notion that records relevant to the performance of a public employee's official duties are accessible, for

disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records that are irrelevant to the performance of one's official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy (see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Under the circumstances, the position held by a public employee is in my view clearly relevant to the performance of his or her official duties and, again, to the extent that records exist reflective of such information, I believe that they are available.

Lastly, with respect to your capacity to initiate an Article 78 proceeding, it is stressed that a person must exhaust his or her administrative remedies before initiating such a proceeding. To exhaust one's administrative remedies, the person must be denied access initially and then appeal to the person designated to determine appeals pursuant to §89(4)(a) of the Freedom of Information Law. If the appeals person upholds a denial of access, one's administrative remedies would be exhausted and, at that juncture, an Article 78 proceeding could be initiated.

It is my hope, however, that this opinion, a copy of which will be sent to the Division of Parole, will obviate the necessity of initiating a judicial proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: William Altschuller, Senior Attorney
Edward Hammock, Chairman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-682
FOIL-AO-2205

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

September 16, 1981

Mr. Robert L. Pardy
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pardy:

I have received your letter of September 15 in which you requested assistance regarding a situation pertaining to the Board of Fire Commissioners of the Highland Fire District.

Specifically, according to your letter, on September 14, at a meeting of the Board, several subjects were considered regarding the proposed 1982 budget. You requested a copy of the proposed budget, but the Board refused to permit you to inspect it. In addition, the Chairman indicated that the Board would enter into an executive session and that anyone else present should leave. After you protested, and you asked what the purpose for the executive session was, and you were told that "they didn't have to tell anyone".

I would like to offer the following comments with respect to the situation that you described.

First, I believe that a board of commissioners of a fire district is subject to the Open Meetings Law. The Board is in my view a "public body" which 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 [see attached Open Meetings Law, §97(2)].

In my opinion, each of the conditions required to be found to determine that the Board is a public body can be met. The Board is an entity consisting of more than two members. It is required to conduct its business by means of a quorum pursuant to §41 of the General Construction Law. That provision states in essence that any entity consisting of three or more public officers or persons that performs it duties collectively, as a body, can do so only by means of a quorum, a majority of its total membership. The Board clearly conducts public business and performs a governmental function [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Further, its functions are performed for a public corporation, a fire district [see Town Law, §174(6)]. Based upon the foregoing, I believe that the Board in question is a public body subject to the Open Meetings Law in all respects.

Second, since the Board is subject to the Open Meetings Law, its meetings must be convened open to the public. It is noted that the scope of the Open Meetings Law has been given an expansive interpretation by the courts. In this regard, it has been held that the definition of "meeting" [see §97(1)], encompasses any gathering of a quorum of a public body 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)].

Third, before entering into an executive session, a public body must follow the procedure specified in §100(1) of the Open Meetings Law. The cited provision 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..."

Based upon the language quoted above, a public body must take three steps before it may enter into an executive session: a motion must be made to go into an executive session during an open meeting; the motion must identify in general terms the topic to be considered; and the motion must be carried by a majority of the total membership of the public body.

Fourth, a public body cannot enter into an executive session to discuss the subject matter of its choice. On the contrary, paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion that may appropriately be considered during an executive session.

If, for example, the proposed budget was the subject of discussion during the executive session, I do not believe that an executive session would have been proper. Further, it has been held that a discussion of a budget by a public body does not fall within any of the grounds for executive session [see Orange County Publications v. The Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978].

Sixth, in terms of your request for the proposed budet, I believe that such a record would be available. In this regard, I direct your attention to the Freedom of Information Law.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a fire 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).

The only relevant ground for denial in my view would be §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 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 policy or determinations must be made available.

Under the circumstances, it would appear that a proposed budget would be available, for it would consist of statistical or factual information accessible under §87(2)(g)(i) [see 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 noted, however, that an agency is not requited to respond immediately to a request. In the future, it is suggested that you submit a request for records in writing, reasonably describing the records in which you are interested. From its receipt of a request made under the Freedom of Information Law, an agency must respond within five business days.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information 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:jm

Encs.

cc: Board of Fire Commissioners

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2206

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

September 21, 1981

Howard Spitz
Town Attorney
Town of Eastchester
40 Mill Road
Eastchester, NY 10709

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Spitz:

I have received your letter of September 16 in which you requested an opinion regarding the Freedom of Information Law.

Specifically, you have asked whether a municipality, such as the Town of Eastchester, may request records from an agency of the state under the Freedom of Information Law. You indicated that it is unclear whether the Law may be used only by individuals, or whether it may be employed by municipalities seeking records.

From my perspective, the Freedom of Information Law does not in any way discriminate in terms of its potential users. Since 1974, the Committee has consistently advised that accessible records should be made equally available to any person, without regard to status or interest. Further, the Committee's advice was specifically cited in Burke v. Yudelson (368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165). It is also noted that challenges to denials of access have been brought not only by individuals, but also by corporations, unions, interest groups, and at least one municipality [see e.g., Albany Custom Floors, Inc. v. O'Shea, Sup. Ct., Albany Cty., January 28, 1977; Alliance for the Preservation of Religious Liberty Inc. v. State of New York, Sup. Ct., New York Cty., NYLJ, April 10, 1979; City School District of the City of Binghamton v. Civil Service Commission, Sup. Ct., Albany Cty., Sept.15, 1976; Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979); Police Benevolent Association v. Helsby, 374 NYS 2d 262]. Therefore, a municipality is not in my opinion precluded from seeking records from a state agency under the Freedom of Information Law.

It has been suggested, however, in numerous situations, that when one unit of government requests records from another unit of government in order to carry out its official duties, that it may be unnecessary to invoke the Freedom of Information Law. For instance, often in the interest of comity, it has been suggested that a unit of government in receipt of a request might disclose records that might otherwise be deniable when it is clear that records are requested in order to carry out one's official duties. In such cases, it has also been suggested that the agency furnishing the records could indicate in writing that it does not ordinarily provide access to the records sought under the Freedom of Information Law, but that the records are being made available in order to enable the recipient of the records to carry out its governmental duties.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2207

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

September 21, 1981

Ms. Barbara Germani
The City of New York
Department of Finance
Municipal Building
New York, NY 10007

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Germani:

I have received your letter of September 15 and appreciate your interest in complying with the Freedom of Information Law.

As a recently designated records access officer, you indicated that you are interested in developing a policy for the Department of Finance to be used as an aid regarding the deletion of identifying details from records. As such, you have requested policy determinations regarding guidelines from this office for the deletion of identifying details.

Although §89(2)(b) of the Freedom of Information Law states that the Committee "may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available...", no such guidelines have been developed for the following reasons.

First, there are virtually thousands of records maintained by agencies of state and local government that contain personal information. Consequently, it would be all but impossible to develop guidelines applicable to all of those records.

Second, and perhaps most importantly, when dealing with the subject of personal privacy, of necessity subjective judgments must often be made. For instance, while one reasonable person might view a record and feel that disclosure of identifying details would be offensive, thereby resulting in an unwarranted invasion of personal privacy, an equally reasonable person might consider disclosure of the same information to be innocuous and, thereby, result in a permissible invasion of personal privacy As such, the Committee, which has discussed privacy on numerous occasions, has opted not to promulgate guidelines, for to do so would involve imposing its subjective judgments upon others.

Third, it is also the Committee's view that, in many instances, agency officials are most familiar with records containing personally identifying details and are, therefore, in the best position to determine the possible effects of disclosure.

And fourth, it is noted that the introductory language of §87(2) of the Freedom of Information Law states that an agency may withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Therefore, the Law permits that portions of records the disclosure of which would result in an unwarranted invasion of personal privacy may be withheld. Again, it is likely that agency officials are in the most knowledgeable position to determine whether or not and the extent to which the disclosure of personally identifying details would indeed constitute an unwarranted invasion of personal privacy.

As you may be aware, this office has prepared hundreds of advisory opinions under the Freedom of Information Law. In order to provide assistance to the public and government, the opinions have been indexed by means of a series of more than 370 "key phrases". By reviewing the index, an individual may request copies of opinions by identifying them by key phrase or number. If, after reviewing the enclosed index, you would like copies of particular advisory opinions, I would be most pleased to send them to you. In addition, copies of all of the advisory opinions have been sent to Thomas Nathan of the Office of Corporation Counsel, which is located at 100 Church Street. If you would like to review copies of the opinions sent to Mr. Nathan, I am sure that he would be pleased to accommodate you. Mr. Nathan can be reached at 566-5344.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2208

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

September 21, 1981

Harry M. Branch
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Branch:

I have received your letter of September 16, in which you requested assistance regarding a request made under the Freedom of Information Law.

Specifically, according to your letter, you are having difficulty gaining access to records relating to your property from the Islip Town Assessor. It appears that the Assessor refused to provide a copy of page one of a "data management display" containing information concerning your property. In addition, as I understand your letter, there should have been additional pages concerning your property, but those pages did not appear on the display. Your letter to the Assessor also indicates that you transmitted a request to the Assessor, but no acknowledgment of the request was received within a period of some two weeks.

I would like to offer the following observations with respect to your inquiry.

First, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a town, 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).

Second, even before the passage of the Freedom of Information Law, it had been held judicially that virtually all records used in the development of assessments are available [see e.g., Sears & Roebuck Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1969)].

Third, notwithstanding judicial determinations rendered prior to the Freedom of Information Law, it would appear that any factual information developed by an assessor in the preparation of an assessment would be available. In this regard, 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. 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 policies or determinations must be made available.

Under the circumstances, it would appear that the records concerning your property would consist of "statistical or factual tabulations or data" that would be available under §87(2)(g)(i).

Fourth, it is emphasized that, as a general rule, an agency is not required to create records in response to a request. As such, if, for example, certain information that should have been contained within the data management display no longer exists, the Town would be under no obligation to create such information or records in response to your request. However, if, for example, the display contains information found on a computer, it is possible that the information found within the computer is based upon paper records that remain in existence. If such records do exist, I believe that they should be available to you for the reasons indicated above.

Lastly, the Freedom of Information Law, §89(1)(b)(iii), requires the Committee to develop general regulations of a procedural nature. In turn, each agency is required under §87(1) of the Law to prepare its own regulations designed to implement the Law. In this regard, §1401.2

of the Committee's regulations requires that each agency designate one or more "records access officers" responsible for implementing the Freedom of Information Law. It is suggested that you contact the town clerk to determine who the designated records access officers might be, for it is possible that the Town Assessor is not a records access officer.

Even if the Assessor is not a records access officer, one of the duties of a records access officer is to coordinate an agency's response to requests and ensure that responses to requests are given within the appropriate time limits.

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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that 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: Town Assessor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2209

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

September 21, 1981

Mr. Warren J. Grossman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grossman:

I have received your letter of September 17 in which you requested a determination regarding a request for a record made under the Freedom of Information Law that you directed to the Village of Scarsdale.

As I understand the situation, one member of the Board of Trustees of the Village of Scarsdale transmitted a memorandum to another member of the Board. Having been denied access to the memorandum by Village officials, you have contended that it should be available to you, for it was disclosed to another Village resident. In short, since the memorandum was disclosed to one member of the public, it is your belief that the memorandum should be open "to all".

I would like to offer the following observations with respect to your inquiry.

First, it is emphasized at the outset that the Committee on Public Access to Records does not render "determinations". On the contrary, the Freedom of Information Law, §89(1)(b)(ii), enables the Committee to render advisory opinions. As such, the Committee does not have the authority to compel compliance with the Freedom of Information Law or otherwise require that records in possession of agencies by made available.

Second, in terms of 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 enumerated in §87(2)(a) through (h).

Third, it would appear, based upon the correspondence that you transmitted, that there are two potential grounds for denial.

Perhaps most relevant under the circumstances 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 noted 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In view of the foregoing, I believe that §87(2)(g) is intended to permit the public to gain access to the so-called "secret law" of an agency, i.e., instructions to staff, policies and determinations upon which an agency relies in carrying out its duties. In addition, §87(2)(g)(i) requires the disclosure of statistical or factual information found within inter-agency and intra-agency materials. With regard to the capacity to deny access, according to the case law and the sponsor of the existing Freedom of Information Law, §87(2)(g) is intended to permit an agency to withhold those portions of inter-agency and intra-agency materials reflective of advice, suggestion, impression and the like.

Without greater knowledge of the contents of the memorandum in question, it is all but impossible to conjecture with respect to rights of access. While some portions of the memorandum might be of a factual nature or perhaps reflective of a determination, other portions may be advisory in nature and therefore deniable.

The other potentially relevant ground for denial would appear to be §87(2)(b), which states that an agency may withhold records or portions thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy". Again, the extent to which disclosure would constitute such an invasion is unknown to me, for I am not familiar with the contents of the memorandum.

Fourth, with respect to your contention that if the memorandum has been made available to one resident, it should be made available to all, I would like to offer two comments.

If, for example, the memorandum in question had been requested by the other resident under the Freedom of Information Law and if it was determined that the record was accessible under the Law, I would agree that it should be made available to you. In this regard, it has been held judicially that records accessible under the Law should be made equally available to any person, "without regard to status or interest" [see Burke v. Yudelson, 386 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165].

On the other hand, if the memorandum was made available to the other resident in error or inadvertently, I do not believe that disclosure under such circumstances would automatically confer a right of access upon other members of the public. In addition, it is possible that the memorandum was displayed to the other member of the public if the memorandum dealt in some way with that individual. If a record pertains to an individual and is requested by that individual, disclosure would not result in an unwarranted invasion of personal privacy. However, such an invasion of privacy might arise if disclosure is made to a third party.

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: Lowell J. Tooley
Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2210

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

September 22, 1981

Larry G. Campbell
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Campbell:

I have received your letter of September 16, in which you appealed a denial of access by the Department of Correctional Services due to its failure to respond to your request within the appropriate time limits. You indicated that, in response to a request directed to the Superintendent of the Auburn Correctional Facility, you received an acknowledgment of the request that did not indicate an approximate date on which your request would be granted or denied.

I would like to offer the following observations regarding the situation that you described.

First, it is emphasized at the outset that the Committee on Public Access to Records does not have the capacity to render determinations on appeal. On the contrary, the Committee is authorized under the Freedom of Information Law to render advisory opinions. Under §89(4)(a) of the Law, an appeal must be directed to the head or governing body of an agency or whomever is designated by such persons to render determinations on appeal.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations regarding the procedural implementation of the Law. In turn, §87(1) requires all agencies to adopt their own regulations consistent with and no more restrictive than those developed by the Committee.

In recognition of the open-ended aspect of §89(3), which does not specify the length of time in which a determination must be rendered following the issuance of a written acknowledgment of the receipt of a request, the Committee, by means of regulation, has indicated the period of time in which a response must be rendered following an acknowledgment. Specifically, §1401.5(d) of the Committee's regulations states that:

> "[I]f the agency does not provide or deny access to the record sought within five business days of receipt of a request, the agency shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied. If access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed".

In view of the foregoing, an agency is required to respond to a request within ten business days of the date of acknowledgment of the receipt of a request. Moreover, the provision quoted above indicates that if no response is given within ten business days of an acknowledgment, the request may be considered denied and may in such cases be appealed to the person or body designated to determine appeals. Consequently, if you do not receive a determination within ten business days of the acknowledgment of the request, you may consider the request to have been "constructively" denied and an appeal may be taken.

Third, according to §5.20(c) of the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services:

> "[A]n inmate who has been denied access to his records under this section may appeal such denial to the Counsel, Department of Correctional Services, Building 2, State Campus, Albany, N.Y. 12226. Such appeal shall be in writing and shall set forth name and address

> (or facility) of the applicant, the specific records denied, the date of the request, the place of the request and, if known, the person denying such request and the date thereof".

As indicated in §89(4)(a) of the Freedom of Information Law, the Counsel to the Department is required to render determination on appeal within seven business days of the receipt of the appeal.

Lastly, it is emphasized that an Article 78 proceeding in which a denial of access is challenged cannot be initiated until an applicant for records has exhausted his or her administrative remedies. As such, if you seek to initiate such a proceeding, an appeal must first be made to the Counsel to the Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Ramon J. Rodriguez, Counsel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML - AO - 683
FOIL - AO - 2211

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

September 22, 1981

Ms. Rita L. Kwetcian
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kwetcian:

I have received your letter of September 17 in which you raised a series of questions regarding the implementation of the Open Meetings Law by the Northern Adirondack Central School Board. You also asked for information relative to the Freedom of Information Law.

According to your letter, the School Board held a regular meeting on August 3 during which "the date, place and separate propositions of the budget vote were set." However, during the next week, you read in a local newspaper that the voting procedure had changed and learned that a "special, unpublished meeting was held on August 7, 1981, and the date, place and propositions to be voted on as one were changed." You have asked whether a special meeting, such as the one held on August 7, may be convened without notifying the public.

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 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 pertains to 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 prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

In view of the requirements of §99, it is clear that notice must be given to the news media and the public by means of posting prior to all meetings, whether they are regularly scheduled or considered "special" or "emergency". In situations in which a special meeting is held on short notice, at the very least, I believe that a public body would be required to give notice to the news media, perhaps by means of a telephone communication, and in addition, notice of such meetings should be posted conspicuously as required by the Law.

I would also like to point out that §102 of the Law states that if a judicial proceeding is initiated under the Open Meetings Law and if a court finds that action was taken in violation of the Open Meetings Law, the court may in its discretion and upon good cause shown nullify action taken in violation of the Law. The same provision also 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. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes."

As such, action taken during a meeting for which no notice was given may by nullified only if good cause can be demonstrated, and only if a failure to give notice was "inadvertent".

You also wrote that during the Board's meeting of August 3, executive sessions were held on five occasions for the following reasons:

> "1. To create a teacher's position
>
> 2. To discuss cafeteria manager's salary
>
> 3. To read qualifications of prospective temporary teachers
>
> 4. Consideration of Committee on Handicapped minutes

5. To discuss clerk of works for new bus garage. (Previous to this regular meeting, he had apparently been on the job. This hiring appeared to be just a formality.)"

Relevant to several of the areas of discussion in executive session that you identified is §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, of matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

It is noted that the language quoted above is different from the language of the exception as it was originally enacted in 1977. Under the original Open Meetings Law, public bodies often entered into an executive session to discuss matters of policy that related to personnel in general or that affected personnel tangentially. The Committee had consistently advised that the so-called "personnel" exception was intended largely to protect privacy, and not to shield matters concerning policy from public view. Therefore, the Committee recommended that the term "particular" be inserted into the exception, and the recommendation was passed and became effective on October 1, 1979. Based upon the amendments to §100(1)(f), it has become clear that an executive session regarding "personnel" may be conducted only when the discussion concerns a particular person and only when one or more of the topics listed in §100(1)(f) is considered.

The first area of executive session that you described, the creation of a teacher's position, would not in my view pertain to any particular individual; on the contrary, the issue would in my view involve a policy consideration and the manner in which public monies will be expended.

The second and third areas that you identified were likely appropriate for discussion in executive session, for they apparently involved the employment history of particular individuals or matters leading to the employment of particular individuals.

The fourth area of executive session, consideration of minutes of the Committee on Handicapped, was in my view proper. In brief, federal law requires that education records identifiable to a particular student or students are confidential. Therefore, a discussion concerning particular students would be exempted from the Open Meetings Law under §103(3), which states that the Open Meetings Law does not apply to matters made confidential by federal or state law.

The fifth area of executive session that you described appears to deal with the hiring of a particular individual. If that is accurate, I believe that an executive session would be proper under §100(1)(f).

You also wrote that, at a meeting held on June 29, "before the regular meeting was called to order, an executive session was held to consider insurance coverage for the school district." Several comments are offered regarding that gathering.

First, the courts have rendered expansive determinations concerning the scope of the Open Meetings Law and particularly its definition of "meeting" [see Open Meetings Law, §97(1)]. In brief, it has been held that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, assuming that a quorum of the School Board was present to discuss insurance coverage, that gathering constituted a meeting that should have been convened open to the public and preceded by notice given in accordance with §99.

Second, as a general rule, a public body cannot conduct an executive session prior to convening an open meeting. Section 97(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) prescribes a procedure that must be followed by a public body during an open meeting before an executive session may be held. The cited provision 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..."

Based upon the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting and that an executive session may be held only after having convened an open meeting.

Third, in terms of the validity of the executive session, the nature of the discussion concerning insurance coverage is not clear. If, for example, the District considered changing insurance companies, perhaps it discussed a matter leading to the employment of a particular insurance company in the future. Under such a circumstance, it would appear that §100(1)(f) may have been applicable. Otherwise, it is in my view questionable whether an executive session could properly have been held.

You also raised questions regarding minutes of the executive session relative to the discussion of insurance coverage. With regard to minutes of executive session, §101(2) of the Open Meetings Law requires that:

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

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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

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

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such board 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 also indicated that you are interested in rights of access granted by the Freedom of Information Law. In brief, 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).

In terms of the usage of the Law, §89(3) states that an applicant should submit a request in writing "reasonably describing" the records in which he or she is interested. Further, the same provision states that an agency must respond to a request within five business days of the receipt of a request.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the Freedom of Information Law, and an explanatory pamphlet dealing with both laws 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 Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2212

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

September 23, 1981

Thomas J. Connelly
Counsellor at Law
1390 Deer Park Avenue
North Babylon, NY 11703

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Connelly:

Your letter of September 17 addressed to the Secretary of State has been forwarded to the Committee on Public Access to Records. The Committee is responsible for advising with respect to the Freedom of Information Law and is housed in the Department of State.

According to your letter, you are interested in submitting a request under the Freedom of Information Law to the Dormitory Authority. However, you indicated that the Dormitory Authority does not have a "request form". As such, you requested a form that you could employ for the purpose of directing a request to the Dormitory Authority.

Please be advised that neither the Freedom of Information Law nor the regulations promulgated by the Committee require that any specific form be used to request records under the Law. On the contrary, in situations in which individuals have not used forms prescribed by an agency, it has been advised that a failure to do so cannot constitute a basis for withholding records. Further, it has also been advised that any request made in writing that reasonably describes records sought should suffice [see Freedom of Information Law, §89(3)].

In making a request, it is suggested that you direct it to the "records access officer" of the agency and that you indicate on the outside of your envelope that the contents consist of a "freedom of information request".

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 an explanatory pamphlet that 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2213

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

September 24, 1981

Mr. Jack Aernecke
Mr. Donald J. Decker
General Electrict Broadcasting
Company, Inc.
1400 Balltown Road
Schenectady, NY 12309

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Messrs. Aernecke and Decker:

I have received your letter and the materials attached to it in which you requested an advisory opinion regarding a denial of access to records by the Fulton County Board of Supervisors. The records in question pertain to a ceiling collapse that occurred on August 31 at the Fulton County Office Building.

Since the receipt of your letter, I have received a copy of a letter addressed to you in which the County Attorney, Charles Caputo, advised you that the reports that you requested are exempt from disclosure pursuant to §3101(d) of the Civil Practice Law and Rules (CPLR).

I have made several inquiries of Fulton County officials on your behalf in order to learn more about the reports and the reasons for which the reports were compiled. In all honesty, rights of access are in my opinion uncertain. Further, a determination of rights in my view can be made only after having ascertained the reasons for which the reports were prepared.

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as Fulton County, 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).

The first and presumably the only relevant ground for denial under the circumstances 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". One such statute that exempts records from disclosure is §3101(d) of the CPLR, which states that:

> "[T]he following shall not be obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship:
>
> 1. any opinion of an expert prepared for ligitation; and
>
> 2. any writing or anything created by or for a party or his agent in preparation for litigation."

However, if, for example, a report or study is prepared for multiple purposes, one of which might be use in litigation, it has been held that the exemption regarding materials prepared for litigation cannot be cited to shield records from disclosure. As stated in Westchester Rockland Newspapers v. Mosczydlowski, which dealt with a police report regarding events surrounding the suicide of a prisoner on a city jail:

> "[G]overnmental material which is prepared solely for purposes of litigation is simply not the type of governmental record to which the public has now been given access...Nevertheless, respondents can find no comfort in the exemption of material prepared for litigation from the ambit of the Freedom of Information Law for the subject police report does not qualify as material prepared solely for such purpose. Rather, it had multiple purposes which included, inter alia, enabling the District Attorney to determine whether any crime or offense had been committed by anyone and enabling the Police Department, itself, to determine whether any of its personnel were guilty of breach of duty and whether its procedures were adequate to prevent any recurrence. It may also be said that

> this investigation was conducted in the regular course of official police business. Since all of these nonlitigation purposes do not, by themselves, constitute independent grounds for exemption, the report cannot be deemed exempt from disclosure pursuant to subdivision (d) of CPLR 3101..." [58 AD 2d 234, 236-238 (1977)].

In view of the foregoing, if the report was not prepared solely for litigation, but for other purposes as well, I do not believe that the denial was appropriate.

In addition, as noted earlier, I have attempted to gain additional information from County officials regarding the reason behind the preparation of the reports in question. In this regard, I have learned that the collapse of the roof occurred suddenly and at a time in which the County Attorney was present in the County Office Building. Moreover, I was informed that the County Attorney at the time of the incident expressed concern regarding litigation. It also appears that a study was sought by an independent contractor immediately and before the County Board of Supervisors had an opportunity to meet and specifically authorize the preparation of the studies in which you are interested. Having discussed the matter with the Clerk of the Board of Supervisors among others, although it is clear that a reason for the preparation of the reports involved their possible use in litigation, the resolution that passed following the collapse does not specify the purposes for which the studies were compiled. Based upon several conversations, it appears that one of the reasons for the studies may have merely involved finding facts (i.e., why the roof collapsed). In this regard, there is a judicial decision that dealt with a somewhat similar situation in which a study concerning roof leakage at a public building was furnished by contract to a municipality. In that decision, the court found that:

> "[U]ndoubtedly, the public interest in the results of this study is high for the skating rink entailed a substantial financial outlay of public monies and taxpayers have a profound right to know the value and result of that investment. However embarrassing or flattering the furnished study may prove to be to the Park District administration, is not determinative or relevant. It is a public record.

> "The Board argues that even if the roofing study is a 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. See, Koump v. Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857.
>
> "The 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 since; although the Board did claim in argument that the study was undertaken on oral advice of counsel, no litigation has yet been commenced some eleven months afterwards.
>
> "Second, material collected in the 'ordinary course of business' in governmental operations, '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." [Winston v. Mangan, 338 NYS 2d 654, 660-661 (1972)].

Based upon the judicial determinations cited above, it appears that rights of access depend upon the determination of a fact, i.e., whether the reports in question were prepared solely for litigation. If contemplation of litigation was the sole purpose for which the studies were prepared, I would agree with the County Attorney's determination. However, if the reports were ordered to find facts, for example, as well as possible use in litigation, I believe that it would be available.

Lastly, the response by the County Attorney did not indicate that you have a right to appeal a denial. In this regard, §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 language quoted above, it is suggested that you appeal to the Fulton County Board of Supervisors or to the person or body designated by the Board to render determinations on 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

cc: Charles Caputo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2214

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

September 24, 1981

Honorable Stanley N. Lundine
Member of Congress
Congress of the United States
House of Representatives
Washington, D.C. 20515

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Congressman Lundine:

Your letter of September 16 addressed to Attorney General Abrams has been forwarded 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 indicated in your letter that you were contacted by the Chemung County Office for the Aging Advisory Committee, which has been unsuccessful in its attempts to obtain certain information. Specifically, that Committee has sought to obtain waiting lists which would indicate the order or priority in which applicants are placed in County housing projects. According to your letter, the United States Department of Housing and Urban Development (HUD) has advised the Office for the Aging Advisory Committee that HUD is required to maintain a waiting list in accordance with federal regulations; however, access to the waiting list is determined by state and local law. Consequently, you have requested advice regarding the application of the New York State Freedom of Information Law relative to disclosure of the waiting lists.

I would like to offer the following comments with respect to issues you raised, which are based on the assumption that the housing facilities in question are subject to the New York State Public Housing Law.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a municipal housing authority, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached).

Second, perhaps most relevant to your inquiry is §87(2)(b) of the Law, which provides that an agency may withhold records or portions thereof which if disclosed would constitute "an unwarranted invasion of personal privacy..." The cited provision makes reference to §89, which in subdivision (2)(b) lists examples of unwarranted invasions of personal privacy. It is noted that the examples are in my opinion merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy.

Third, while I believe that the Freedom of Information Law is intended to ensure the accountability of government, the privacy provisions of the Law, in my view, are intended to enable government to prevent disclosures concerning the personal details of individuals' lives. For example, if an individual requests waiting lists regarding housing facilities, it is my view that a housing authority may withhold or delete identifying details relative to applicants. As such, if a waiting list includes the names and addresses of applicants, their order of priority and the date on which the applications were submitted, the housing authority could in my opinion properly delete the names and addresses of applicants prior to furnishing the list. On the other hand, if there is a list indicating an average waiting period that does not identify applicants, that record would be accessible.

Fourth, the New York State Public Housing Law furnishes guidance with respect to disclosure of information provided by applicants for public housing. Section 159 of the Public Housing Law states that:

> "[I]nformation acquired by an authority or municipality or by an officer or employee thereof from applicants for dwellings in projects of an authority or municipality or from tenants of dwellings thereof or from members of the family of any such applicant or tenant or from employers of such persons or from any third person, whether voluntarily or by compulsory

> examination as provided in this chapter, shall be for the exclusive use and information of the authority or municipality in the discharge of its duties under this chapter and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the authority, municipality or successor in interest thereof is a party or complaining witness to such action or proceeding. Notwithstanding the foregoing, the authority or municipality shall furnish to the commissioner of housing full and complete reports relating to any such applicant or tenant whenever the commissioner of housing shall request such reports. Also, nothing herein contained shall operate to prevent an authority or municipality from making full and complete reports to the commissioner of housing or to the municipality in which an authority operates or to the federal government or any agency thereof relating to the administration of this chapter or of any project or relating to any such applicant or tenant, nor to prohibit an authority or any government or agency receiving such information of an authority, from publishing statistics or other general information drawn from information received from such applicants or tenants".

Based on the language quoted above, it appears that the Legislature determined that disclosure of information concerning tenant applicants would constitute an improper or "unwarranted" invasion of personal privacy unless records are made available to the federal government or an agency involved in the administrations of state and federal laws and rules.

Fifth, it is emphasized that when dealing with privacy, attempts to balance interests and subjective judgments must of necessity be made. Therefore, although one reasonable person might believe that disclosure of particular information would be offensive and result in an

unwarranted invasion of personal privacy, another equally reasonable person might feel that disclosure would be innocuous, thereby resulting in a permissible invasion of personal privacy. In short, I do not feel that there are any specific rules that one may follow in determing issues relative to personal privacy. However, based upon the Freedom of Information Law and the restrictions upon disclosure imposed by the Public Housing Law, it would appear that information that identifies applicants on a waiting list could justifiably be withheld.

Lastly, I direct your attention to the final sentence of §159, which is set forth above and infers that information regarding applicants and tenants, both personal and statistical, may be made available under certain circumstances to government agencies. Therefore, it is possible that your membership on the select Committee on Aging would permit you to gain access to additional information that relates to the subject matter.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2215

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

September 25, 1981

Paul F. Mantica
Deputy Chief of Police
Rotterdam Police Department
101 Princetown Road
Rotterdam, New York 12306

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mantica:

I have received your letter of September 22, in which you requested an advisory opinion regarding the disclosure of pre-appointment background investigation records compiled relative to an unsuccessful candidate for the position of police-paramedic in the Rotterdam Police Department.

According to your letter, several months ago, you contacted the office and were advised that release of the names and other identifying information provided by the members of the public regarding the candidate would likely result in an unwarranted invasion of personal privacy. Subsequent to that discussion, the candidate commenced an action under Human Rights Law against the Town of Rotterdam and has submitted a written request under the Freedom of Information Law for access to the records in question.

I would like to offer the following comments in response to your inquiry

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Rotterdam Police Department, 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, relevant to your inquiry is §87(2)(b) of the Law, which provides that an agency may withhold records or portions thereof which if disclosed would constitute "an unwarranted invasion of personal privacy..." The

cited provision makes reference to §89, which in subdivision (2)(b) lists examples of unwarranted invasions of personal privacy. The examples are in my opinion merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy.

Third, in terms of the candidate's request, I believe that those portions of records which if disclosed would constitute an unwarranted invasion of personal privacy with respect to others identified in the records may be withheld. For example, if in your pre-appointment investigation, the Department interviewed members of the public concerning the candidate, the names, addresses and other information that would identify those individuals could in my opinion be withheld under §87(2)(b).

It is noted, however, that §89(2)(c) of the 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".

Under the language quoted above, it would appear that the candidate may inspect portions of records pertaining to himself if the records are not otherwise deniable and if disclosure would not identify persons other than the candidate. For instance, if the background investigation included credit data, which would be available to him elsewhere, that information should be made available 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Mr. James P. Alderdice

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2216

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

October 2, 1981

Thomas Edwards
80A-1831
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Edwards:

I have received your letter of September 28, in which you requested information regarding the means by which you can obtain your criminal history records and determine if there are any warrants or ongoing investigations pertaining to you.

First, with respect to criminal history information, I believe that you may obtain such information from either of two sources. I believe that the superintendent at the Auburn Correctional Facility can make the "DCJS report" available to you under §5.22 of the regulations promulgated by the Department of Correctional Services. In the alternative, you may write directly to the Division of Criminal Justice Services, Identification Services, Executive Park Towers, Stuyvesant Plaza, Albany, NY 12203.

Second, with respect to your other question, I assume that you are seeking to learn whether there are any outstanding warrants in existence pertaining to you or investigations relating to you. In this regard, all that I can suggest is that, although the Freedom of Information Law is based upon a presumption of access, there are provisions that enable an agency to withhold records compiled for law enforcement purposes when disclosure would, for example, interfere with an investigation. To provide you with a better idea of rights granted by the Freedom of Information Law, I have enclosed an explanatory pamphlet on the subject 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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2217

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

October 5, 1981

Mr. Charles E. Wright
80-A-2724
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wright:

I have received your letter of September 24 in which you raised a question regarding the appeal process under the Freedom of Information Law.

Specifically, you wrote that you made a request under the Freedom of Information Law and that you are currently awaiting a response. If the person to whom you addressed the request does not reply to your request, you have asked for the identity of the body or officer to whom you should direct an appeal.

First, the Freedom of Information Law requires the Committee to adopt general regulations of a procedural nature. In turn, the Law requires that each agency adopt regulations consistent with those of the Committee. In this regard, the Department of Correctional Services has promulgated regulations designed to carry out the procedural aspects of the Freedom of Information Law.

Second, one of the requirements found in the Committee's regulations involves the designation of one or more "records access officers" who are responsible for handling requests made under the Law. According to the regulations of the Department of Correctional Services, an inmate may direct a request to the facility superintendent. Consequently, I am not sure whether the individual to whom you directed your request was the appro-

priate person. If he is not authorized to respond to a request under the Freedom of Information Law, I would assume that your request would be forwarded to the facility superintendent.

Third, as you are aware, §89(4)(a) of the Freedom of Information Law permits an applicant for records to appeal a denial of access to the head or governing body of an agency, or whomever is designated to determine appeals. In the event of a denial of access in writing or a constructive denial of access involving a failure to respond to a request or acknowledge receipt of a request within five business days, you may appeal. Under the regulations promulgated by the Department of Correctional Services, an appeal should be addressed to:

Counsel
Department of Correctional Services
State Campus
Correctional Services Building
Albany, New York 12226

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2218

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

October 6, 1981

George F. Harris
Antell & Harris
Attorneys and Counselors at Law
Sixth Floor
19 West Main Street
Rochester, New York 14614

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Harris:

I have received your letter of September 28 and appreciate your interest in compliance with the Freedom of Information Law.

As the attorney for the Board of Commissioners of the Brighton Fire District, you have requested an advisory opinion pertaining to rights of access to worksheets regarding budget items prepared by the District's Treasurer. You have indicated that the worksheets in question do not represent official balances and that the Board takes no action based upon the contents of the worksheets.

I would like to offer the following observations with respect to your inquiry.

First, you asked whether "such a budget sheet would fall within the included class specified in Public Officers Law, Section 88(1)". Please be advised that, although §88(1) had been the focal point of rights of access when the Freedom of Information Law was originally enacted in 1974, a series of amendments to the Law became effective on January 1, 1978. As you are aware, the Freedom of Information Law in its initial form granted access to categories of records listed in §88(1). The amendments, however, reverse the logic and structure of the Law. Rather than providing access to specified categories of records to the exclusion of all others, the amended statute is based upon a presumption of access and provides that all

records 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). Therefore, under the amended Law, when a request is made, a determination of rights of access is made by reviewing the grounds for denial in order to discern the extent to which records sought fall within one or more grounds for denial.

Second, the amended Freedom of Information Law defines "record" broadly in §86(4) to include "any information...in any physical form whatsoever..." kept, held, produced or reproduced by, with or for an agency, such as the Board of Commissioners. Consequently, the worksheets in question are in my view clearly "records" subject to rights of access granted by the Law.

Third, among the eight grounds for denial listed in §87(2), only one is in my opinion relevant. 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..."

It is noted that 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 policies or determinations must be made available.

Under the circumstances, it appears that those portions of the worksheets consisting of "statistical or factual tabulations or data" must be made available.

Lastly, in a case that reached the Court of Appeals, it was held that so-called budget worksheets were available [see Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754 (1977)]. In Dunlea, the issue involved the status of numbers appearing in columns that represented projections, or advice appearing in the form of numbers. Even though the numbers may have been advisory in nature, the court found that they constituted "statistical tabulations" that were accessible under the Law. The court also found that the worksheets were available, even if the statistical tabulations were not reflective of "objective reality".

In sum, to the extent that the worksheets contain "statistical or factual tabulations or data", I believe that they 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2219

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

October 6, 1981

Mr. Martin M. Rice
Senior Attorney
Counsel's Office
Department of Labor
Two World Trade Center
Room 7330
New York, NY 10047

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rice:

During our telephone conversation of September 28, you were very helpful in clearing up some factual issues with respect to your denial of Ms. Giordano's request made under the Freedom of Information Law. She had requested records relating to a particular insurance fraud investigation by the Unemployment Insurance division of the Department of Labor.

I would like to offer the following additional comments relative to your appeal denial.

First, it appears that your office may disagree with the strict interpretation of §537 of the Labor Law set forth in Messina v. Lufthansa [441 NYS 2d 557 (1981)]. In Messina, supra, it was held that only information supplied directly by employers or employees can appropriately be withheld under §537.

You indicated during our conversation last week that your office would not disclose information relating to the insurance fraud investigation in question. In my opinion, if the investigation file contained information obtained from sources other than the employee and or employer, it should be accessible, if no other basis for withholding exists under §87(2) of the Freedom of Information Law. Conversely, any information obtained directly from the employer and/or employee could be deleted and withheld in conjunction with the court's strict interpretation of §537 of the Labor Law in Messina.

Second, you also mentioned that the intra-agency exception would apply to a determination of your office. In this regard, §87(2)(g) 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 noted that 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 policies or determinations must be made available. Consequently, if your office has rendered a determination regarding the status of the subject of the investigation, in my opinion, I believe that it would constitute "final agency policy or determinations" which should be made available after having deleted information in accordance with §537 of the Labor Law.

Thank you for the opportunity to comment.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Mary Ann Giordano

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2220

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

October 7, 1981

Mr. Wayne Jackson
c/o General Delivery
Patchogue, NY 11772

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jackson:

You have asked for an advisory opinion with respect to three applications for public access to records that you submitted to the Suffolk County Police Department. In each instance, the information requested was denied.

Having reviewed the applications, I would like to offer the following observations and suggestions.

The first application involves a request for records "showing a list of all outgoing telephones call showing telephone numbers called and the time of such calls between 3:30 AM Sept. 11, 1981 and 4:00 PM Sept. 11, 1981 originating from 5th precinct, Comman #6550, Patchogue, N.Y." In response to the request, the Police Department indicated that such records are not maintained.

It is noted at the outset that the Freedom of Information Law is an access to records law. Stated differently, §89(3) of the Law states that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if, for example, there is no "list" in existence containing the telephone numbers in question, an agency would be under no obligation to create such a list on your behalf.

In addition, even if such a list is in existence, it is possible that it could be withheld in whole or in part. Here I direct your attention to §87(2)(b) of the Freedom of Information Law (see attached), which provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". If telephone numbers are disclosed, it is possible that they could be used in a manner that would infringe upon the privacy of individuals.

Nevertheless, it is suggested that you renew your request and phrase it in a different manner. If I remember correctly, you are interested in demonstrating that calls were made to or from your own telephone number or another number known to you. If that is so, it is suggested that you request records or portions thereof that indicate telephone communications between the Police Department and a particular, specified telephone number. By so doing, you could avoid problems that might arise if there is no "list". Further, if the number is your own, the numbers of others could be deleted to protect privacy, while reference to your number could be made available.

Your second inquiry involves a request for a prisoner's property receipt pertaining to yourself produced by the 5th Precinct in Patchogue. In response to your request, the Suffolk County Police Department indicated that the record would be available at the 5th Precinct. Assuming that the property receipt is not in possession of the central office of the County Police Department, but rather only in possession of the 5th Precinct, it is suggested that you submit a request to the appropriate individual at the 5th Precinct. Again, your request should be in writing, providing as much detail as possible in order to enable the agency to locate the records as quickly and efficiently as possible.

Your third area of inquiry concerned a request for:

> "any and all records showing or identifying the I.D. of each police car and driver that responded to a call at 46 Victory Ave., Shirley, N.Y. at or about 3:30 AM Sept. 11, 1981 and the time arrived and departure time of each car."

As I explained to you during our discussion, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records in which he or she may be interested. Based upon the degree of detail contained within your request, it would appear that the request did reasonably describe the records sought. However, in an effort to mediate and gain additional information on your behalf, I have contacted the Suffolk County Attorney's Office regarding your inquiry. In some instances, even though a record may be "reasonably described", an agency may not be able to locate it due to the nature of its filing system. The response to your request indicated that complaint records are filed by means of a central complaint number and/or the name of a complainant. This point was verified by a representative of the County Attorney's Office. Complaints are not filed by regions with Suffolk County, for instance, or by means of the time that a complaint is made. As such, even though you provided a significant amount of detail, the Police Department would apparently be unable to locate the record without either a complaint number or the name of the complainant. Nevertheless, based upon our discussion, it would appear that you are aware of the identity of the complainant as well as the complaint number. As such, it is suggested that you resubmit a request for the records in question by identifying the complainant or signifying the complaint number.

I realize that the foregoing suggestions might require that additional requests be made. However, under the circumstances, it would appear that such steps must be taken in order to elicit appropriate responses.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2221

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2618, 2791

October 7, 1981

Frank Fernandez
#80A3422
Box 51
Comstock, NY 12821-0051

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fernandez:

I have received your letter of October 1 in which you requested assistance in obtaining records from various agencies.

Specifically, you have asked for information relative to records in possession of the New York City Police Department, New York state criminal and supreme courts, the Department of Correctional Services, the United States District Court, Eastern District of New York, the United States Parole Commission, and the Federal Bureau of Prisons.

I would like to offer the following observations with respect to your inquiry.

First, the New York Freedom of Information Law is applicable to records in possession of agencies of government in New York. Consequently, the Law does not apply to records in possession of federal agencies. Federal agencies are, however, subject to the provisions of the federal Freedom of Information Act.

Second, the definition of "agency" appearing in §86(3) of the New York Freedom of Information Law, specifically excludes the courts and court records. Nevertheless, many court records are available under various provisions of the Judiciary Law and Court Acts. For example, §255 of the Judiciary Law states that a clerk of a court must search for and provide access to records in

his possession upon payment of the appropriate fees. Consequently, if you are interested in gaining access to records of the criminal or supreme courts in New York, it is suggested that you address your requests to the clerks of the appropriate courts, supplying as much identifying information as possible, such as names, dates, docket numbers, and similar details that would enable the clerk to locate the records sought.

In view of the foregoing, among the agencies that you identified, only two, the New York City Police Department and the State Department of Correctional Services, are subject to the Freedom of Information Law. In this regard, under regulations promulgated by the Committee that govern the procedural aspects of the Freedom of Information Law, each agency is required to designate one or more records access officers. In the case of the New York City Police Department, it is suggested that you direct your request to the "Records Access Officer", New York City Police Department, One Police Plaza, New York, NY 10038. With respect to the Department of Correctional Services, under the Department's regulations, a request made by an inmate should be directed to the facility superintendent. Again, as much detail as possible should be provided when making a request.

Third, although the Committee provides advice regarding the New York Freedom of Information Law, as a service to the public, documentation regarding the federal Freedom of Information Act is made available whenever possible. As such, enclosed for your consideration is a copy of a pamphlet entitled "Your Right to Federal Records" prepared by the United States Department of Justice. The pamphlet contains the provisions of the federal Freedom of Information Act and explains how the Act may be used.

In addition, in order to assist you in gaining access to records in New York, enclosed are copies of the New York Freedom of Information Law, an explanatory pamphlet on the subject, and §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

BY: Pamela Petrie Baldasaro
Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss
Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2222

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

October 7, 1981

Mrs. Sally A. Nauseef
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Nauseef:

I have received your letter of September 28 in which you requested information regarding your capacity to review a civil service examination that you had taken.

More specifically, you wrote that you have been attempting to gain access to information for six months regarding a civil service examination administered by Broome County. You wrote that you were not informed of any right to seek a review of the examination, nor have you been given information regarding the scoring of your examination with respect to points added for seniority. Further, you mentioned that the exam lasted nearly seven hours, but that examinees were given no advance notice of the length of the exam.

I would like to offer the following observations with respect to your situation.

First, as you may be 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.

The ground for denial that is relevant under the circumstances is §87(2)(h), which states that an agency may withhold records or portions thereof that:

> "...are examination questions or answers which are requested prior to the final administration of such questions".

In other words, if an examination question will be given in the future, §87(2)(h) permits an agency to withhold both the question and the answer. Conversely, if an examination question will not be used again, both the question and the answer are available. The reason behind this ground for denial is that civil service examination questions are often used more than once. If questions used more than once are disclosed, some individuals could have an advantage over others due to premature disclosure.

Second, in some instances, an examination may be reviewed by a candidate after it is given or after the results have been made available. However, that is not the case with respect to every examination. It is suggested that you call or write to the State Department of Civil Service in order to obtain more information regarding the particular exam that you took. I believe that the appropriate office is the Bureau of Examinations and Staffing Services, which is located at the Department of Civil Service, Agency Building #1, State Office Building Campus, Albany, NY 12239. If you wish to contact that office by phone, the number is (518)457-5445.

Third, although you indicated that you have been seeking information regarding the examination for approximately six months, you did not specify whether your inquiries were made orally or in writing. In this regard, it is suggested that requests for records always be made in writing and directed to the "records access officer" of the agency in possession of the records sought. When a request is made in writing, the agency is required to respond within the time limits specified in the Freedom of Information Law and the regulations promulgated by the Committee.

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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the CivilPractice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations to which reference was made earlier, and an explanatory pamphlet on the subject 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2223

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

October 7, 1981

Ms. Margaret J. Spinella
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Spinella:

I have received your letter of September 29 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you wrote that, on several occasions, you requested a copy of the annual school district budget from the superintendent and assistant superintendent of schools in the West Babylon School District. In response to your request, the superintendent forwarded to you a copy of the so-called "popular" budget and the assistant superintendent suggested that you write to the State Education Department to obtain the budget. The assistant superintendent also indicated that she was unsure whether the District had to supply you with the budget, but that she would contact the District's attorney and inform you of the attorney's findings. To date, however, you have received no response.

In my opinion, an annual school district budget is clearly accessible and must be made available by the District for the following reasons.

First, although the Education Law does not specifically allude to a document characterized as a "budget", the document required to be prepared and made available under §1716 of the Education Law, which is entitled "Estimated expenses for ensuing year", is the annual budget. The cited provision states in 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 educational services shall be shown in full, with no deduction of estimated state aid. This section shall not be construed to prevent the board from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time. Such 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."

In view of the foregoing, I believe that the statement of estimated expenses for the ensuing year that is required to be compiled and made available under §1716 of the Education Law is essentially the budget.

Second, §2116 of the Education Law states that:

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

Again, the language cited above indicates that a school district must make available to you records reflective of its annual budget.

Third, even if the quoted provisions of the Education Law did not exist, the annual budget would in my opinion be available under the Freedom of Information Law. In this regard, it is emphasized that 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, except to the extent that records or portions thereof fall within one or more grounds for denial enumerated in §87(2)(a) through (h).

Under the circumstances, there is only one ground for denial that would be relevant to rights of access to the budget. However, due to the structure of that provision, it directs that the budget be made available. Specifically, §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 noted 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

From my perspective, since the budget consists of statistical or factual information, it should be made available under §87(2)(g)(i). Moreover, I believe that it also reflects both a final determination made by the School Board as well as the policy of the District for a particular fiscal year and, therefore, would be available under §87(2)(g)(iii).

Fourth, even though an annual budget may be required to be submitted to the State Education Department, I believe that the Education Law requires that copies of the budget be maintained the the School District clerk.

In this regard, §2121(7) of the Education Law requires that the district clerk "keep and preserve all records, books and papers belonging to his office..." Therefore, if, for example, the budget document is kept in two locations, the State Education Department and the District, it would be equally available from either source.

And fifth, 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that I have been 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: Mr. Edward DeIulio
Dr. Dorothy Pierce

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2224

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
[redacted]
BARBARA SHACK
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1981

Barry Brown
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brown:

I have received your letter of September 26 in which you requested an advisory opinion under the Freedom of Information Law.

Your letter concerns a request for records in possession of the New York State Department of Social Services and the response to your request. Specifically, although the Department determined that the records sought are accessible under the Freedom of Information Law, you were informed that you would be required to pay a fee of twenty-five cents per photocopy. In this regard, you indicated that you are a recipient of public assistance currently involved in a fair hearing. As such, you intimated that the assessment of a fee effectively denies you the right to an administrative remedy and access to the courts. Therefore, you have contended that the fees sought to be assessed by the Department of Social Services should be waived.

Having reviewed your initial letter to this office as well as the response to your request by Richard Chady, Records Access Appeals Officer of the Department of Social Services, I must disagree with your contentions.

Please be advised that I have contacted the Department of Social Services on your behalf in order to obtain additional information regarding the assessment of fees for copies by the Department. As I understand it, when an individual is involved in a fair hearing, copies of records

from a case file that are or may be admitted as evidence in the hearing are furnished to the individual. Nevertheless, it appears that the records in which you are interested are not found within your case file. Similarly, it does not appear that they would be used as evidence. On the contrary, you requested a "copy of the current State Welfare Plan, submitted to HEW", and a list of employees of the Compliance Unit, Fair Hearing Section and Office of Counsel of the Department. Mr. Chady responded that the State Welfare Plan is voluminous and that it consists of approximately one thousand pages. Since the records for which Mr. Chady has sought to assess a fee are not contained in your case file, I believe that his response was appropriate and that the Department of Social Services may assess a fee for copying those documents.

Lastly, it is important to point out that the Freedom of Information Law contains no provisions requiring an agency to waive the fees for photocopying.

In sum, since the records sought are not part of your case file, the Department of Social Services in my view would not be required to waive a fee for photocopying and may assess 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

Robert J. Freeman
Executive Director

RJF:ss

cc: Richard Chady

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2225

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

October 9, 1981

Linda Weygandt
Co-President
Sweet Home Association
of Substitute Teachers
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Weygandt:

I have received your letter of September 30, in which you requested a "determination" regarding the "validity" of a request that you directed to the Sweet Home School District.

In terms of background, on September 10, you requested from the President of the Board of Education "records pertaining to the names of those per diem substitute teachers employed by the Sweet Home Central School District who have received letters of reassurance of continued employment during the 1981-1982 school year". In a response dated September 17, the President of the School Board indicated that your request had been referred to the District's counsel for advice. That letter also indicated that you would receive a response to the request as soon as possible. According to a letter dated September 30, however, no response had been given as of that date.

I would like to offer the following observations with respect to your inquiry.

First, it is emphasized that the Committee on Public Access to Records does not have the authority to issue what may be characterized as a "determination". On the contrary, the Committee has the responsibility of advising with respect to the Freedom of Information Law. Consequently, the advice contained in the ensuing paragraphs may be accepted or rejected by yourself or the District.

Second, the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural implementation of the Law [see attached, Freedom of Information Law, §89(1)(b)(iii)]. In turn, each agency, including a school district, is required to adopt its own regulations consistent with those promulgated by the Committee.

A potentially important aspect of the Committee's regulations involves the designation by the governing body of an agency, in this case the school board, of one or more "records access officers". Under §1401.2 of the regulations, the records access officer is designated to coordinate an agency's response to requests made under the Freedom of Information Law. It is suggested in this regard that you review the regulations adopted by the School Board under the Freedom of Information Law in order to determine who the designated records access officer or officers might be. In the future, it is recommended that requests be transmitted to the records access officer rather than the President of the School Board.

It is also noted that if the records access officer denies a request, §89(4)(a) of the Freedom of Information Law specifies that an applicant may appeal the denial to the head or governing body of an agency, or whomever is designated by that person or body to render determinations on appeal. It is possible that a request initially directed to the School Board President might result in problems, for that person or the School Board might be designated to render determinations on appeal. In short, a determination of a request and an appeal should not be made by the same individual or body [see attached regulations, §1401.7(b)].

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 taken 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Under the circumstances, it appears that the response to your request dated September 17 could be considered an acknowledgment of the receipt of the request. As such, I believe that a response should have been made within ten business days of the date of the acknowledgment, which I believe would have been October 1. Therefore, if no response to your request was received by October 1, I believe that your request may be considered "constructively" denied and that you may appeal to the person or body designated to determine appeals.

Third, in terms of rights of access, if the records in which you are interested exist, I believe that they are accessible under the Law.

It is noted that the Freedom of Information Law is an access to records law. Stated differently, the Law grants access to certain existing records and, as a general rule, an agency need not create a record in response to a request [see Freedom of Information Law, §89(3)].

It is also important to point out that the Freedom of Information Law is based upon a presumption of access. In this regard, the Law provides 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.

Assuming that the letters in question exist, I do not believe that any ground for denial could appropriately be cited. While disclosure of the names of per diem substitute teachers who have received letters of reassurance would indicate their identities, based upon judicial interpretations of the Freedom of Information Law, it would appear that such disclosures would constitute a permissible rather than "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Further and in a related vein, records of payments made to substitute teachers would be accessible under the Law. Therefore, I do not believe that disclosure of the identities of the individuals who received the letters in question could justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Dr. James N. Finch
Mrs. Marjorie Baumler

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2226

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

October 9, 1981

John J. Sheehan
Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter of September 28, in which you requested advice regarding your difficulty in gaining access to records in possession of Chemung County.

In short, the problem appears to involve confusion regarding the custody of particular records, the identities of the individuals maintaining the records, as well as the procedures by which you may appeal a denial of access.

It is noted at the outset that since the receipt of your letter, I have spoken with Louis Mustico, Chemung County Attorney. Based upon my conversation with him, it appears that a determination regarding your request has been made.

Nevertheless, to avoid similar problems from arising in the future, it is suggested that you request a copy of the rules and regulations promulgated by Chemung County under the Freedom of Information Law.

As you are likely aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations regarding the procedural implementation of the Law. In turn, §87(1) of the Law requires each agency, including Chemung County, to adopt its own regulations consisting with those promulgated by the Committee.

In this regard, §1401.2 of the Committee's regulations requires that the head or governing body of an agency designate one or more records access officers by name or by

specific job title. The records access officer or officers have the duty of coordinating the County's response to requests for records. Similarly, the regulations indicate that the head or governing body of the County determine appeals, unless a different person or body has been designated to perform that function.

As such, by reviewing Chemung County's procedures, perhaps the problems that you have faced can be avoided in the future.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2227

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

October 9, 1981

Mr. James E. Carter
Superintendent of Schools
City School District of the
City of Elmira
951 Hoffman Street
Elmira, NY 14905

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carter:

I have received your letter of October 5 in which you requested an advisory opinion regarding your response to a request made under the Freedom of Information Law by David Hill, President of the Elmira Teachers Association.

In a letter addressed to you, Mr. Hill demanded within twenty-four hours of his request certain documents discussed at a meeting held by the Board of Education. The documents include long range plans and "updated student information" that relate to the plans. Your letter indicates that you denied his request "on the basis that the information requested is computer print-out sheets" which you consider to be working documents and, therefore, deniable.

I would like to offer the following observations regarding your inquiry.

First, in my view, applicants for records under the Freedom of Information Law do not make "demands" but rather requests.

Second, the Freedom of Information Law and the regulations promulgated by the Committee specify the time limits within which a response to a request must be given. Although an agency, such as a school district, may provide access to records immediately or within twenty-four hours, for example, §89(3) of the Law requires

that an agency respond to a request within five business days of its receipt. Therefore, I do not believe that you or the District would be required to respond to Mr. Hill's demand within twenty-four hours.

Third, although the records sought by Mr. Hill might be characterized as "working documents", I do not believe that the characterization of the records in question as working documents removes them from rights of access granted by the Law.

In this regard, 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."

In view of the breadth of the definition quoted above, the documents sought are in my view "records" subject to rights of access granted by the Freedom of Information Law, even if they are "working documents". In short, if the School District maintains the records in question, regardless of their physical form or characteristics, they are subject to rights of access granted by the Law.

Fourth, 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, except to the extent that records or portions thereof fall within one or more grounds for denial enumerated in paragraphs (a) through (h) of §87(2).

Based upon your description of the records in question as "computer printouts", it appears that only one ground for denial is relevant. Moreover, due to the structure of that ground for denial, it also appears that the records sought are accessible under the Law.

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..."

It is noted 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 information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In view of the foregoing, I would conjecture that the computer printouts consist in great measure, if not in toto, of "statistical or factual tabulations or data". If that is so, the printouts are accessible in their entirety.

Moreover, it appears that the documents should likely have been discussed during an open meeting held by the Board of Education. That issue will be considered in an advisory opinion requested by Craig Smith of the Elmira Star-Gazette. A copy of my response to Mr. Smith will be sent 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: David Hill

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO 2228

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

October 13, 1981

Mr. James Ingalls
Professor of Pharmacology
Arnold & Marie Schwartz College
of Pharmacy and Health Sciences
Long Island University
75 DeKalb at University Plaza
Brooklyn, New York 11201

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Professor Ingalls:

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

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the Law, and an explanatory pamphlet that may be particularly useful to you, for it contains sample letters of request and appeal.

You have asked how you may acquire accessible information under the Law. In this regard, 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.

Under the Committee's regulations, each agency subject to the Law is required to designate one or more "records access officers" who are responsible for coordinating the agency's responses to requests made under the Law. As such, it is suggested that requests should be directed to the "records access officer" of the agency maintaining custody of records in which you are interested.

Section 89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. As such, an applicant is not required to identify with specificity the records in which he or she is interested. Nevertheless, when making a request, it is suggested that as many identifying details be provided as possible, such as names, dates, file designations and similar information that will assist an agency in locating 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

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2229

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

October 13, 1981

Write-Time
P.O. Box 28907
St. Louis, MO 63132

Dear Sir/Madam:

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

You have requested "a list of T.V. Stations accepting payed commercials..." in New York State.

In this regard, unless I am mistaken, I do not believe that any state agency maintains or is required to maintain a list of commercial television stations operating in New York. Moreover, under the Freedom of Information Law, an agency is generally not required to create a record in response to a request.

It is suggested, however, that you contact the Federal Communications Commission, which licenses and regulates commercial television. I would conjecture that the Federal Communications Commission could provide you with information regarding all commercial television stations in and outside of New York.

In order to locate the appropriate office of the Federal Communications Commission to elicit a response to your request, it is suggested that you contact the nearest Federal Information Center. Federal Information Centers have been created to answer questions quickly and to assist you in locating the appropriate federal agencies and offices when the source of information is needed.

The nearest Freedom of Information Center to you is located in St. Louis at the Federal Building, 1520 Market Street. You can reach the Federal Information Center at (314) 425-2106.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2230

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

October 14, 1981

Ms. Raetta M. Decker
Councilwoman
Town of Greenville
R.D. #4, Box 345
Middletown, NY 10940

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Decker:

I have received your letter of October 2 in which you requested advice regarding your inability to gain access to records of the Greenville Volunteer Fire Department.

Specifically, as a member of the Greenville Town Board, you have engaged in numerous efforts to gain access to records of the Greenville Volunteer Fire Department. Most recently, you made a request at an open meeting on September 16, but you were verbally informed by the President of the Volunteer Fire Department that the records sought, which concern disbursements, "were not open to anyone". Further, Mr. Ardler, the President of the Department, had indicated in response to an earlier opinion addressed to you that the Freedom of Information Law is not binding upon the Fire Department and that my letter merely constituted my "opinion". You have asked what course of action should now be taken.

First, I agree with Mr. Ardler's comment that advice rendered by this office merely constitutes an "opinion". However, in this instance, my opinion is based upon a decision rendered by the Court of Appeals, the state's highest court. It is emphasized that the Court of Appeals' decision represents the final step in the judicial process in New York and that the court's determinations are essen-

tially the "law of the land" in New York. Even if I were to disagree with the Court of Appeals' determination, in good faith, I would be compelled to advise based upon its decision, for it is binding throughout the state.

Although a copy of Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)] was sent to you in February in an effort to convince the Department of its obligation to disclose, apparently that was not sufficient. Consequently, a copy of the decision as well as this letter will be sent to Mr. Ardler. Perhaps after having read the decision, he will be assured that the Court of Appeals left no room for interpretation regarding the coverage of the Freedom of Information Law with respect to volunteer fire companies.

The only other step that could be taken would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules. In view of the Court of Appeals' decision, I would hope that the initiation of such a proceeding would be unnecessary, for it would likely be costly and time consuming.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Ardler

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2231

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

October 15, 1981

Larry DeBerry
78-A-370
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeBerry:

I have received your letter of September 29 in which you requested from this office records containing remarks "given prior credit following cancellation of delinquency on prior sentence per Counsel's Memo of June 26, 1981."

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 an agency to make records available.

However, I would like to offer the following suggestion.

Under the Freedom of Information Law, the Committee is required to issue general procedural regulations. In turn, each agency is required to adopt its own regulations consistent with those of the Committee. In this regard, the Department of Correctional Services has promulgated regulations under the Freedom of Information Law. Under §5.20 of the Department's regulations, an inmate should direct a request in writing to the facility superintendent or his designee. As such, it is recommended that you submit a request to the superintendent of the facility in which you are housed. If your request is denied, you have the right to appeal to Counsel to the Department of Correctional Services, State Campus, Correctional Services Building, Albany, New York 12226.

I hope that 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-2232

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

October 15, 1981

Mrs. Mary LaClair
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. LaClair:

I have received your letter of October 2.

You expressed concern in your correspondence that certain time limitations with respect to a petition for a referendum would soon expire. Therefore, I attempted to contact you by telephone without success last Friday in order to advise you of the following information.

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 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Second, the time limitations set forth in §24 of the Municipal Home Rule Law involve subject matter which is outside the jurisdiction of the Committee. However, on your behalf, I have contacted legal representatives of the Department of State's Legal Services Division and the Attorney General's office. Those attorneys advised me that your next step may be to consider litigation against the County with respect to its refusal to certify that your petition complied with all legal requirements. It is suggested that you contact a private attorney who can advise you more specifically regarding your legal recourse under the Municipal Home Rule Law, the Election Law and any applicable statutes of limitations.

Third, I have determined from the Bureau of Miscellaneous Records in the Department of State that the local law to which you made reference was filed in that Bureau on September 9, 1981. If you have further questions regarding this filing with the Department of State you might consider calling the Bureau at (518) 474-2755.

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
by: Pamela Petrie Baldasaro

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2233

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

October 19, 1981

Herbert A. Terrell, Esq.
Nichols & Givens
Attorneys at Law
21 West Fifth Street
Chester, PA 19013

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Terrell:

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

You have requested information of a technical nature pertaining to various subjects that are apparently related to human behavioral testings. Further, you indicated that you are indigent and that the "amended act" permits agencies to waive fees when records are sought in the public interest.

I would like to offer the following observations regarding your inquiry.

First, under the Freedom of Information Law, a request should be directed to the agency or agencies maintaining the records in which an applicant is interested. I have no knowledge as to whether the information that you are seeking is maintained by any state agency. I would conjecture that the only agencies that might have information on the subjects in which you are interested would be educational, such as the State University or other large institutions of higher education.

Second, if my contention that the state does not engage in the type of research in which you are interested is accurate, it is suggested that you might want to request similar information from the National Institutes of Health, a federal agency, in Bethesda, Maryland.

Third, with respect to the waiver of fees, I believe that you were alluding to the federal Freedom of Information Act (5 USC §552), which does permit the waiver of fees for copying in certain cases. However, the New York Freedom of Information Law contains no provisions regarding a waiver of fees.

Enclosed for your consideration is an explanatory pamphlet regarding the New York Freedom of Information Law 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:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2234

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

October 19, 1981

Raul Hardy
79 B 537
Box 51
Comstock, NY 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hardy:

I have received your letter of October 6 in which you requested information as well as records pertaining to yourself.

Specifically, you wrote that you have attempted to obtain records pertaining to you involving particular cases in which you were treated as a juvenile.

I would like to offer the following observations and suggestions.

First, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. As such, it does not have possession of records generally, such as those in which you are interested, nor does it have the authority to require the disclosure of records.

Second, in order to gain your criminal history record, there may be two possible sources. One such source would involve a request directed to the superintendent of the facility in which you are housed. Second, criminal history information is maintained by the State Division of Criminal Justice Services, which is located at Stuyvesant Plaza, Executive Park Tower, Albany, NY 12203.

Third, with respect to other records pertaining to you, it would appear that they are likely in possession of one or more courts. In this regard, although the courts and court records are not subject to the Freedom of Information Law, there are numerous provisions of the Judiciary Law and other court acts that grant broad rights of access to court records. Consequently, it is suggested that you request records concerning your cases from the courts in which the proceedings were held. For instance, if you were tried or sentenced in a county court, you should write to the clerk of the county court to request records involving the proceeding in which you were involved. It is also possible due to your age that records may be in possession of family court. If that is so, perhaps a request should be directed to the clerk of the family court. If possible, you should supply as much identifying information as possible, such as names, dates, index or docket numbers, etc.

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

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2235

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

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 20, 1981

Mr. Wayne Jackson
General Delivery
Patchouge, NY 11772

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of October 7 regarding your attempts to gain access to records from the Suffolk County Police Department.

You raised five issues, three of which were dealt with in earlier correspondence. The remaining two pertain to the number of requests that may be made within a given period of time and access to police blotters.

With respect to the first issue, you wrote that, on September 23, you submitted twelve applications for access to records to Captain Johnson of the Suffolk County Police Department. Captain Johnson informed you that you were limited to the submission of three requests within a twenty-four hour period.

In this regard, the Freedom of Information Law does not specify or otherwise limit the number of requests that may be submitted to an agency within any given period of time. Further, the Freedom of Information Law and the regulations promulgated by the Committee provide agencies with a substantial amount of time to respond to requests. 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

The second issue concerns access to police blotters for particular months. In response to your request, you wrote that you were informed that only newspaper reporters may inspect police blotters. If that response was indeed given, I respectfully disagree.

First, the Freedom of Information Law does not distinguish in terms of rights of access between members of the news media and members of the public. In short, it has been held 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, affirmed 51 AD 2d 673, 378 NYS 3d 165].

Second, the term "police blotter" has derived its meaning and usage by means of custom. Stated differently, there is no specific definition of the contents of a police blotter in any statute or regulation of which I am aware. As such, although many police departments have by means of custom maintained records characterized as police blotters, the contents of police blotters may vary from one police department to another.

Third, there was a decision rendered under the Freedom of Information Law which determined the scope of what traditionally constitutes a police blotter. 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 even reported by or to a police department is recorded. Further, the court held that the police blotter is available, for it is not investigative in nature, but rather is merely a summary of events or occurrences.

As such, if the police blotter maintained by the Suffolk County Police Department is analogous to that described by the court in Sheehan, I believe that it is available.

Lastly, your request involved a review of police blotters for a three-month period. Depending upon the manner in which the blotter is maintained, it may be easy or difficult to make police blotters maintained for three months available. If the police blotter for Suffolk County is maintained in a different manner from that described in Sheehan, the Police Department might be required to engage in a more substantial review of the contents of the blotter in relation to the grounds for denial appearing in §87(2) 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: Captain H. Johnson

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO 2236

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

October 21, 1981

Mike Danahy
Managing Editor/The Leader
Second Floor Campus Center
SUNY at Fredonia
Fredonia, New York 14063

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Danahy:

I have received your letter of October 8 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have requested advice regarding a request for Fredonia College's budget proposal for 1982-1983 from both the Division of the Budget and the State University. You also sought advice regarding a document entitled the SUNY "Multiphase 'Rolling' Plan". The Plan apparently consists of long term strategy, is labeled "confidential" and was used in 1980 by the Chancellor at a meeting of SUNY college presidents.

I would like to offer the following observations and comments with respect to your questions.

First, with respect to the Fredonia College budget request, I have contacted the Division of the Budget on your behalf to obtain information regarding the Division's response. I was informed by a representative of the Division that the College President has offered to meet with you to review the budget proposals. From my perspective, the offer should be accepted, for an interpretation of the documentation would likely be of great value to you in view of the technical aspects of the proposal. If you have further questions following your review with the President, please feel free to call me.

With respect to the second area of inquiry concerning the "Multiphase 'Rolling' Plan" and the meeting of college presidents, your question involves rights of access to "any or every document or decision coming out of this annual conference".

In this regard, 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 SUNY, 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 facts that you have described, it appears that one ground for denial may be relevant. However, that ground for denial may serve to grant access to some of the records developed following the meeting. Specifically, §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 noted that 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 policies or determinations must be made available.

Under the circumstances, it appears that the "Multiphase Rolling Plan" was and may continue to be a proposal, rather than the policy of SUNY. Moreover, since it was distributed among persons within a single agency, i.e. SUNY, it could be characterized as "intra-agency material".

Nevertheless, if at the meeting or later in response to the plan, policies were adopted, determinations were made, or instructions to staff were given, those records would in my view be available.

According to the sponsor of the Freedom of Information Law as amended in 1977, one aspect of the intent of §87(2)(g) was to permit the public to gain access to the so-called "secret law" of an agency. In many instances, the duties of an agency are carried out by means of policy statements or instructions to staff that affect the public, for example, which do not appear in any statute or regulation. Since, however, such documentation represents the working law or policy of an agency, it would be available under §87(2)(g)(ii) or (iii). Conversely, inter-agency or intra-agency materials consisting of advice, recommendations, proposals and the like would be deniable. The extent to which documentation exists reflective of policy or decisions that may have been adopted as a result of the 1980 meeting 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2237

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

October 21, 1981

Dr. George Silberman
Social Service Employees Union
Local 371
817 Broadway
New York, NY 10003

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Silberman:

I have received your letter and the correspondence attached to it.

According to the documentation attached to your letter, on September 22 you directed a request under the Freedom of Information Law to the New York City Human Resources Administration (HRA) in which you sought a monthly provisional report and a "List of all HRA Managerial Personnel". Despite correspondence later sent to the General Counsel and the Commissioner of HRA, you had not received a response as of October 13. As such, your question is "why it takes so long to release what is clearly materials that should be released."

I would like to offer the following observations and comments with respect to your inquiry.

First, I have contacted the Office of Counsel of HRA on your behalf to determine whether your request had been answered as of today. I was informed that a response to your request was mailed to Dennis Coleman on October 16. Further, I was advised that the materials requested would be made available upon payment of the appropriate fees for photocopying.

Second, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, provide specific time limits regarding agencies' responses to requests. 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 business 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 denia of access that may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remendies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 473 NYS 2d 886 (1981)].

Third, in terms of the substance of your request, one area of information sought involved a list of managerial employees. In this regard, it is noted that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if, for example, HRA maintained no list of managerial employees, it would not be required to prepare such a list on your behalf.

I would like to point out, however, that an exception to the general rule that an agency need not create a record is found in §87(3)(b) of the Freedom of Information Law, which pertains to the creation of a payroll listing. The cited provision requires that each agency maintain:

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

Although the payroll record is not required to specify who the managerial employees might be, a review of such a list might nonetheless be useful in some circumstances.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Armstrong

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2238

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

October 22, 1981

Mr. Maurice Peoples
Erie County Holding Center
10 Delaware Avenue
Buffalo, New York 14202

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Peoples:

I have received your letter of October 16 in which you sought advice concerning a request submitted to the "public information officer" of the Buffalo City Court. In addition, you requested information regarding federal agencies that you might contact regarding information pertaining to lengths of incarceration, release dates and related matters.

According to the correspondence attached to your letter, you requested records from the Buffalo City Court under the Freedom of Information Law relating to a specified pre-indictment number, as well as other records of proceedings. You also requested that the City Court waive fees for copies on the ground that you are an indigent defendant.

I would like to offer the following comments and observations regarding your correspondence.

First, and perhaps most importantly, the Freedom of Information Law does not apply to courts and court records. Please note that the Law applies to agencies, and that the term "agency" as defined in §86(3) of the Freedom of Information Law specifically excludes the judiciary. Consequently, the Buffalo City Court, unlike an agency subject to the Freedom of Information Law, is neither required to designate a "records access officer" or public information officer, now is it required to comply with the Freedom of Information Law generally.

Second, even though the Freedom of Information Law does not apply to the courts and court records, there are numerous statutes in the Judiciary Law and various court acts that grant rights of access to court records. For instance, §255 of the Judiciary Law (see attached), a statute generally applicable to the courts, states that a court clerk must, upon payment of the appropriate fees, make available records in his or her possession.

Third, although the federal Freedom of Information Act contains provisions concerning the waiver of fees for copying, the New York Freedom of Information Law contains no such language.

Fourth, included in your request were "any and all records of proceedings held in Buffalo City Court August 16th, 1975 through September 25th, 1975." I would conjecture that the number of proceedings and therefore the records falling within the scope of your request may be voluminous. Consequently, rather than requesting all records pertaining to that time period, perhaps you could narrow your request by identifying specific case names, index or docket numbers and similar identifying information that would assist a clerk in locating the records sought.

Fifth, with respect to information regarding federal agencies, it is noted that the Committee is responsible for advising only with respect to the New York Freedom of Information Law. Nevertheless, I have enclosed a copy of a pamphlet published by the United States Department of Justice entitled "Your Right to Federal Records" that may be useful to you.

Lastly, you made specific reference to the District of Columbia's Department of Corrections. In this regard, it is in my view likely that the District's Department of Corrections is not a federal institution, but rather an institution of the District of Columbia. Consequently, access to records of that Department may be subject to rights granted by an access law enacted in the District of Columbia.

I hope that 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-2239

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

October 22, 1981

Mr. Robert Billings
Erie County Holding Center
10 Delaware Avenue
Buffalo, New York 14202

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Billings:

I have received your letter in which you requested an advisory opinion regarding a request that you submitted to the Erie County Supreme Court under the Freedom of Information Law. You have asked whether the court will make the information available to you under the Freedom of Information Law.

The records that you requested include administrative staff manuals and instructions to staff that affect inmates' pro se motions, as well as statements of policy and interpretations that have been adopted by the court that affect inmates at the Erie County Holding Center.

I would like to offer the following observations and comments with respect to your inquiry.

First, I could not possibly inform you as to whether the Erie County Supreme Court "will" indeed supply you with the information in which you are interested.

Second, and perhaps most importantly, the Freedom of Information Law does not apply to courts and court records. Please note that the Law applies to agencies, and that the term "agency" as defined in §86(3) of the Freedom of Information Law specifically excludes the judiciary. Consequently, the Erie County Supreme Court, unlike an agency subject to the Freedom of Information Law, is neither required to designate a "records access officer" or public information officer, nor is it required to comply with the Freedom of Information Law generally.

Third, even though the Freedom of Information Law does not apply to the courts and court records, there are numerous statutes in the Judiciary Law and various court acts that grant rights of access to court records. For instance, §255 of the Judiciary Law, a statute generally applicable to the courts, states that a court clerk must, upon payment of the appropriate fees, make available records in his or her possession.

Lastly, although the federal Freedom of Information Act contains provisions concerning the waiver of fees for copying, the New York Freedom of Information Law contains no such language.

I hope that 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- 2240

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

October 22, 1981

Joseph C. Catalano
Deputy Town Attorney
Office of the Town Attorney
Town of Oyster Bay
Town Hall
Oyster Bay, New York 11771

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Catalano:

As you are aware, I have received your letter of October 16 and appreciate your interest in complying with the Freedom of Information Law.

Your inquiry involves the capacity of the District Attorney's office to gain access to the complete personnel files of Town employees. You have indicated that it is the Town's goal to cooperate fully with other agencies of government but that concern has been expressed regarding "the release of confidential records of [your] employees which may be used to prosecute said employees". You also wrote that if the documents are "deemed accessible", the Town "may be exposed to liability by the involved employees in having violated the confidential status of their records".

I would like to offer the following observations and comments with respect to your inquiry.

First, situations often arise in which one agency of government seeks records from another agency of government. In some of those instances, the records sought might not in their entirety be accessible as of right to the general public under the Freedom of Information Law. However, it has been suggested that one unit of government seeking records from another does not make a request as a member of the public under the Freedom of Information Law,

but rather as an entity of government seeking records in order to carry out its official duties. Consequently, when an agency to which the request is directed seeks to cooperate with the agency making the request, the following suggestion has been offered. Specifically, the agency in possession of the records might make them available and state in a covering memorandum that the records are not generally made available under the Freedom of Information Law, but that they are being made available under the circumstances to enable the requesting agency to carry out its official duties. By so doing, one can avoid establishing a precedent that records are available while concurrently cooperating with another unit of government that seeks records to perform its duties.

Second, the Freedom of Information Law is permissive. Stated differently, the introductory language in §87(2) of the Law states that an agency "may" withhold certain records or portions thereof falling within one or more of the ensuing grounds for denial; it does not generally require that an agency must withhold records falling within the grounds for denial.

Third, you indicated that the records in question may have some "confidential status". From my perspective, the term "confidential" is somewhat overused. In my view, the term "confidential" has a narrow meaning in New York law. Specifically, to be characterized as "confidential", I believe that there must be a statutory provision that precludes disclosure of particular records. In such cases, the records would 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". Only in situations in which a statute precludes disclosure could an agency in my opinion characterize records as "confidential". Further, only in those cases would an agency be precluded from disclosing or viewing the Freedom of Information Law as permissive.

It is also noted that a number of judicial determinations rendered before and after the enactment of the Freedom of Information Law dealt with the so-called "governmental privilege". In brief, when an agency could demonstrate to a court that disclosure would, on balance, result in detriment to the public interest, the governmental privilege would be successfully asserted [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)].

Nevertheless, in a more recent determination of the Court of Appeals, it appears that the governmental privilege may have been all but abolished. In Doolan v. BOCES [48 NY 2d 321 (1979)], it was held in essence that, to deny access, an agency must prove that records sought fall within one or more of the grounds for denial listed in §87(2) of the Freedom of Information Law. Unless such proof can be offered, the records are available, notwithstanding an assertion of the privilege.

Fourth, in terms of potential liability for disclosure, there are several determinations which indicate that when a public officer discloses or speaks in the performance of his or her official duties, that person is absolutely immune from liability [see Ward Tellecommunication and Computer Services, Inc. v. State, 42 NY 2d 289 (1977); Sheridan v. Crisona, 14 NY 2d 108, 113; Gilberg v. Goffi, 21 AD 2d 517, 591, affd. 15 NY 2d 1023; Follendorf v. Brei, 51 Misc. 2d 363 (1966)].

Lastly, if, for whatever the reason might be, the Town determines not to disclose personnel records, it is likely that the District Attorney would have the capacity to subpoena the records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2241

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

October 22, 1981

Stephen Milbank
81 A 2435
Box 149
Attica, NY 14011

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Milbank:

I have received your letter of October 15, in which you requested information regarding the means by which you may gain access to records pertaining to you. Apparently you are interested in gaining access to records regarding your arrests and the disposition of judicial proceedings in which you were involved.

First, the New York State Division of Criminal Justice Services maintains criminal history information, which includes a record of arrests and convictions. Criminal history information may be obtained directly from the Division of Criminal Justice Services at Stuyvesant Plaza, Executive Park Tower, Albany, New York 12203. In the alternative, the same information may be obtained by an inmate by directing a request to the facility superintendent or his designee. As such, it is suggested that you request the "DCJS Report" pursuant to §5.22 of the regulations of the Department of Correctional Services from your facility superintendent.

Although the DCJS report will include the nature of dispositions of court cases, it is noted that many court records are available. Specifically, §255 of the Judiciary Law states in brief that a clerk of a court must make available, upon payment of the appropriate fees, records in his or her possession. Therefore, if you want records regarding judicial proceedings in addition to the DCJS report, it is suggested that you direct a request for records to the clerks of the courts in which the proceedings were conducted. Such requests should provide as much identifying information as possible, such as names, dates, index and docket numbers, and other similar information that would enable a clerk to locate 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2242

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

October 23, 1981

Arthur E. Gasparini, President
Larchmont Mamaroneck Property
Owners Association
189 Hickory Grove Dr. E.
Larchmont, New York 10538

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gasparini:

As you are aware, I have received your letter of September 30 and the materials attached to it.

According to the materials, you requested a copy of a letter written by several Larchmont police officers which supposedly contains allegations against the former police chief. It is your opinion that you were not properly advised of the procedures under the Freedom of Information Law and the regulations regarding the identity of the person or body to whom an appeal should be addressed. Additionally, you raised questions concerning the responsibilities of the Board of Police Commissioners under the Freedom of Information Law, which was characterized as a separate entity of the Town.

I would like to offer the following observations and comments with respect to your inquiry.

First, in my opinion, the Board of Police Commissioners is an "agency" subject to the Freedom of Information Law, for it is a municipal board [see attached, Freedom of Information Law, definition of "agency", §86(3)].

Second, §87(1)(a) of the Law requires that "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation" in accordance with the regulations promulgated by the Committee. Consequently, even though

there may be several agencies within town government, such as a board of police commissioners, nevertheless, a town board as the governing body is required to promulgate uniform rules and regulations pertaining to each agency within Town government under §87(1)(a) of the Law.

Third, the Committee's regulations, which have the force and effect of law, in §1401.2 requires that the governing body 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". Therefore, if, for example, the Town Board in its regulations has designated a single records access officer, requests for records in possession of any agency within Town government would fall within the scope of that person's responsibility, even if he or she did not have physical possession of records sought. If, however, the Town Board had designated a specific records access officer to respond to requests directed to the Board of Police Commissioners, that person would be required to respond to requests directed to the Board.

To determine the identity or identities of access officers designated by the Town Board, it is suggested that you request a copy of the Town's regulations adopted under the Freedom of Information Law.

In my view, the situation that you encountered could likely have been handled differently. If, for example, the Town's regulations identified a records access officer for the Board of Police Commissioners, the Town Clerk might have directed you to the appropriate person. Further, based upon §87(1) of the Freedom of Information Law, which was discussed earlier, if no records access officer had been designated to respond to requests directed to the Board, the Town Clerk would in my opinion have been responsible for granting or denying the request. It is noted in this regard that a town clerk is the legal custodian of all town records under §30 of the Town Law. As such, in the absence of the designation of a records access officer for the Board of Police Commissioners, it appears that the Clerk would be required to perform the duties of records access officer with respect to requests for records of the Board.

Notwithstanding the procedural difficulties that you may have faced, the materials attached to your letter indicate that the Town Supervisor engaged in substantial efforts on your behalf. In short, although the means by which you obtained the records may have been questionable in terms of procedure, the result was likely favorable from your perspective.

Lastly, enclosed for your review is a copy of the regulations promulgated by the Committee. The regulations will also be sent to the other persons receiving copies of this letter.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive
Director

PPB:RJF:ss

Enclosures

cc: Mr. Ralph Fisher, Chairman
Mr. Allen L. Thompson, Police Commissioner
Mr. Joseph J. Sussen, Jr., Police Commissioner
Mrs. Dorothy Miller, Town Clerk
Mr. Leo Goldsmith, Jr., Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 2243

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

October 26, 1981

Mr. Santo Triolo
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Triolo:

I have received your letter of October 14 in which you requested the assistance of this office in ensuring compliance with the Freedom of Information Law by the City of Albany.

Please be advised that I have contacted the City Clerk, Garry Burns, on your behalf in order to obtain additional information regarding your request. Mr. Burns informed me that the records that you requested had been set aside for you to obtain, but that you had not contacted his office recently. Mr. Burns also informed me that he would be mailing the records in question to you.

In view of the foregoing, it appears that there may have been an absence of communication between yourself and the Clerk. It appears further that the situation has been rectified.

For future reference and in order to diminish the types of problems you have recently encountered, I would like to offer the following suggestions.

First, under the regulations promulgated by the Committee, each agency, such as a city, is required to designate one or more records access officers. A records access officer is required to coordinate the agency's response to requests for records. I believe that in our previous discussions, I informed you that the access officer for the City of Albany is the City Clerk, Mr. Burns. As such, in the future, it is recommended that requests for records be forwarded initially to Mr. Burns acting in his capacity as records access officer.

Second, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responses to requests.

Specifically, 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 may be appealed 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, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that 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: Garry Burns

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 2244

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

October 27, 1981

Mr. Matthew Chachere
Hilltopia, Inc.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chachere:

I have received your letter of October 14.

In a previous letter dated September 17 you had requested an advisory opinion to assist you in obtaining information that could be useful in a lawsuit commenced by your organization against the Jericho Union Free School District. In my response to your letter of September 17, I requested information regarding the subject matter of your litigation, for it is the policy of the Committee not to issue advisory opinions after litigation has been commenced under the Freedom of Information Law. However, you indicated in your October 14 letter that the litigation in question concerns a contractual matter unrelated to the Freedom of Information Law.

I would like to offer the following comments with respect to your inquiry.

First, having reviewed the correspondence you have transmitted within the last two months, I do not believe any new advice in addition to that provided by Mr. Freeman in his letter of August 21 can be offered at this juncture. I am aware that there are statutory provisions in the Education Law with respect to the sale of school district property. However, I could not state with certainty that the resolution of the Jericho Union Free School District, a copy of which you attached to your letter, would con-

stitute the initiation of procedures to sell the property, and thereby make this situation comparable to that which existed in Murray v. Troy Urban Renewal Agency (Sup. Ct., Rensselaer Cty., April 24, 1980).

Second, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. It has no authority to compel an agency, such as the Jericho Union Free School District, to make records available. Consequently, in order to protect your time limitations under the Law you may want to appeal your inability to obtain the District's subject matter list.

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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Third, if you are ultimately unsuccessful in obtaining the "missing" records that you believe are in possession of the School District, or if you are unable to obtain certification from the School District that it no longer has possession of those records, you should consider consultation with a private attorney in order to determine alternative methods of access. For example, if you are now involved in litigation, it is possible that discovery devices may be apprcpriately employed.

I regret that I am unable to be of further assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

cc: Mr. David Nydick

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 2235

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

October 27, 1981

James F. Hayes
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hayes:

I have received your letter of October 14.

You have indicated that you have not yet received material requested some time ago from the State University Regents External Degree Program. As such, you have requested information regarding the means by which an individual may initiate a judicial challenge to a denial of access without the assistance of an attorney.

It is noted at the outset that I have contacted Ms. Judith Safranko on your behalf in order to encourage a response to your inquiry. Ms. Safranko informed me that materials responsive to your request would be mailed to you either today or tomorrow. As such, it is my hope that the necessity of initiating litigation can be avoided.

Should you determine to initiate a judicial proceeding, please note that the vehicle for so doing is Article 78 of the Civil Practice Law and Rules. As a general rule, when an Article 78 proceeding is brought against an agency or public officer, the person bringing the suit, the petitioner, has the burden of proving that the agency acted unreasonably or that a public officer failed to perform a duty required to be performed by law. Under the Freedom of Information Law, however, the burden of proof is different. Section 89(4)(b) of the Law specifies that the burden of proof rests upon the agency that denied access to records, which must demonstrate that records sought fall within one or more of

the grounds for denial appearing in §87(2)(a) through (h). Moreover, 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 envisioned by 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); Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979)].

Lastly, in all honesty, I could not provide specific information regarding the means by which you could initiate a lawsuit pro se. However, perhaps the best sources of information regarding an Article 78 proceeding would be so-called "form" books. McKinney's Forms and Bender's Forms, for instance, provide model documents used in Article 78 and other proceedings. By reviewing the appropriate forms, one might have the capacity to fill in the appropriate blanks and fulfill whatever responsibilities there may be.

Once again, however, I am hopeful that Ms. Safranko's response to you will nullify the necessity of initiating a lawsuit.

I hope that 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: Judith Safranko

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 2246

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

October 27, 1981

Ms. Diane Goodman, Counsel
The New York State Lottery
Swan Street Building
Empire State Plaza
Albany, New York 12223

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Goodman:

Based upon our telephone conversation last week, the ensuing comments have been prepared in the interest of identifying a common ground in reference to a determination on appeal rendered in response to a request by Mr. Richard Brodrick. I would like to reiterate several of the points that we discussed.

In brief, Mr. Brodrick requested records related to a contract award.

First, we are in agreement with respect to your reversal of the denial of access to records sought by Mr. Brodrick in category "A". The records requested under that category consisted of proposals submitted by another bidder. The Division's requests for proposals specifically indicated that cost and price information in vendor's proposals would be available to the public.

Second, we appear to be in agreement that the final decision of the Division of the Lottery, which awarded the contract to Scientific Games Development Corporation, is accessible under the Freedom of Information Law.

Third, you affirmed the original denial of category "B" of the request, which involved:

> "[A]ny correspondence, memoranda, or documents of any kind relating to the aforementioned bids..."

As a basis for the denial, you cited §87(2)(g) of the 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..."

You indicated during our conversation that any statistical or factual material would be made available in accordance with the Freedom of Information Law, but that "internal memoranda" would not be disclosed. My concern is that instructions to staff that affect the public or final agency policies and determinations found within "internal" memoranda would also be accessible under the Freedom of Information Law if contained within such memoranda.

Additionally, Contracting Plumbers Cooperative Restoration Corp. v. Anthony R. Ameruso [430 NYS 2d, 196 (1980)], in my view, supports such a conclusion. In Contracting Plumbers, it was found that:

> "...it would appear that disclosure of the contents of the successful bid proposal and the basis of the determination to accept the successful bid proposal by the agency together with its findings, reports and memoranda would be expressive of the legislative purposes set forth in section 84 POL" (id. at 198, emphasis added).

The factual circumstances in Contracting Plumbers v. Ameruso, supra, may in my view be distinguished from those present in Bartlett v. Nassar [100 Misc. 2d 904 (1979)]. In the former, the court rendered its decision after a contract had been awarded. In Bartlett, supra, however, the memoranda requested were written by a budget director to a county executive with respect to the projected condition of a particular fund. After a review of what

the court characterized as "intra-office memos", it concluded that these records did not contain "statistical or factual tabulations" but solely "opinions, policy options and recommendations" that had yet to be accepted or rejected.

In reference to our previous discussions, it is my belief that we have removed any confusion regarding the litigative position of the parties in Contracting Plumbers v. Ameruso, supra. The petitioner was the unsuccessful bidder; the respondents were the New York City Department of Transportation and its Commissioner. The court held that the respondents, the governmental entity, failed to prove that the records requested by the unsuccessful bidder could be withheld on the basis of §87(2)(c) of the Law.

Fourth, you indicated agreement with my comments that the exception regarding records the disclosure of which would result in an unwarranted invasion of personal privacy [see §87(2)(b)] would not consitute an appropriate basis for denial relative to post-award records of contractual performance. You wrote in your response to appeal that "private communications between two contracting parties are not public documents but are personal". On the contrary, such communications would appear to have no bearing on personal privacy and clearly would be relevant to the duties of the agency. Further, it is difficult to envision any other ground for denial that could justifiably be cited. As noted in Contracting Plumbers, supra, a "successful bidder had no reasonable expectation of not having its bid open to the public". In a similar vein, it would appear that compliance with the terms of a contract by a successful bidder is a matter of public interest.

I would appreciate an opportunity to discuss the matter further and thank you for your cooperation.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2247

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

October 28, 1981

Shirley Kwan
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kwan:

I have received your letter of October 21, in which you raised questions regarding student records.

Specifically, you have asked whether:

> "...the school's faculty have the right to retain our application essays, forms and clippings after selections are made and class is well into the first semester? Are they open to faculty members who are not part of the selection committee?"

You have also stated that you understand that there may be reasons for records to be open to instructors, but you are unsure of whether academic reasons override provisions relating to the protection of privacy.

I would like to offer the following comments with respect to your inquiry.

First, it is emphasized that the Freedom of Information Law is not applicable with regard to the records in question. That statute concerns rights of access to records in possession of state and local government in New York. Since Columbia University is private, it is not subject to the provisions of the Law.

Second, however, there is a federal Act which is in my view applicable to the records that you described. Specifically, the federal Family Educational Rights and Privacy Act (20 USC §1232g), which is commonly known as the "Buckley Amendment", is applicable to:

> "...all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.]" (see attached regulations promulgated by the Department of Health, Education and Welfare, now the Department of Education, §99.1(a)].

Since Columbia participates in grant programs administered by the United States Department of Education as well as federally guaranteed student loan programs, it is subject to the provisions of the Buckley Amendment.

In brief, the Buckley Amendment states that all "education records" (see definition in §99.3) that identify a particular student or students are confidential, except with respect to the parents of students under the age of eighteen. Rights of access granted to parents of students under the age of eighteen are passed on to "eligible students" attending institutions of post-secondary education, such as the Graduate School of Journalism at Columbia, who are eighteen years of age or more.

Third, with respect to the University's right to retain applications, essays, forms and similar records after selections have been made and students are in attendance, there is no provision of law of which I am aware that would preclude educational institutions from maintaining possession of such records. The only provision with which I am familiar concerning the retention of records is §99.13 of the regulations and is entitled "[L]imitation on destruction of education records". In brief, for purposes of your inquiry, an educational institution subject to the Buckley Amendment cannot destroy education records if a request to inspect or review those records is outstanding. Stated differently, there is nothing in the Buckley Amendment that requires an educational agency or institution to destroy or otherwise dispose of education records.

Fourth, in terms of disclosure of education records among faculty members, §99.31 of the regulations is likely relevant, for it pertains to situations in which prior consent from an elegible student is not required prior to disclosure. In relevant part, the cited provision states that:

> "[A]n educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is:
>
> (1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests..."

It appears that education records pertaining to students enrolled at the Graduate School of Journalism may be disseminated to faculty members, for example, who have been determined to have legitimate educational interests in the records.

With respect to all others, I believe that education records pertaining to students could not be disclosed without the consent of the students.

I hope that 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- 2248

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

October 29, 1981

Lowell J. Tooley
Village Manager
Village of Scarsdale
Village Hall
Scarsdale, NY 10583

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tooley:

As you are aware, I have received your letter of October 26 in which you raised a question under the Freedom of Information Law.

Specifically, you referred to a letter of September 21 addressed to Warren J. Grossman in which an advisory opinion was rendered. With regard to advice given in that letter, your question is whether it is my view that:

> "...a memorandum from one member of the Village Board to another Board member, if it was of a factual nature or reflective of a determination, is open to public access?"

As indicated in the opinion addressed to Mr. Grossman, the key provision appears to be §87(2)(g) of the Freedom of Information Law. That provision states that an agency, such as a village, 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..."

As I explained in the earlier opinion, the provision quoted above contains what in effect is a double negative. While portions of inter-agency or intra-agency materials consisting of advice, recommendations, opinions and similar information may be withheld, those portions consisting of "statistical or factual tabulations or data" or final determinations, for example, are available.

Under the circumstances, assuming that no other grounds for denial appearing in the Freedom of Information Law could appropriately be cited, it is my view that those portions of the memorandum in question consisting of statistical or factual information or reflective of a final agency determination would be available.

It is also noted that the introductory language of §87(2) of the Freedom of Information Law states that an agency may withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. As such, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. I believe, too, that the capacity to deny "records or portions thereof" imposes a responsibility upon an agency to review records sought in their entirety to determine which portions, if any, fall within the scope of one or more of the grounds for denial.

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: Warren J. Grossman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2249

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

October 30, 1981

Helen C. Heller
Executive Director
United Parents Associations
95 Madison Avenue
New York, New York 10016

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Heller:

As you are aware, I have received from the New York City Board of Education copies of your request made under the Freedom of Information Law to the Board and your appeal, which followed a denial of access.

As I understand the situation, you have requested copies of so-called "Disclosure of Interests Questionnaires", which are completed by members of community school boards. In response to your request, the Board denied, stating that:

> "[T]he material you seek is exempt from disclosure under Sections 87.2(b) and 89.2(b) of the Freedom of Information Law, as records which if disclosed would constitute an unwarranted invasion of personal privacy".

In your letter of appeal, you expressed an understanding of the Board's concern regarding questions of privacy. However, you wrote that, in your view, the public has a clear right to know:

> "1. whether a CSB member is employed by the Board of Education;
>
> 2. whether a CSB member's spouse is employed by the Board of Education;

> 3. whether a CSB member, or spouse, provides -- directly or indirectly -- any supplies, materials, labor, professional services, etc. to the Board of Education".

I would like to offer the following comments and observations regarding your request and rights of access.

First, 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 Board of Education, are available, except to the extent that records fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, it is important to note that the Law "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..."

Therefore, assuming that the Board of Education has in its possession the questionnaires in which you are interested, those documents would constitute "records" subject to rights of access granted by the Law.

Third, the introductory language in §87(2) of the Law states that an agency may withhold "records or portions thereof" falling within one or more of the grounds for denial that follow. In my view, the language quoted in the preceding sentence indicates that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, that language also in my opinion imposes a responsibility upon agencies to review records sought in their entirety to determine which portions, if any, fall within one or more of the grounds for denial.

Fourth, as indicated in the response by the records access officer, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof the disclosure of which would constitute an unwarranted invasion of personal privacy. It is often difficult, however, to determine when disclosure would result in an unwarranted invasion of personal privacy, for, of necessity, subjective judgments must often be made.

Nevertheless, there is a significant amount of case law regarding the privacy of public employees. In this regard, the courts have generally held that a public employee enjoys a lesser right to privacy than members of the public generally, for it has been found that public employees have a greater duty to be accountable than any other identifiable group. In addition, in terms of records that identify public employees, it has been found in essence 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 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); aff'd 45 NY 2d 954 (1978); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne County, March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980)]. Conversely, to the extent that records regarding public employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Fifth, with respect to the information in which you are interested, I believe that the case law rendered under the Freedom of Information Law as well as provisions of the Law itself indicate that disclosure would result in a permissible invasion of personal privacy.

For instance, §87(3)(b) of the Law states that each agency shall maintain:

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

Based upon the language quoted above, the identities of community school board members or their spouses employed by the Board would be found in payroll records required to be compiled and made available under the Freedom of Information Law.

Similarly, records reflective of the provision of "supplies, materials, labor, professional services, etc. to the Board of Education" would in my view be available. In short, contracts or other agreements under which goods or services are provided would in my view be available under the Freedom of Information Law. Section 87(2)(g)(i) grants access to "statistical or factual tabulations or data" found within inter-agency or intra-agency materials. Further, §87(2)(g)(iii) provides access to final agency policies or determinations. From my perspective, a contract or agreement with the Board to provide goods or services would constitute factual information and might be reflective of a final agency determination. As such, it would appear that the information sought is accessible under the Law.

Lastly, it is emphasized that I am unfamiliar with the scope or content of the "Disclosure of Interests Questionnaire". I would conjecture that certain aspects of the questionnaire would, if disclosed, result in an unwarranted invasion of personal privacy. For instance, in various situations, it has been advised that home addresses, social security numbers, the amounts of personal assets or liabilities, the number of shares of stock held by an individual and similar information might justifiably be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Moreover, several years ago, by means of an executive order, certain high-level state agency employees were required to complete financial disclosure statements and transmit them to the Board of Public Disclosure. Those statements contained information of a personal nature that was withheld, as well as information the disclosure of which was determined to constitute a permissible invasion of personal privacy. In order to ensure accountability and rights of access, a "public inspection version" was derived from original financial disclosure statements. To make certain information available while protecting against the disclosure of other types of information, stencils were devised in order that photocopies could be made in which portions of a page would not be reproduced, while the remainder would be photocopied for the purpose of being made available to the public.

It is suggested that if the Disclosure of Interests Questionnaire contains both accessible and deniable information, perhaps a system similar to the one established by the Board of Public Disclosure could be considered. Once again, such a system could ensure that information of a highly personal nature would be withheld, while information accessible under the Freedom of Information Law could 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:ss

cc: Mary Tucker

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2250

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

October 30, 1981

Mr. Robert B. Houghtaling

[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Houghtaling:

I have received your letter of October 26.

You have sought assistance with respect to a request made under the Freedom of Information Law directed to the New York State Department of Correctional Services. Specifically, you submitted a request on October 2. However, as of the date of your letter to the Committee, a response had not yet been received.

I would like to offer the following comments with respect to your inquiry.

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 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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Lastly, as a general rule, the Freedom of Information Law is applicable to existing records. Consequently, unless direction is provided to the contrary, an agency is not generally required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, if no records were prepared with regard to the incident that you described, the Department would have no obligation to prepare 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

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2251

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

November 2, 1981

Reese Weyant
79 C 474
135 State Street
C-16-40
Auburn, NY 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Weyant:

I have received your letter of October 19.

According to your letter, you were unsuccessful in obtaining records sought from your counselor by means of a verbal request. You have requested information regarding the manner in which a request should be made under the Freedom of Information Law. Although you have not indicated the exact nature of the records you are seeking, the following observations will be based on the assumption that you are requesting access to inmate records pertaining to you.

First, it is noted that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. This office does not have possession of records generally, such as those in which you are interested, nor does it have the capacity to compel an agency to provide access to records.

Second, the Freedom of Information Law requires the Committee to promulgate regulations of a procedural nature. In turn, each agency, such as the Department of Correctional Services, is required to adopt its own regulations consistent with those promulgated by the Committee.

Third, in this regard, the Department of Correctional Services has promulgated regulations under the Freedom of Information Law. Enclosed for your consideration is a copy of §5.20 of the Department's regulations, entitled

"Examination of inmate record by subject or his attorney". Under those regulations, an inmate is required to direct a request under the Freedom of Information Law to the facility superintendent or his designee. Since you have been unsuccessful in obtaining records from your counselor, it is possible that you may have directed your request to the wrong person. It is suggested that you renew your request and direct it to the facility superintendent. In the event that the superintendent denies access to the records, according to §5.20(c) you may appeal a denial to the Counsel to the Department of Correctional Services.

Lastly, enclosed for your consideration is an explanatory pamphlet regarding the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2252

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

November 4, 1981

David Cox/A.K.A. David Hill
Great Meadow Correctional Facility
Comstock, NY 12821-0051
81A1171 (C-3-14)

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hill:

I have received your letter of October 22, which is addressed to Gilbert P. Smith, Chairman of the Committee on Public Access to Records.

Please be advised that, although Mr. Smith is the Chairman of the Committee, correspondence is generally handled by the Committee's staff. As such, please consider the following to be a response to your letter directed to Mr. Smith.

In your letter, you characterized Mr. Smith as the "appeals officer". In this regard, please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. Consequently, the Committee has no authority to render determinations on appeal, nor does it have the authority to compel an agency to make records available under the Law.

When an individual is denied access to records by means of a written denial or a denial made by means of a failure to respond within the appropriate time limits, he or she may appeal to the head or governing body of an agency or whomever is designated to determine appeals.

According to a directory of New York City government offices, the Kings County Hospital Center operates within the New York City Health and Hospitals Corporation. As such, it is suggested that you either renew your request or appeal to the Health and Hospitals Corporation.

To initiate a new request, it is suggested that you direct a request to the Secretary of the Corporation, 125 Worth Street, Room 521, New York, NY 10013. If you feel that an appeal would be more appropriate, it should be directed to the Office of General Counsel at the same address, Room 523. In short, based upon the information that you have provided, it appears that your request may have been directed to an office that does not generally deal with inquiries 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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Pracitce Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that 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-2253

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

November 4, 1981

Timothy H. Gillette
79 A 3700
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gillette:

I have received your letter dated October 23 and notarized on October 29 in which you requested various records pertaining to yourself.

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 those in which you are interested, nor does it have the authority to require an agency to make records available.

Nevertheless, I would like to offer the following observations and comments.

First, the Freedom of Information Law is applicable to existing records, and an agency is not generally required to create records in response to a request [see attached, Freedom of Information Law, §89(3)]. In this regard, some of the records in which you are interested may have been created as long as twenty years ago and it is possible that they may no longer exist. In short, if records no longer exist, an agency would have no obligation to prepare records on your behalf.

Second, §89(3) of the Law requires that an applicant "reasonably describe" the records in which he or she is interested. From my perspective, it is possible that a

request for all records pertaining to yourself from a medical facility or a prison might not "reasonably describe" the records sought. It is suggested that, when making a request, as much information be provided as possible, such as dates, file designations, docket numbers, and similar information that might enable an agency to locate records quickly.

Third, under the regulations promulgated by the Committee, each agency is required to designate one or more "records access officers" who are responsible for handling requests made under the Freedom of Information Law. Since the records sought may be in possession of a number of agencies, you may be required to submit requests to each of the agencies that might have possession of the records in question.

Lastly, you indicated that you have the ability to pay for photocopies at the rate of "a nickel a page". In this regard, I would like to point out that §87(1)(b)(iii) of the Freedom of Information Law states that, as a general rule, an agency may charge up to twenty-five cents per photocopy.

Also enclosed for your consideration is an explanatory pamphlet on the Freedom of Information Law that might 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-2254

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

November 6, 1981

Patrick M. Murphy, Jr., Esq.
Village Attorney
Village of Mineola
171 Jericho Turnpike
Mineola, New York 11501

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Murphy:

As you are aware, your letter of August 25 addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

According to your letter:

> "[T]he Mineola Fire Department, a duly organized Village Fire Company, has recently found it necessary to discipline one of its volunteer firemen. A disciplinary proceeding was had, after which it was determined that the fireman involved would be suspended for a period of six months. During the disciplinary proceeding, stenographic minutes of the record were taken. The time within which the disciplined fireman has to commence an Article 78 Proceeding has expired".

Your question is whether the Freedom of Information Law precludes making public the "transcript of testimony taken at the disciplinary proceeding".

In my view, the Village is not precluded from disclosing the transcript in question. However, I would like to offer the following comments and observations regarding your inquiry.

First, assuming that the Village Fire Company is an entity of Village government, I believe that it would constitute an "agency" as defined by §86(3) of the Freedom of Information Law and, therefore, would be subject to the Law. In brief, "agency" is defined to mean entities of state and local government and their components.

In a related area, questions often arise regarding the status of volunteer fire companies, which may be not-for-profit corporations that perform their duties by means of a contractual agreement with one or more municipalities. Despite their status as not-for-profit corporations, the Court of Appeals in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], found that volunteer fire companies are "agencies" subject to the provisions of the Freedom of Information Law. Therefore, whether the fire company is an entity of village government or a volunteer fire company, it would in my opinion be an agency 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. Stated differently, 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.

Third, the Freedom of Information Law is permissive. Although the introductory language in §87(2) indicates that an agency may withhold records or portions thereof falling within one or more of the grounds for denial, there is nothing in the Law that requires an agency to withhold records, even if one or more grounds for denial could appropriately be cited. From my perspective, the only instance in which an agency would be required to withhold records would involve direction given in a statute which specifically precludes disclosure. In such instances, records would be considered exempted from disclosure by statute and would fall within §87(2)(a) of the Law.

Fourth, even though the transcript in question may in my view be disclosed, it is possible that one or more grounds for denial might be applicable. For instance, §87(2)(g) states that an agency may withhold records or portions thereof the disclosure of which would result in

"an unwarranted invasion of personal privacy". In this regard, the transcript might identify witnesses, for instance, and it is possible that disclosure of their identities would result in an unwarranted invasion of personal privacy.

Similarly, the transcript itself might be considered "intra-agency" material. Here 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..."

It is noted that 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 policies or determinations (i.e., the determination made with respect to the subject of the proceeding), must be made available. Conversely, to the extent that inter-agency or intra-agency materials consist of advice, recommendation, suggestion and the like, such records may be withheld.

In sum, while I do not believe that there is any provision of law that would preclude the Village from disclosing the transcript, it might be worthwhile to review its contents to determine the effects of disclosure, particularly in view of the privacy of those who may have been involved in the proceeding other than the subject of the 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:ss

cc: George Braden

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2255

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

November 6, 1981

Mr. Kenneth Ray Banks
#319239
Box 16 S-2-20
Louclady, TX 75851

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Banks:

I have received your letter of October 28, 1981. You have requested information regarding the means by which you may gain access to your arrest records.

Based upon your letter, it is assumed that records in which you are interested are criminal history records that essentially consist of a summary of arrests and convictions. If my assumption is accurate, the records would be available to you from the New York State Division of Criminal Justice Services.

In order to direct a request to the Division, you should write to:

The Division of Criminal Justice Services
Identification Services
Executive Park Towers
Stuyvesant Plaza
Albany, New York 12203

I am sure that the Division will respond promptly and inform you of whatever information it needs to process your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2256

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

November 6, 1981

Ms. Diane A. Goodman, Counsel
The New York State Lottery
Swan Street Building
Empire State Plaza
Albany, New York 12223

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Goodman:

I have received your letter of October 30 in which you responded to my correspondence of October 27.

Since you requested my response with respect to two points set forth in your letter, I would like to offer the following comments.

You expressed surprise regarding my reference to §87(2)(g)(ii) concerning "instructions to staff that affect the public...", and §87(2)(g)(iii) pertaining to "final agency policy or determinations..." In view of your comment, it may be worthwhile to review key provisions of the Freedom of Information Law.

First, it is emphasized that §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".

As such, all records in possession of an agency are subject to rights of access granted by the Law.

Second, the Law is based upon a presumption of access and states in §87(2) that all records of an agency, such as the Division of the Lottery, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Third, the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Therefore, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. The quoted language also indicates that requested records must be reviewed in their entirety to determine which portions, if any, may justifiably be withheld.

Fourth, as noted in our previous correspondence, §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 noted that 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 policies or determinations must be made available. Subsequent to our initial conversation, I was concerned that I had not clearly indicated to you the requirement under the Law that records or portions thereof reflective of instructions to staff that affect the public or final agency determinations must also be made available. In short, the point is that an "internal" memoranda is not necessarily deniable; on the contrary, its contents determine rights of access.

Lastly, I believe that we agree that §87(2)(b), which deals with unwarranted invasions of personal privacy, is not an appropriate basis for denial in this particular situation. However, in my opinion, my comments regarding the use of the inter, intra-agency basis for denial would also be relevant to Mr. Brodrick's request for any post-award correspondence. Given the expansive nature of his request, it is possible that several categories for denial could be applicable. Consequently, if any of the post-award correspondence requested falls within §87(2)(g) as "internal memoranda", it may be withheld, except to the extent that it consists of the three types of available information described in §87(2)(g)(i), (ii) and (iii).

I hope these comments are responsive to your letter. Thank you for your prompt attention to this matter.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Richard G. Brodrick

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2257

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

November 9, 1981

Richard T. Bruno
Law Clerk
Davoli & McMahon, P.C.
Attorneys and Counselors
500 South Salina Street, Suite 816
Syracuse, New York 13202

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bruno:

As you are aware, I have received your letter of October 28 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, your office represents the Onondaga County Industrial Development Agency (the "IDA"). In this regard, the Armani Plumbing & Heating Company has applied to the IDA in order to engage in a financing agreement. To accomplish the financing, the IDA will apparently have the right to inspect certain financial records of the Company. You have indicated, however, that the IDA "does not have these records in its possession, nor is the Company required to turn over these records to the Agency". Further, you wrote that the IDA "does not contemplate taking possession of those records".

Based upon our previous telephone conversations, it is your understanding that unless the records "are actually taken into possession" by the IDA, they will not be subject to rights of access granted by the Freedom of Information Law. Moreover, it is also your understanding that, while the IDA may have the right to inspect the company's records, that factor would not constitute possession of the records by the IDA for the purpose of making them available to the public.

I believe that your understanding of the statute is correct, and I would like to offer the following comments in this regard.

First, as we discussed, an industrial development agency is an "agency" as defined by §86(3) of the Freedom of Information Law, for, under the provisions of §856 of the General Municipal Law, an industrial development agency is a "corporate governmental agency, constituting a public benefit corporation". As such, an industrial development agency and its records are clearly subject to the Freedom of Information Law.

Second, in brief, §87(2) of 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. In this regard, the term "record" is defined broadly to mean:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes". [see §86(4)].

Although the definition quoted above is broad, it is applicable only to information "kept, held, filed produced or reproduced by, with or for an agency..."

Based upon the facts described in your letter, the records in possession of the company are prepared by the company and could not be characterized as records produced by, with or for the IDA. Similarly, as you indicated, the records in question never have been and are not apparently intended to come into the possession of the IDA. Consequently, it is my view that the records that are the subject of your inquiry fall outside the scope of 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2258

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

November 9, 1981

Mr. Anthony DeStefano
Fairchild News Service
7 East 12 Street
New York, New York 10003

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeStefano:

I have received your letter of November 2 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a denial of access by the New York City Police Department with respect to your request for a copy of a transcript of a tape recording used in conjunction with a departmental disciplinary trial. Both your letter and the denial by the Police Department indicate that the record in question is deniable on the ground that it constitutes:

> "...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 terms of background, you wrote that the tape recording in question was made by a civilian and later turned over to the Police Department. In addition, you stated that the transcript was revealed to the subject of the trial, identified at the administrative trial as

an exhibit, and that portions were read into the record. As a result of the departmental trial, the subject of the trial was dismissed from the Police Department.

I would like to offer the following comments and observations with respect to your inquiry and the basis for denial offered by the Police Department's records access officer.

First, as you are aware, 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 to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Second, I do not believe that the tape recording in question could be characterized as inter-agency or intra-agency material. Therefore, I do not feel that the basis for denial cited by the records access officer was appropriate. In this regard, the term "agency" is defined by §86(3) of the Law 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.

In view of the definition quoted above, inter-agency materials would constitute those communications transmitted between or among officials of two or more agencies. Intra-agency materials would consist of those communications between or among officials of a single agency. Under the circumstances, the tape recording could not in my view be characterized as either inter-agency or intra-agency materials, for it was produced by a "civilian", who is not an employee or official of an agency. Consequently, it is difficult to envision how the document in question could be denied on the basis of §87(2)(g).

I would like to point out that a recent Appellate Court decision found that materials submitted by a third party consultant pursuant to a contract with a municipality were found to be intra-agency materials [see Sea Crest Construction Corp. v. Stubing, 442 NYS 2d 130, ___ AD 2d ___ (1981)]. Even if the principle stated in Sea Crest is accurate, it does not appear that it would be applicable in this instance, for the civilian was not under any contractual obligation or relationship with the Police Department.

Further, the transcript of the tape recording may have been prepared by the Police Department. As such, it might be argued that the transcript constitutes "intra-agency" material. However, from my perspective, the character of record remains unchanged; it continues to be reflective of a conversation between an employee of the Department and a civilian.

There are other grounds for denial that might, however, be relevant. One such ground for denial is §87(2)(e), which states that certain records compiled for law enforcement purposes may be withheld. Nevertheless, since the tape recording was prepared by a civilian, it is questionable whether it was prepared for law enforcement purposes. Moreover, even if it could be argued that the tape record was prepared for law enforcement purposes, since the trial has been terminated and a final determination has been rendered, it does not appear that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would arise.

The only other relevant ground for denial would appear to be §87(2)(b). That provision states that an agency may withhold records or portions thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy". It is possible that the tape recording identifies persons other than the civilian and the police officer whose conversation was recorded. To the extent that other persons are named and disclosure of their identities would result in an unwarranted invasion of personal privacy, such portions of the tape recording or the transcript might justifiably be deleted to protect against an unwarranted invasion of personal privacy. However, since much about the administrative trial has been disclosed, it would appear that considerations of privacy might be minimal.

In sum, I do not believe that the basis for denial offered by the Department's records access officer was appropriate. Moreover, the extent to which any remaining grounds for denial could justifiably be cited is in my view questionable.

I hope that 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: Mimi Gertz
Rosemary Carroll

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2259

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

November 9, 1981

Mr. Vernon C. Arrington
81-B-981
Box 500
Elmira, NY 14902

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Arrington:

I have received your letter of October 27.

You have requested assistance with respect to your inability to obtain records under the Freedom of Information Law from an attorney who had previously represented you. Specifically, you have written this attorney to request your records under the Law, and despite repeated attempts, you have not received any response.

I would like to offer the following comments with respect to your inquiry.

The Freedom of Information Law applies to records of an "agency". Since the term "agency" is defined, in brief, to mean units of state and local government, the Law does not include within its scope records which are held by or in the possession of private attorneys.

It may be worthwhile for you to contact the bar association or judicial district grievance committee in which the attorney is located in order to determine if they might assist you in obtaining the records in which you are interested.

I regret that I cannot be of greater assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

RJF:PPB:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-691
FOIL-AO-2260

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

November 9, 1981

Edward F. Fagan, Jr.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fagan:

I have received your letter of November 4 in which you described the procedure of a board of education during a so-called "work session".

According to your letter, at the "work sessions", the Board of Education and various administrators prohibit those in attendance from speaking or raising questions. Further, you wrote that as the sessions progress:

> "...the school superintendent distributes papers, charts and other written information on the agenda items as they come up for discussion. The Board members then silently read the subject matter and in due time the board President will usually ask, 'Is there any question on this'? If there is no question, they will usually vote. If there is a question it is sometimes, 'I would like to change a word in a paragraph on page four'. Sometimes there is a question which leads to a dialouge [sic] and on these occasions the public has some idea of what the discussion is about".

Consequently, you have indicated that there is often "not enough oral response by the board for the public to fully understand what is being discussed or voted upon". You also mentioned a specific problem that arises during

In view of the breadth of the definition of "record", it is clear that virtually all materials used by the Board of Education at its work sessions are subject to rights of access granted by the Freedom of Information Law.

Third, to become more fully apprised of the substance of the discussions that transpire at the work sessions, it is suggested that you submit a request in advance of the work sessions to the district's records access officer. Perhaps a request would involve any materials distributed or intended to be reviewed by members of the Board of Education at its upcoming meeting or work session. While it is possible that not all of the materials would be available under the Law, the agency would in my view be required to review the records in question to determine the extent, if any, to which they could justifiably be withheld.

Fourth, based upon your description of the materials, it appears that many would likely be available.

Perhaps the most relevant ground for denial under the circumstances that you described would be §87(2)(g). Due to the structure of that ground for denial, it might also be cited as a basis for disclosure. 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".

It is noted that 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 policies or determinations musb be made available.

discussions of a proposed budget. According to your letter, references are made to page and account numbers and the Board has "ruled that the budget is not available to the public until after the year it pertains to is closed" (emphasis yours).

You have asked for advice regarding the situation described, for you believe that "the spirit of the Open Meetings Law is being skirted".

I would like to offer the following observations and comments regarding your inquiry.

First, as you are aware, the Open Meetings Law permits the public to attend and listen to the deliberations of a public body, except when an executive session may appropriately be convened. It is emphasized that the Open Meetings Law is silent with respect to public participation at meetings. Consequently, the Committee has consistently advised that a public body may, but need not, permit public participation at meetings. It has also been advised that if a public body chooses to permit public participation, it should do so based upon reasonable rules that treat all members of the public equally.

Second, there may be a method by which you may learn more about the records being discussed at a meeting. In this regard, I direct your attention to the Freedom of Information Law.

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, 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).

I would also like to point out that the term "record" is defined 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".

Of particular import may be §87(2)(g)(i), which grant access to "statistical or factual tabulations or data" found within inter-agency or intra-agency materials. Records prepared by District officials for review by Board members would constitute "intra-agency materials". However, to the extent that they consist of statistical or factual information, they would in my view be available, unless a different ground for denial could justifiably be cited.

It may also be important to point out that a proposed budget to be considered by a school board is in my view required to be open to the public. Here, I direct your attention to §1716 of the Education Law, entitled "[E]stimated expenses for ensuing year". In relevant part, the cited provision states 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 educational services shall be shown in full, with no deduction of estimated state aid. This section shall not be construed to prevent the board from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time. Such 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".

In view of the language quoted above, a proposed school district budget must be prepared and made available to taxpayers prior to the meeting during which it is adopted. As such, I cannot understand your statement that the Board will not make its budget available until it has been "closed". Again, the proposed budget is required to be prepared and made available prior to its adoption under the Education Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2261

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

November 10, 1981

Douglas E. Lee
75-A-1894
Greenhaven Correctional Facility
Stormville, New York 12582

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lee:

I have received your letter of November 2, to which you attached a request directed to the Department of Correctional Services.

You requested a complete copy of the Policies, Procedures and Guidelines Manual developed by the Division of Health Services, as well as a so-called "Vaughan" index. In addition, you requested that I direct a legal opinion to Ms. Barbara Maguire of the Department, explaining to her that she "must" provide you with a copy of the manual in question.

Upon receipt of your letter, I contacted Ms. Maguire's office on your behalf. In this regard, I was informed that you made a similar request some months ago, but that it was denied due to its breadth and the possibility that some aspects of the manual might justifiably be withheld. I was also informed that, at the time of your initial request, the manual was in the process of being revised. As a consequence, it was felt that transmittal of the materials to you would have been misleading, for certain aspects were likely obsolete.

I have arranged, however, to have an updated index to the manual sent to you. By means of the index, you should have the capacity to "reasonably describe" those portions of the manual in which you are interested. As you are aware, §89(3) of the Freedom of Information Law requires that an applicant reasonably describe records sought.

It is also noted that, although the federal courts under the federal Freedom of Information Act have required the compilation of a "Vaughan" index which details certain aspects of records that may be withheld, no judicial decision of which I am aware has been rendered under the New York Freedom of Information Law that requires the compilation of a similar index. Nevertheless, I believe that the index to the manual that is being sent to you will be useful and enable you to request particular aspects of the manual.

I hope that 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: Barbara Maguire

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2262

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

November 10, 1981

Mr. James Brocato
75-C-346
Box B
Dannemora, NY 12929

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brocato:

I have received your letter of October 27.

You have requested comments in regard to your continuing attempts to obtain records pertaining to your trial and conviction from various law enforcement officials. Having reviewed your letter and the enclosures, I would like to offer the following observations.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a district attorney's office or a police department, 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, there may be several grounds for withholding that may be relevant to your request.

For example, §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."

The provision quoted above is based largely upon potentially harmful effects of disclosure, and the extent to which it may properly be asserted is unknown to me.

Additionally, §87(2)(f) of the Law represents another ground for denial that may arise in the context of law enforcement investigations. That provision states that an agency may withhold records or portions of records where disclosure "would endanger the life or safety of any person."

Since I am not familiar with the contents of the records you are seeking, I could not conjecture as to the extent to which this exception would be applicable. However, since you indicated that you are looking for statements believed to have been made by "informants", it is likely an agency could invoke one or more of the categories of denial discussed above.

Third, as Mr. Freeman indicated in his letter to you of September 10, Article 240 of the Criminal Procedure Law establishes the times and procedures within which criminal discovery vehicles may be employed. In this regard, it is reiterated that it has been held in one court that the Freedom of Information Law is not intended to permit a defendant from circumventing normal discovery procedures (see People v. Billups, Sup. Ct., Queens Cty., NYLJ, July 13, 1981). The relevance of that decision to your request is unknown to me.

Fourth, you have made reference to comments from a law enforcement official with respect to the cost involved in complying with your Freedom of Information Law request. Section 87(1)(b)(iii) permits an agency to assess fees for photocopying. Although the federal Freedom of Information Act permits a discretionary waiver of fees for photocopying, the New York Freedom of Information Law contains no similar provision.

Lastly, as previously suggested in Mr. Freeman's correspondence, you might consider contacting the appropriate courts to request records you are seeking in accordance with §255 of the Judiciary Law if you have not yet done 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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2263

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

November 10, 1981

Mr. Thomas P. O'Connor
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. O'Connor:

I have received your letter of November 4.

According to your letter and the attached correspondence with the State Police, you have continually attempted to gain access to records pertaining to you since 1977. Nevertheless, your attempts have been unsuccessful. You have requested assistance in gaining access to particular documents that are apparently in possession of the State Police.

I would like to offer the following comments in this regard.

First, it is emphasized that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. The Committee has no authority to enforce the provisions of the Law or compel an agency to make records available.

Second, I am not familiar with the contents of the records in which you are interested. Nevertheless, the language used as the basis for the denial in a letter addressed to you on October 30, 1981, is in my view inappropriate. That language reiterates provisions of the original Freedom of Information Law enacted in 1974. Specifically, Assistant Deputy Superintendent Stainkamp wrote that "the information you request is exempt from disclosure as it is part of an investigative report com-

piled for law enforcement purposes." The original Freedom of Information Law enabled an agency to withhold "investigatory files compiled for law enforcement purposes" [see original Law, §88(7)(d)]. Consequently, if a record was once considered part of an investigatory file, it would remain forever deniable under the original Law.

However, the original statute enacted in 1974 was replaced by a new Freedom of Information Law that became effective on January 1, 1978. The existing Freedom of Information Law is based upon a presumption of access and states that all records of an agency, such as the State Police, 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). Further, a review of the grounds for denial indicates that they are based largely upon potentially harmful effects of disclosure.

The provision that may be considered to have replaced what was formerly §88(7)(d) 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."

The language quoted above indicates that records compiled for law enforcement purposes may be withheld only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would indeed arise.

It is also noted that the introductory language in §87(2) states that an agency may withhold "record or portions thereof" that fall within one or more of the grounds for denial. As such, it appears that the Legislature envisioned situations in which a single record might be both available and deniable in part. It also appears that an agency in receipt of a request for records is required to review the records sought in their entirety to determine the extent, if any, to which information found within the records might justifiably be withheld.

As you may be aware, under §89(4)(a) of the Freedom of Information Law, a denial of access may be appealed to the head or governing body of an agency, or to the person designated to determine appeals by the head or governing body. It is suggested that you direct an appeal to the Division of State Police. I believe that the appeals officer for the Division is Assistant Deputy Superintendent Donald Brandon.

Lastly, if an agency denies access pursuant to a determination rendered on appeal, an applicant may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. As a general rule, the burden of proof in an Article 78 proceeding rests upon the public, which must demonstrate that an agency acted unreasonably. However, §89(4)(b) of the Freedom of Information Law specifies that in a proceeding initiated under that statute, the agency has the burden of proving that the records denied in fact fall within one or more of the grounds for denial.

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: Donald Brandon
Francis Stainkamp

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2264

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

November 12, 1981

Warren J. Grossman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grossman:

I have received your letter of November 9.

According to your letter, you requested certain information under the Freedom of Information Law from the Village of Scarsdale. You indicated, however, that the information was not provided in a timely manner and that Village officials completed "certain actions" before the information was made available to you. You have asked for advice regarding the time limits within which an agency is required to respond to a request 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 may be appealed to the head of the agency of whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

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 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: Village Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2265

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

November 12, 1981

Mr. Scott J. Schwarz
Zuckert, Scoutt & Rasenberger
Brawner Building
888 Seventeenth Street, N.W.
Washington, DC 20006-3959

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schwarz:

As you are aware, I have received your letter of November 3.

You have requested assistance in relation to a request directed to the Essex County Industrial Development Agency (ECIDA). According to your letter and the correspondence attached to it, your firm requested records in a number of areas on October 2 from ECIDA. Although you indicated that, in response to your request dated October 23, ECIDA's attorney determined to disclose some of the materials sought, others were withheld. Specifically, you wrote that:

> "[T]he response claimed that the names of the private engineering firms contacted by ECIDA were exempt from disclosure under Section 89(3) of the New York Public Officers Law. Three documents were referred to the Committee on Public Access to Records. Additional documents were withheld pursuant to Section 87.2(a) and (g) of the New York Public Officers Law. ECIDA's response does not describe or identify the particular documents being withheld."

In this regard, you have contended that §87(2)(a) of the Freedom of Information Law does not "exempt" any of the documents that you requested and that upon appeal

> "...ECIDA will have to identify the specific state or federal statute upon which the withholding is based and describe or identify each document being withheld."

I would like to offer the following comments and observations regarding your inquiry.

First, as I indicated to you by telephone this morning, the firm representing ECIDA had transmitted to this office three documents that were requested in order to obtain a determination relative to rights of access to those documents. I immediately contacted the firm and explained that the Committee on Public Access to Records has only the authority to advise under the Freedom of Information Law; it has no authority to review records that are the subject of a request in order to render a determination of a quasi-judicial nature. Consequently, I returned the documents to the firm without having read them and offered to provide advice in the future if it is sought.

Second, I agree with the response to your request to the extent that it is based upon §89(3), which states that, as a general rule, an agency is not required to create records in response to a request. In this regard, if, for example, ECIDA maintains no list of engineering firms that it may have contacted with respect to a particular project, there would be no obligation on the part of ECIDA to create such a list on behalf of an applicant for records. It is noted that the extent to which reflective of those sought exist is unknown to me.

Third, with regard to §87(2)(a), that provision states that an agency may withhold records or portions thereof that "are specifically exempted from disclosure by state or federal statute". Having reviewed appropriate provisions of the General Municipal Law, there is no statute of which I am aware that would specifically exempt from disclosure the records in which you are interested. If there is a federal statute that supersedes the New York Freedom of Information Law and which prohibits disclosure, I am unaware of its existence.

Fourth, another basis for withholding offered by ECIDA was §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 noted 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.

Further, the extent to which §87(2)(g) might justifiably be cited is in my view questionable. As I view the language of §87(2)(g), inter-agency materials would consist of those documents transmitted among or between two or more agencies as "agency" is defined by §86(3) of the Law. Similarly, intra-agency materials would consist of those documents transmitted between or among officials of a single agency. Consequently, I do not believe that materials submitted by third party consultants or persons who contract with an agency would fall within the scope of §87(2)(g). Nevertheless, I am constrained to point out that a recent judicial determination held to the contrary and found that communications between a town and a consulting firm under contract with the town fell within the scope of the exception in question [see Sea Crest Construction Corp. v. Stubing, 442 NYS 2d 130, ___ AD 2d ___ (1981)].

Fifth, with respect to the specificity of a denial, the regulations promulgated by the Committee merely indicates that the records access officer must

> "(i) Make records available for inspection or
>
> (ii) Deny access to the records in whole or in part and explain in writing the reasons therefor..." [see attached regulations, §1401.2(b)(3)].

If records are denied on appeal, the basis for further denial must be "fully" explained in writing to the person requesting the records. As such, in the event of a denial on appeal, the rationale for the denial must in my view provide greater specificity than the initial denial. Further, the Court of Appeals, the state's highest court, has held that the public policy concerning disclosure is fixed by the Freedom of Information Law. Stated differently, an agency may withhold records only to the extent that the records fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law [see Doolan v. BOCES, 48 NY 2d 341 (1979)].

As I explained during our telephone conversation today, there has not yet been a judicial decision rendered under the New York Freedom of Information Law of which I am aware that would require the compilation of a so-called "Vaughan index". Consequently, the degree of specificity that must be provided by an agency denying access to records on appeal is not completely clear at this juncture.

Lastly, there is a recent judicial determination in which you may be interested, for it appears to involve issues similar to those that may be present in the controversy with ECIDA. I have enclosed a copy of that determination for your consideration.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Barbara Boster
Philip Chabot

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 692
FOIL-AO- 2266

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

November 13, 1981

John H. Cosgrove
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cosgrove:

I have received your letter of November 6, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, at a meeting of the Town Board of the Town of Canaan, you requested to inspect a "controversial $18,000 bill that had been discussed during the monthly town board meeting after a public hearing on the budget". In response to your request, however, the Town Supervisor stated that you would have to "apply under FOI to see the bill..."

You have asked whether such a requirement is valid or legal in view of the past practices in which you have inspected bills and correspondence after the conclusion of Town Board meetings. You also wrote that members of the press and other members of the public have reviewed various documentation after meetings.

I would like to offer the following comments and observations regarding your inquiry.

First, as I may have explained in the past, the Open Meetings Law permits the public to attend and listen to the deliberations of a public body. The law is silent with respect to public participation. Consequently, it has been advised that although a public body may permit public participation at open meetings, there is no requirement that public participation be allowed. It has also been advised that if the public is permitted to speak or otherwise participate at meetings, that such activities should be permitted by means of rules that are reasonable and which treat all members of the public in like fashion.

Second, in a technical sense, an agency, such as the Town of Canaan, is not required to respond to requests made under the Freedom of Information Law, unless such requests are made in accordance with the Law and applicable regulations.

For instance, under the regulations promulgated by the Committee, which govern the procedural aspects of the Law, a request for records is generally directed to the agency's designated records access officer (see attached regulations, §1401.2). In addition, §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, an agency is not required to respond to a request immediately. Under both §89(3) of the Law and 1401.5(d) of the regulations, an agency is required to respond to a request within five business days of its receipt.

In short, although the bill may have been the subject of discussion at an open meeting, a failure to permit inspection of the bill following the meeting would not in my view constitute a violation of the Freedom of Information Law.

Nevertheless, I believe that consideration should be given to the rules, policies and perhaps past practices of the Town. If it has been established by means of policy or practice that the public has the capacity to inspect accessible records during or following meetings, and if other members of the public were permitted to inspect records at the meeting, it is questionable whether a denial with respect to your request was appropriate. Stated differently, if there is a rule or policy that has been established by the Town Board that permits members of the public and the media to inspect accessible records during or after Town Board meetings, I believe that the rule should be carried out in a reasonable fashion and that all members of the public should be treated equally. If such a policy is in effect, a failure to permit you to inspect the bill in question might not have constituted a violation of the Freedom of Information Law, but rather the policy established by the Town.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

cc: Richard C. Klingler, Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2267

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

November 13, 1981

Bruce Hazel
81 A 4701
J-161-A Block
354 Hunter Street
Ossining, NY 10562

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hazel:

I have received your letter of November 18 in which you requested from this office copies of your "rap sheet" and indictment.

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, such as those in which you are interested, nor does it have the authority to require an agency to make records available.

Nevertheless, I would like to offer the following comments.

First, with respect to your "rap sheet", or criminal history record, I direct you to §5.22 of the regulations promulgated by the Department of Correctional Services. The cited provision states that the "DCJS report", which is the rap sheet, shall be made available to inmates. In order to obtain a copy of your rap sheet, you should direct your request to the superintendent of the facility in which you are housed. In the event that you are denied access to the rap sheet, you may appeal the denial to the Counsel to the Department of Correctional Services, Building #2, State Office Building Campus, Albany, NY 12226.

With respect to the indictment, if the Department does not have possession of the indictment, it is suggested that you submit a request to the clerk of the court in which the indictment was handed down. Although the Freedom of Information Law does not apply to the courts or court records, I believe that an indictment is likely available under the provisions of §255 of the Judiciary Law. In directing your request to the clerk, it is suggested that you provide as much detail as possible, including indictment, docket or index numbers, dates and similar information that will enable the clerk to locate 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2268

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

November 13, 1981

Mr. Leon West
81-D-88
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. West:

I have received your letter of November 10.

You have requested materials regarding the Freedom of Information Law. In addition, you have asked under what section you may gain access to records of county agencies, such as offices of district attorneys.

First, enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern its procedural implementation, and an explanatory pamphlet that may be particularly useful to you, for it contains sample letters of request and appeal.

Second, §86(3) of the Law defines "agency" broadly 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 definition of "agency", counties, including the offices that comprise county government, constitute agencies subject to the Freedom of Information Law.

Third, the focal point of the Law is §87(2), which indicates that the Law is based upon a presumption of access. Stated differently, all records of an agency, such as a county and its component agencies, 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).

Fourth, under the regulations promulgated by the Committee, the head or governing body of each agency, such as a county, is required to designate one or more records access officers. As such, it is suggested that you direct a request to the "record access officer" of the county that maintains possession of the records in which you are interested. It is also suggested that you indicated on the outside of the envelope that the contents include a "Freedom of Information 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

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-694
FOIL-AO-2269

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

November 16, 1981

Mr. Thomas R. Cogar
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cogar:

I have received your letter of November 9 as well as the correspondence attached to it. You have raised questions regarding both the Freedom of Information and Open Meetings Laws.

It is noted at the outset that the facts as stated in your letter and the correspondence are not entirely clear. Nevertheless, I will attempt to be responsive to each of the areas of your inquiry.

Your first point concerns the procedure for entry into an executive session. In this regard, I would like to offer the following comments.

First, the cornerstone of the Open Meetings Law, the definition of "meeting" [see §97(1)] has been interpreted broadly by the courts. In brief, it has been held that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Second, the term "executive session" is defined in §97(3) of the Law to mean a portion of an open meeting during which the public may be excluded. Further, §100 (1) of the Law prescribes the procedure that must be followed by a public body before it may enter into an executive session. Specifically, the cited provision 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 foregoing, 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. Moreover, three steps must be accomplished before a public body may enter into an executive session. They include a motion to go into an executive session made during an open meeting, a statement in the motion that identifies in general terms the subject or subjects to be considered during an executive session, and passage of the motion to go into an executive session by a majority of the total membership of a public body.

It is also noted that a public body may not enter into an executive session to discuss the subject of its choice. Section 100(1)(a) through (h) specifies and limits the areas of discussion that may appropriately be considered during an executive session. Your correspondence does not indicate whether or not the procedure described in the preceding paragraphs was followed. However, the description of the procedure may be useful to you as a member of the public, as well as persons who serve on public bodies.

The second area of inquiry pertains to a request that you made under the Freedom of Information Law regarding records of a "so-called executive session".

In response to your request, William Kellerhals, the Clerk-Treasurer and records access officer of the Village of Port Leyden, indicated that no minutes were taken during the executive session and that no action was taken by the Board "either during or after the session."

Here I direct your attention to §101(2) of the Open Meetings Law concerning minutes of executive sessions. The cited provision states that:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

In my view, the language quoted above indicates that minutes of an executive session must be compiled only when action is taken during an executive session. Therefore, if no action was taken during the executive session to which you and Mr. Kellerhals made reference, I do not believe that there was any obligation to keep minutes.

Further, in terms of the Freedom of Information Law, that statute grants access to existing records. Section 89(3) of the Law states that, in general, an agency, such as a village, is not required to create records in response to requests. Consequently, if no records exist, the Freedom of Information Law would not be applicable.

In view of the provisions of both the Freedom of Information Law and the Open Meetings Law, it appears that minutes of the executive session in question were not required to be kept. As such, I do not believe that there was any violation of law with regard to that issue.

Your third enclosure pertains to an executive session during which the "fate of the Village was discussed" and in which the discussion pertained to the Village Police. You wrote that notice of the time and place of the meeting had not been given prior to that executive session.

Here I would like to offer two comments.

First, §99 of the Open Meetings Law requires that notice be given prior to all meetings. Specifically, §99 (1) concerning meetings scheduled at least a week in advance requires that notice of the time and place of such meetings be given to the public by means of posting in one or more designated, conspicuous public locations and the news media (at least two) 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 in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is in my view clear that notice must be given to the public by means of posting and to the news media prior to all meetings, whether regularly scheduled or otherwise.

With respect to the subject matter under consideration, it is unclear whether an executive session was appropriate. If, for example, the Village was involved in collective bargaining negotiations under the Taylor Law with members of the Police Department, an executive session would have been appropriate under §100(1)(e) of the Open Meetings Law.

Another ground for executive session might have been relevant. For instance, if the budget of the Police Department was under consideration, or if the possibility of layoffs was the subject of the discussion, §100(1)(f) of the Open Meetings Law may have been the basis for entry into an executive session. The cited provision states that a public body may go 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..."

It is emphasized that the language quoted above permits a public body to enter into an executive session to discuss those matters listed only when they deal with a "particular" person. As such, a discussion of personnel in general terms would not in my view qualify as a basis for entry into an executive session. If, however, a particular individual was the subject of the discussion, it is possible that an executive session may have been proper.

Enclosed for your consideration are copies of both the Freedom of Information Law and Open Meetings Law, as well as an explanatory pamphlet on the subject.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: William Kellerhals
William Hamblin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2270

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

November 17, 1981

David W. Truscott, Chairman
Committee for the Preservation
of the Youmans House
10 Orchard Street
Delhi, New York 13753

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Truscott:

I have received your letter of November 11 as well as the materials attached to it. Having reviewed the materials, I would like to offer the following comments.

First, in terms of procedure, you initiated the process of requesting records long ago. I would like to point out that under §89(4)(a) of the Freedom of Information Law, a person initially denied access to records may appeal the denial within thirty days of the denial. As such, in your attempts to gain access to the records again, it is suggested that an initial request to the designated access officer should be repeated.

Second, questions have been raised concerning the existence of records. In this regard, I direct your attention to §89(3) of the Freedom of Information Law, which states in part that when an agency indicates that it does not have possession of records, it shall, upon request:

> "...certify that it does not have possession of such record or that such record cannot be found after diligent search."

If necessary, it is suggested that you seek such a certification from the agency that you believe maintains custody of the records in question.

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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that 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: Cyrus Schoonmaker

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2271

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

November 17, 1981

Mr. Robert Bryant
71-A-793
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bryant:

I have received your letter of November 12 in which you requested copies of materials regarding the Freedom of Information Law and its use, as well as information concerning the nature of records that may be requested under the Law.

First, as you requested, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern its procedural implementation and an explanatory pamphlet that may be particular useful to you, for it contains sample letters of request and appeal.

Second, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, the Law is not a vehicle by which an individual can request "information" or cross-examine public officials; on the contrary, it is a law that is applicable to certain existing records.

Third, 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). Further, a review of the eight grounds for denial indicates that many are based upon potentially harmful effects of disclosure.

Fourth, the New York Freedom of Information Law applies to virtually every unit of government in the state, except the courts and the State Legislature.

And fifth, in making a request, an attempt should be made to "reasonably describe" the records sought [see Freedom of Information Law, §89(3)]. If possible, identifying information such as names, dates, file designations, docket numbers and similar information that will enable an agency official to locate records should be provided. In addition, as indicated in the pamphlet and the regulations, a request should be directed to an agency's "records access officer".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2272

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

November 23, 1981

Ms. Jane Barton
Vice President
Montgomery County Land and
Home Owners Association
Windy Hill Farm
R.D. 1 - Box 713
Esperence, NY 12066

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Barton:

I have received your letter of November 18.

You have requested advice with respect to the time limits for submission of an appeal under the Freedom of Information Law. Further, you expressed uncertainty with respect to whom you should properly address an appeal.

I would like to offer the following comments in response to your inquiry.

First, §89(4) of the Freedom of Information Law states in relevant part that:

> "...any 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".

If, as you have indicated, you have not yet appealed the denial of the tape recording that you requested, it is suggested that you do so in order to comply with the thirty day time limitation for appealing a denial.

Second, since you are uncertain as to whom an appeal should be directed, it would be sufficient, in my view, to address your appeal to the head or governing body of the agency, the County. As such, your assumption that you would direct an appeal to the County Board of Supervisors appears to be reasonable.

Third, you have expressed concern that a conflict of interest may arise where a county attorney is the access officer and also has other duties, which may include advising the Board of Supervisors with respect to the Freedom of Information Law. It is noted in this regard that §1401.7 of the regulations promulgated by the Committee requires that:

> "The records access officer shall not be the appeals officer".

Therefore, it is my belief, if an individual functions as both a records access officer and an appeals access officer for an agency, the agency would fail to comply with regulations promulgated under the Freedom of Information Law.

Lastly, I would also like to point out that in a situation in which an appeal was made but a determination was not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Law, it was held the appellant exhausted his administrative remedies, that he could then initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules, and that the agency's failure to respond resulted in the court granting access to the records [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss
cc: Montgomery County Board of Supervisors
William Moore, County Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2273

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

November 23, 1981

Jerry Hampton
81 A 4782
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hampton:

Your letter of November 20 addressed to the records access officer of the Department of State has been forwarded to the Committee on Public Access to Records. The Committee is housed in the Department of State and is responsible for advising with respect to the Freedom of Information Law.

I would like to offer the following observations with regard to your inquiry.

First, the Committee on Public Access to Records does not have possession of records generally, such as records pertaining to you, nor does it have the authority to require an agency to make records available.

Second and perhaps more important in relation to your request, §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. From my perspective, when writing to an agency, and particularly a large agency as in the case of the Department of State, a request for records pertaining to oneself without more would not likely "reasonably describe" the records sought.

In this instance, without additional information regarding the nature of the records that you are seeking, it would be all but impossible for the various offices in the Department of State to locate records pertaining to you.

It is suggested that your requests in the future should include as much identifying detail as possible in order to assist an agency records access officer in locating records sought. For instance, you might want to include the general area of records in which you are interested, as well as dates, file designations, docket numbers and similar information.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-696
FOIL-AO-2274

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

November 24, 1981

Ernest A. Arico, Jr.
The Times Record
501 Broadway
Troy, NY 12181

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Arico:

I have received your letter of November 16 in which you requested an advisory opinion regarding which meetings of public bodies can be attended by members of the public and the news media. Your specific question pertains to meetings of the Hoosick Falls Volunteer Fire Company, which recently held a meeting and, according to your letter, barred members of the news media from attending.

I would like to offer the following observations regarding your inquiry.

First, the Open Meetings Law applies to meetings of all public bodies. In this regard, §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 note that the language quoted above differs from the definition of "public body" as it appeared in the Open Meetings Law as originally enacted. Under the original definition, questions often arose regarding its scope and whether the definition was applicable to entities other than governing bodies. The original definition made reference, for example, to the capacity to "transact" public business. Many contended that the term "transact" involved the capacity to take final action. In order to ensure that advisory bodies, including committees and subcommittees, for instance, would be subject to the Law, the term "transact" was replaced with "conduct". Further, the end of the definition makes specific reference to committees, subcommittees and similar bodies. As such, under the amended definition of "public body", which became effective on October 1, 1979 , I believe that it is clear that the Open Meetings Law is applicable not only to governing bodies, but also to other bodies, even if such bodies have only the authority to advise and no authority to take final action.

With respect to volunteer fire companies, I believe that each of the conditions necessary to a finding that such companies are public bodies can be met.

A volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the conditions precedent can be met, I believe that a volunteer fire company is a "public body" subject to the Open Meetings Law.

I would also like to point out that the status of volunteer fire companies had long been unclear. Such companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not such bodies conducted public business and performed a governmental function. Nevertheless, in a case brought under the

Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, it is in my view clear that a volunteer fire company also falls within the definition of "public body" and is required to comply with the Open Meetings Law.

You have also asked what possible steps may be taken to prevent the public from being barred at future meetings. In this regard, it is suggested that educating the members of various public bodies may be the best method of informing them of their duties under the Open Meetings Law. If that fails, an aggrieved person barred from a meeting may initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

In order to assist the volunteer fire company in question by explaining the appropriate provisions of the Open Meetings Law, a copy of this advisory opinion will be sent to the company.

With respect to case law rendered under the Open Meetings Law, I have enclosed a summary of judicial determinations rendered under the Law. In addition, as you requested, enclosed is a supply of pamphlets that explain both the Freedom of Information and Open Meetings 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:ss

Enclosures

cc: Hoosick Falls Volunteer Fire Company

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2275

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

November 27, 1981

Paul J. Browne
Albany Correspondent
Watertown Daily Times
Legislative Correspondents
Assn., Inc.
State Capitol
Albany, New York 12224

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Browne:

I have received your letter of November 17 in which you requested an advisory opinion regarding a denial of access to records.

Specifically, you wrote that the Watertown Times initially requested records containing the identities of persons arrested for speeding in Jefferson County. The correspondence attached to your letter indicates that the records access officer for the State Police, Col. Francis Stainkamp, informed you by telephone that it was the policy of the State Police "to deny routine access to the identities of persons arrested for speeding". Your letter to the access officer stated that the policy, according to the State Police, was designed to protect the privacy of such individuals, for persons arrested for speeding may "take umbrance [sic] at seeing their name in the paper". The records access officer also wrote that "[E]xisting procedures require that any person requesting records must specifically identify the record sought and provide all details which would assist in its retrieval". It is also noted that the State Police apparently indicated that arrest records identifying persons arrested "for DWI and other offenses deemed more serious" are routinely made available.

In my opinion, records identifying individuals arrested for speeding are accessible.

It is emphasized at the outset that although the original Freedom of Information Law required that an applicant seek "identifiable records", that requirement was changed. In many instances, if an individual did not specifically know the record in which he or she may have been interested, it was all but impossible under the original statute to identify the record or records sought. As of January 1, 1978, however, the new Freedom of Information Law has required that an applicant "reasonably describe" records sought [see Freedom of Information Law, §89(3)]. Therefore, under the current statute, a person requesting records need not "identify" the records in which or she is interested, but rather may merely "reasonably describe" the records sought.

Perhaps the key deficiency in the Freedom of Information Law as originally enacted in 1974 was its structure. Unless an applicant could conform a request to one or more categories of accessible records, that person had no rights. The current Freedom of Information Law reversed the presumption of the original Law and now is based upon a presumption of access. Stated differently, §87(2) now provides 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 listed in paragraphs (a) through (h) of the cited provision.

In my view, since the Legislature in 1974 determined that police blotters and booking records should be available to the public, any alterations in the Law that became effective in 1978 should not be used as the basis for withholding records that had long been considered accessible. Moreover, I believe that the direction provided by the Legislature to the effect that police blotters and booking records should be made available represented an inference that disclosure of such documents would result in a permissible rather than "an unwarranted invasion of personal privacy " [see Freedom of Information Law, §87 (2)(b)].

Further, I view the amendments to the Freedom of Information Law that became effective in 1978 as an attempt to remediate deficiencies that arose under the original Law and to broaden rather than restrict rights of access.

In terms of the grounds for denial listed in the current Law, I do not believe that any could justifiably be cited to withhold the records in question. Although it might be contended that the records were compiled for law enforcement purposes, it is in my opinion unlikely that the harmful effects of disclosure described in the provision pertaining to such records would arise. Section 87(2)(e) of the Law states that an agency may withhold records or portions thereof that:

> "...are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures".

In the case of speeding tickets, it is difficult to envision how disclosure of such records would interfere with an investigation, deprive a person of a right to a fair trial or impartial adjudication, identify a confidential source or disclose criminal investigative techniques or procedures other than routine techniques and procedures. If my contention is accurate, §87(2)(e) could not be cited as a basis for withholding.

The only other ground for denial that I can envision as being at all applicable is §87(2)(b), which provides that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". As stated previously, in view of the legislative history of the Freedom of Information Law, I do not feel that the cited provision would constitute a basis for withholding. Moreover, case law and other statutory provisions in my view tend to confirm such a contention.

For instance, questions have often arisen concerning police blotters, for the term "police blotter" is not, to the best of my knowledge, specifically defined in any provision of law. On the contrary, it is a phrase that has been developed by means of custom and usage. Nevertheless, in a determination by the Appellate Division, it was found that a police blotter is a log or diary in which any event reported by or to a police department is recorded. It was also found that a police blotter contains no investigative information but rather is merely a summary of events or occurrences. Consequently, it was held that a police blotter is available [see Sheehan v. City of Binghamton, 59 AD 2d 808, (1977)]. If the information in which you are interested is analagous to that generally found within a police blotter, I believe that it would be available based upon the case law cited above.

In addition, if the concern of the State Police is to protect privacy, it would appear that its policy of disclosing the names of persons arrested for more serious offenses but not disclosing the names of those arrested for speeding is inconsistent. If disclosure of the identities of those arrested for serious offenses would not result in an unwarranted invasion of personal privacy, it is difficult to understand how disclosure of the identities of those arrested for less serious offenses would result in such an invasion.

Records other than the tickets themselves but nonetheless related to them would in my view be available and therefore indicate that the information in which you are interested should be accessible under the Freedom of Information Law. For instance, if an individual is arrested for a traffic violation, I believe that the individual arrested generally may have two choices in terms of response. The individual can essentially plead guilty and send a check to pay for whatever the fine might be to the appropriate agency. In this regard, a record indicating the payment of such a fine would in my opinion be accessible under various provisions of laws [see e.g., §§107, 2091-a, 2020 and 2021 of the Uniform Justice Court Act].

On the other hand, if a fine is not paid by mail, an individual may appear in court. In this regard, it has long been held that the dockets are accessible under various provisions of law, such as §2019-a of the Uniform Justice Court Act and §255 of the Judiciary Law. Even prior to the passage of the Freedom of Information Law, it was

found in Werfel v. Fitzgerald [23 AD 2d 306 (1965)], that dockets were available under §255 of the Judiciary Law as well as other statutory provisions and common law. Section 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 therefreom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found".

Since records identifying a person arrested for speeding would be available pursuant to statute from sources other than the State Police, again, I believe that such statutes indicate that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Further, even though the records may be in possession of the State Police, I believe that the effects of disclosure would be the same as in the case of related records required to be disclosed by other sources. Therefore, it is my opinion that the records in which you are interested are accessible under the Freedom of Information Law and should be made available by the State Police.

I hope that 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: Col. Francis Staimkamp
Donald Brandon
John B. Johnson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2276

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

December 1, 1981

Ms. Mary Lou Bartlett
Oneida County Clerk
Office of the County Clerk
County Office Building
800 Park Avenue
Utica, New York 13501

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Bartlett:

I have received your letter of November 13 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the Oneida County Comptroller was asked by the Utica Observer-Dispatch "to render a list of all county employees, their titles, salary and home addresses". You wrote that it is your understanding as records access officer that the County is "not allowed to give home addresses". You have asked for a confirmation with respect to the issue.

I would like to offer several comments and observations with respect to your inquiry.

It is emphasized that the Freedom of Information Law is permissive. Stated differently, although the Law states that certain records may be withheld based upon one or more of the grounds for denial appearing in §87(2)(a) through (h), the Law does not require that such records be withheld.

In the case of home addresses, due to a change in the Freedom of Information Law, it has generally been advised that home addresses need not be disclosed on the ground that disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b) of the Law.

When the Freedom of Information Law was originally enacted in 1974, there was a requirement that agencies create payroll listings identifying all employees by name, address, title and salary [see original Freedom of Information Law, §88(1)(g)]. The original statute did not specify which address, home or business, was required to be included within the payroll record. In some instances, when home addresses were disclosed, public employees complained that they were being solicited or harassed in their homes. As a consequence, one among a series of amendments to the Freedom of Information Law that became effective on January 1, 1978, involved a specification of the address to be included in the payroll record.

The applicable provision in the current Law, §87(3)(b), requires that each agency must maintain:

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

Based upon the language quoted above, it is in my view clear that the provision in the Freedom of Information Law concerning payroll information is intended to require an agency to include the public office address rather than the home address of public employees.

It is also noted that §87(3)(b) represents one of the few instances in the Freedom of Information Law in which an agency, such as a county, is required to create a record. From my perspective, the payroll record required to be compiled under §87(3)(b) should exist and be updated on an ongoing basis.

In sum, while there is nothing in the Freedom of Information Law that would prohibit the county from disclosing the home addresses of its employees, the Law does not in my view require that they be disclosed. Further, I believe that the County is required to compile and make available the payroll record envisioned by §87(3)(b) of the Law to which reference was made earlier.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2277

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

December 1, 1981

Mr. Michael Abrams, Secretary
Inwood Fire Department
188 Doughty Boulevard
Inwood, L.I., New York 11696

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Abrams:

I have received your letter of November 8, which reached this office on November 19. Please accept my apologies for the delay in response.

According to your letter, as Secretary of the Inwood Fire Department, when you sought records, you were requested to submit freedom of information forms to the District's records access officer. Although you indicated that copies of the requests were attached to your letter, those copies were not included with your correspondence. Nevertheless, you wrote that since the date of your request, you have received no reply from the access officer or the Board. You also wrote that you were informed that earlier attempts to review records of the Board's expenditures were "met with total disregard for such requests".

I would like to offer the following observations and comments with respect to your request for assistance.

First, your letter does not indicate whether the district in question is a fire district created under the Town Law or a volunteer fire company. In either event, it is my view that its records would be subject to the provisions of the Freedom of Information Law. If it is a fire district created under the Town Law, it is a politcal subdivision of the state [see Town Law, §174(6)], and, therefore, would fall within the definition of "agency" appearing

in §86(3) of the Freedom of Information Law. If it is a volunteer fire company, it would also fall within the scope of the Freedom of Information Law by virtue of a decision rendered by the Court of Appeals, the state's highest court [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In brief, the Court of Appeals found that although a volunteer fire company may be a not-for-profit corporation that performs its duties on a contractual basis for a municipality, it is nonetheless an "agency" subject to the Freedom of Information Law in all respects.

Second, records reflective of expenditures as well as books of account, ledgers and similar records have long been available under various provisions of law (i.e., §51 of the General Municipal Law) and the Freedom of Information Law. Specifically, §87(2)(g)(i) of the Freedom of Information Law requires that statistical or factual information found within intra-agency materials be made available.

Third, with respect to the time limits for response to requests made under the Law, §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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

And lastly, I would conjecture that you requested records initially not as a member of the public under the Freedom of Information Law, but rather as an officer of the District in an attempt to carry out your official duties. If my assumption is accurate, it is in my view questionable whether you should be required to follow the procedures that must generally be accomplished by members of the public. In short, while the public might invoke the Freedom of Information Law on the basis of its "right to know," you might be requesting records on the basis of a "need to know" in order to perform your official duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2228

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

December 2, 1981

Mr. Bobby Johnson
#80-A-0492
Box 149
Attica, NY 14011

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Johnson:

I have received your letter of November 23 in which you described a problem and requested an advisory opinion.

Specifically, you have requested stenographic transcripts from the Appellate Division and Criminal Term in Brooklyn. To date, however, you have been unable to gain access to the transcripts. Your question is whether the use of the Freedom of Information Law may help you in gaining access to the transcripts.

I do not believe that the Freedom of Information Law would be applicable to the records in question.

Section 86(3) of the Law defines "agency" 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."

Based upon the language quoted above, the "judiciary" is excluded from the scope of the Freedom of Information Law. Further, the term "judiciary" is defined in §86(1) of the Freedom of Information Law to include:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based upon the definitions of "agency" and "judiciary" appearing in §86 of the Freedom of Information Law, it is in my view clear that court records fall outside the scope of the Freedom of Information Law.

Nevertheless, there are various provisions of the Judiciary Law and court acts that provide substantial rights of access to court records. In order to avail yourself of rights provided under those provisions of law, it is suggested that you contact a representative of Prisoners' Legal Services or a similar organization, which may have the capacity to expedite the process of gaining access to the transcripts 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:jm

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

Error

No Foil

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 2280

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

December 4, 1981

Honorable Walter J. Floss, Jr.
65 Court Street
Room 318
Buffalo, New York 14202

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Senator Floss:

I have received your letter of November 25 in which you requested an advisory opinion under the Freedom of Information Law.

Once again, your inquiry concerns the unsuccessful efforts of Mrs. Benjamin Markey to gain access to records regarding an investigation conducted by the Board for Professional Medical Conduct concerning the treatment of [redacted]

Although I appreciate Mrs. Markey's concerns, I do not believe that the Freedom of Information Law can be used as a basis for obtaining the records in which she is interested. In fact, the Court of Appeals within the past month has rendered a determination indicated that the records in question are confidential [see Matter of John P. v. Whalen, 75 AD 2d 1021; aff'd ___ NY 2d ___, NYLJ, November 24, 1981].

Although the Freedom of Information Law provides broad rights of access, one of the exceptions, §87(2)(a) concerning records that are specifically exempted from disclosure by statute, would in my view be applicable to the records in question. In this regard, the Court of Appeals in the decision cited above held in relevant part that:

> "...by paragraph a of subdivision 11 of Section 230 the Legislature has plainly decreed that reports to the Board by physicians or members of the public concerning possible misconduct 'shall remain confidential and shall not be admitted into evidence in any administrative or judicial proceeding except that the board, its staff, or the members of its committees may begin investigations on the basis of such reports and may use them to develop further information'; by paragraph a of subdivision 10, has authorized the Board, by a Committee, to investigate suspected professional misconduct, and required it to investigate each complaint received 'regardless of the source'; and by paragraph 1 of subdivision 10, has authorized the Board or its representative to 'examine and obtain records of patients in any investigation or proceeding,' and provided that '[u]nless expressly waived by the patient, any information so obtained shall be confidential and shall not be disclosed except to the extent necessary for the proper function of the board and the New York State board of regents * * *' and that "Any other use or dissemination by any person by any means, unless pursuant to a valid court order or otherwise provided by law, is prohibited'."

Based upon the holding of the state's highest court, I do not believe that the Freedom of Information Law could be cited as a vehicle for gaining access to the records in question.

Once again, however, it is suggested that Mrs. Markey confer with Dr. Thaddeus Murawsky of the Board for Professional Medical Conduct. Dr. Murawksy can be reached at (518) 474-8357. Perhaps after discussing her concerns with Dr. Murawsky, Mrs. Markey can gain insight into the situation.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2281

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

December 7, 1981

Mr. James E. Meyers
76-C-453
135 State Street
Auburn, NY 13021

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Meyers:

I have received your letter of November 27, in which you requested advice regarding access to several types of records.

Your first area of inquiry concerns your ability to gain access to records of a mental facility. In this regard, as a general rule, patient records maintained by state mental facilities in New York are confidential. Under current law, even the subject of such records does not have a right to gain access to them. The applicable provision of law is §33.13 of the Mental Hygiene Law. That statute requires confidentiality, except under circumstances that are specified in the Law. One of those circumstances would involve obtaining consent from the Commissioner of Mental Health. As such, it is suggested that you direct a request to the Commissioner of Mental Health to the attention of the Office of Counsel and that you explain your reasons for wanting to review such records. The address to which you should direct your inquiry is:

Commissioner of Mental Health
New York State Office of Mental Health
Office of Counsel
44 Holland Avenue
Albany, New York 12229

If it is determined that records can be obtained, photocopies are generally made available at a cost of twenty-five cents per page.

You also asked how you may obtain a copy of your "family record". I am not sure of the nature of the information that you are seeking. However, I assume that you are interested in gaining access to vital records, such as records of birth and death. Access to those records is not governed by the Freedom of Information Law, but rather by provisions of the Public Health Law, which indicate that those records may be made available upon a showing of a judicial or proper purpose. Therefore, when requesting such records, once again, it is suggested that you specify reasons in writing for seeking those records.

In addition, vital records are kept in two locations. The original records are maintained by the Bureau of Vital Records at State Health Department. The address for that office is:

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

The other source for the records is a local registrar of vital records, such as a city clerk of the City of Syracuse.

Your last area of inquiry concerns your attempt to gain access to records in possession of the FBI concerning your father. In response, the FBI informed you that it would need his active duty serial number plus his signature. However, you indicated that your father is deceased and that you may have no way of getting his signature.

Please note that this office is responsible for advising with respect to the New York Freedom of Information Law, which pertains to records in possession of government in New York. Consequently, this office has no jurisdiction with respect to requests directed to federal agencies, such as the FBI. Nevertheless, I would like to offer two suggestions. First, the federal Act requires that an applicant for records "reasonably describe" the records sought. Perhaps if you could provide specific information concerning your father, such as dates, events and similar identifiers, a federal agency could locate records pertaining to him. Second, it is

also suggested that you contact the Federal Information Center. Perhaps by describing your situation to an employee of a federal information center, assistance could be provided in terms of tracking down the records in question. In Syracuse, you can call the Federal Information Center at 476-8545.

I hope that 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-2282

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

December 7, 1981

Michael Borden, Jr.
80 A 3841 C-217
Box B
Dannemora, NY 12929

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Borden:

I have received your letter of November 29 and thank you for your kind words.

In your first area of inquiry, you asked whether under the Freedom of Information Law you may obtain information from the news media, such as articles including your name and photograph. In this regard, the definition of "agency" appearing in §86(3) of the Law indicates that the Law is applicable only to entities of government. Consequently, newspapers and other news media outlets would not be subject to the Freedom of Information Law. As such, newspapers, for example, would have no obligation to supply you with information pertaining to you in their possession.

Nevertheless, it is possible that a newspaper might make old issues or articles available to you if you would identify yourself and the event or events that may have been reported. Often newspapers contain identifiers, such as names, on computers, which can lead to the location of specific issues of a newspaper.

Your second area of inquiry concerns access to medical records in possession of the facility in which you are housed. It has generally been advised that factual information, such as laboratory tests and results are available to the subject of the records. However, those portions of medical records consisting of diagnostic advice or opinion may in my view generally be withheld under §87(2)(g) of the Freedom of Information Law.

It is also noted that the regulations promulgated by the Department of Correctional Services indicate that the facility superintendent is the records access officer and the person to whom a request should be directed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 2283

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

December 7, 1981

Fritz Montalalou
73 A 5100
P.O. Box 149
Attica, NY 14011

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Montalalou:

I have received your letter of November 27 in which you requested advice under the Freedom of Information Law.

Your first area of inquiry concerns the process by which you may seek to obtain copies of your prison records. In this regard, the Freedom of Information Law requires the Committee on Public Access to Records to promulgate general regulations regarding the procedural implementation of the Freedom of Information Law. In turn, each agency is required to develop its own regulations consistent with those adopted by the Committee. The Department of Correctional Services has adopted regulations which contain provisions that deal specifically with requests made by inmates. I have enclosed a copy of those regulations for your consideration.

Your second area of inquiry concerns other records that may be accessible under the Freedom of Information Law. In this regard, the Freedom of Information Law is applicable to records in possession of governmental entities in New York, including units of both state and local government [see attached Freedom of Information Law, definition of "agency", §86(3)]. 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 categories of deniable records enumerated in §87(2)(a) through (h).

In terms of the procedural use of the Law, I have enclosed a copy of the regulations promulgated by the Committee to which reference was made earlier. Also enclosed is an explanatory pamphlet on the subject that 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2284

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

December 7, 1981

Mr. Dennis P. Buckley
Assistant Counsel
Department of Agriculture
and Markets
Albany, New York 12235

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Buckley:

As you are aware, I have received your letter of November 30 in which you requested an advisory opinion under the Freedom of Information Law. Your interest in compliance with the Law is much appreciated.

Your inquiry concerns a request directed to the Department of Agriculture and Markets for "a computer printout of all of the food companies which have registered with your department as Kosher product producers". The applicant for the records also expressed the belief that each company registered is required by law to "disclose the name and address of the supervising Rabbi which would also be included in this list". You indicated in your letter that the reference to the identity of the supervising Rabbi is apparently based upon §201-e(3) of the Agriculture and Markets Law, which, as you stated, provides that packaged food commodities which are certified by an organization as being Kosher for Passover shall not be offered for sale until thirty days after the certifying organization, producer, or distributor of the food has registered the name, address and telephone number of the supervising Rabbi with the Department. Nevertheless, the request does not address itself only to foods that are "Kosher for Passover", but rather to all foods sold as Kosher.

Based upon the request, you have derived an inference that the materials sought would be used for commercial purposes "rather than for any private individual's effort to purchase Kosher foods". In this regard, you cited §§87(2)(b)

and 89(2)(b) of the Freedom of Information Law concerning unwarranted invasions of personal privacy as a possible basis for withholding. The question is essentially whether the Department of Agriculture and Markets has discretionary authority to grant or deny the request.

In my opinion, for the reasons described below, the Department may grant or deny the request, for I believe that it indeed has discretionary authority to disclose or withhold under the circumstances described.

First, the Freedom of Information Law in my opinion is permissive. Stated differently, an agency may withhold records falling within one or more grounds for denial listed in §87(2)(a) through (h), but it need not. Therefore, if, for example, it is determined that a ground for denial might be applicable, the Department may nonetheless disclose, unless the records are specifically exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)], in which case there would be an absence of discretionary authority.

Second, as you indicated, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

> "...if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..."

In turn, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, one of which includes:

> "...sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..." [see §89(2)(b)(iii)].

Based upon the language quoted above, if a list of names and addresses would be used for commercial or fund-raising purposes, I believe that it may be withheld.

Third, as I explained during our recent telephone conversation, a degree of confusion has arisen with respect to the appropriate scope of §89(2)(b)(iii) concerning the disclosure of lists of names and addresses. Specifically,

the decision rendered in New York Teachers Pension Associates, Inc. v. Teachers' Retirement System of City of New York [71 AD 2d 250 (1979)] left unclear the extent to which a request may be considered to have been made for "commercial or fund-raising purposes". As you indicated, however, it would appear that the applicant for the list represents an organization and that the list would if disclosed likely be reproduced and used for multiple purposes, including commercial use. If that is so, again, I believe that the list may be withheld.

As promised, enclosed for your consideration is a copy of the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law. The report contains a recommendation to amend the Law regarding disclosure of lists of names and addresses. I believe that the proposal would, if enacted, clarify rights of access to lists of names and addresses and diminish some of the problems that now exist.

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- 2285

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

December 9, 1981

Mr. Fred Greenberg
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Greenberg:

I have received your correspondence of November 16. Please accept my apologies for the delay in response.

According to your letter, a serious problem exists with respect to the ability to gain access to records from the Board of Education of the City of New York. In this regard, you wrote that:

> "...It seems that they are not acting in good faith and are not following their own rules and regulations in an attempt to frustrate the orderly review and adjustment of employee complaints".

You enclosed several requests that date back as far as June 30 that remain outstanding and have asked that the Committee investigate and advise you as to the nature of action that this office may take to remedy the situation.

I would like to offer the following comments with respect to your inquiry.

First, the Committee on Public Access to Records has neither the authority nor the resources to conduct what may be characterized as an "investigation". In short, the Committee has only the authority to advise with respect to the Freedom of Information Law; it does not have the authority to enforce the provisions of the Freedom of Information Law or to compel an agency to make records available.

Second, similar inquiries have arisen in the past due to the substantial number of requests directed to the Board of Education under the Freedom of Information Law. I would conjecture that the Board of Education receives and responds to more requests made under the Law than any agency in the state. Further, I believe that the Board last year received approximately 3,000 requests under the Law. The matter has been discussed with officials of the Board of Education and, based upon those discussions, I believe that the Board attempts to carry out its duties and respond to requests made under the Freedom of Information Law in good faith, in chronological order, and as expeditiously as possible. Stated differently, while I agree that the time that the Board of Education takes to respond to requests may be lengthy, I do not believe that there is any intent to violate the provisions of the Law or discriminate in any way with respect to applicants for records under the Law.

Third, having reviewed the requests that you made, it is in my view questionable whether the records sought exist in every instance. For example, in your request of June 30, you asked Ruth Bernstein, Deputy Records Access Officer, to "kindly rush" the following information:

> "1. List of all records maintained at the Central Board or depositories under the jurisdiction of the Central Board and whether or not such records are accessible pursuant to the Freedom of Information Law".

In this regard, I would conjecture that you referred to what is commonly known as the "subject matter list". That list is required to be compiled under §87(3)(c) of the Freedom of Information Law, 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 my view, under the provision quoted above, agencies are required to create a list in reasonable detail by category of the records that they maintain, whether or not such records are available under the Freedom of Information Law. The provision in question does not in my opinion require an agency to distinguish in its list whether categories of records are accessible or deniable.

Similarly, in your letter of September 15, you requested "the number of step III decisions rendered" during a particular period regarding a specific collective bargaining agreement. In this regard, it is emphasized that §89(3) of the Freedom of Information Law provides that, as a general rule, an agency need not create records in response to a request. Therefore, if, for example, no specific number of such determinations has been tabulated, the Board would be under no obligation to create such a tabulation or record on your behalf.

Lastly, if you feel that the Board of Education has violated the Freedom of Information Law due to its failure to respond to requests within the time periods indicated in the Law, one course of action might involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. Nevertheless, to reiterate, having discussed the issue on several occasions with officials of the Board of Education, again, it appears that the Board has a substantial backlog of requests and has attempted in good faith to respond to those requests as quickly as it can under the circumstances.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Ruth Bernstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2286

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

December 11, 1981

Mr. Jerem O'Sullivan
Counsellor at Law
47 North Country Road
P.O. Box 86
Shoreham, NY 11786

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. O'Sullivan:

I have received your letter of December 8 in which you raised a question regarding the interpretation of the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment". The question is apparently based upon an article recently published in Newsday.

According to your letter, the article:

> "...states that rights accorded to students under the Buckley Amendment after reaching the age of eighteen years or attendance in post-secondary institution are mitigated by the student's continued status as a dependent".

You wrote, however, that your interpretation of the Buckley Amendment and the regulations promulgated thereunder lead you to a different conclusion.

I have reviewed the regulations and contacted Ms. Pat Ballinger of the United States Department of Education, which administers the Act, on your behalf to discuss the issue. In this regard, I would like to offer the following comments and observations with respect to your inquiry.

First, in a technical sense, questions concerning the Buckley Amendment fall outside the scope of the Committee's jurisdiction. Nevertheless, as a service to the public and government, I have become familiar with the Act and the regulations and have maintained an ongoing relationship with the Department of Education in order to provide assistance to people in New York having inquiries on the subject.

Second, as you are aware, the Buckley Amendment generally grants rights of access to education records to parents of students under the age of eighteen years and to "eligible students" who attend institutions of post-secondary education, and concurrently prohibits disclosure of such records to third parties without the consent of parents or eligible students as the case may be.

While §99.4 of the regulations essentially transfers rights of access and confidentiality of parents to eligible students attending institutions of post-secondary education, §99.31 of the regulations, which is entitled "Prior consent for disclosure not required", indicates that an educational agency or institution may disclose personally identifiable information without the consent of an eligible student "to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954" [see §99.31(a)(8)]. Based upon the quoted provision, a college or university subject to the Buckley Amendment may, for example, disclose education records of dependent students to their parents without the prior consent of the students.

Having discussed the matter with Ms. Ballinger today, I was informed that the policies of colleges and universities subject to the Act vary substantially in terms of their implementation of the Act. For instance, some institutions presume that a student is a dependent, unless the student provides information to the contrary. Conversely, other institutions presume that a student is independent or emancipated, unless information to the contrary is given by a student.

In sum, I believe that the article appearing in Newsday is accurate and that, in view of §99.31 of the regulations promulgated under the Act, a post-secondary educational agency or institution may disclose education records of eligible students to their parents without the students' prior consent in accordance with the cited 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:ss

cc: Pat Ballinger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2287

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

December 11, 1981

Mr. Barry Coker
78-B-1358
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Coker:

I have received your letter in which you explained that you are attempting to initiate a lawsuit against your parole officer.

In this regard, you indicated that you have no forms or information dealing with lawsuits, that you wrote to the Queens County District Attorney on the subject but received no response, and that you would like to know whether the FBI could "take over" a lawsuit on your behalf against your parole officer.

Please be advised that the Committee on Public Access to Records is responsible for advising only with respect to the New York Freedom of Information and Open Meetings Laws. Further, the Committee has no authority to enforce the provisions of either of those statutes or compel an agency to make records available.

If you are interested in gaining access to records, the Committee might be able to provide advice or direction.

In terms of forms that might be used with respect to a lawsuit, it is possible that your library may have a series of "form books" such as McKinney's or Bender's forms. In some cases, by reviewing a form book, you can

find situations described that are similar to your own and use a particular form by essentially filling in the appropriate blanks. In addition, some series of books containing statutes also contain forms used regarding those statutes.

Lastly, I have no idea of what the nature of your action against the parole officer might be. Consequently, I could not conjecture as to the extent to which the FBI or any other law enforcement agency would have jurisdiction or provide assistance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2288

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

December 11, 1981

Leon West #81 D 88
Great Meadow Correctional
Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. West:

I have received your letter of December 4 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, you are attempting to gain access to records from the New York Telephone Company. You have indicated further that it is your belief that the Telephone Company is a public corporation subject to the Freedom of Information Law.

I would like to offer the following observations with respect to your inquiry.

First, the Freedom of Information Law is applicable to records in possession of agencies. In this regard, the term "agency" is defined in §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".

From my perspective, although the New York Telephone Company is regulated by the state, it is not subject to the Freedom of Information Law, for it is not a governmental entity. Consequently, I believe that its records fall outside the scope of rights of access granted by the Freedom of Information Law.

Second, the agency that regulates the Telephone Company is the Public Service Commission. Perhaps if you direct an inquiry or complaint to the Public Service Commission and describe the relevant facts or records in which you are interested, that agency might have the capacity to assist you or obtain information on your behalf. To direct an inquiry to that agency, it is suggested that you write to:

Office of Public Relations
Public Service Commission
Empire State Plaza
Agency Building #3
Albany, NY 12223

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2289

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

December 11, 1981

Mrs. Pearl D. Michaels
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Michaels:

I have received your appeal as well as the correspondence attached to it and have distributed the other copies to Committee members.

Having reviewed the correspondence, it appears that you have raised two issues, one of which deals with the Freedom of Information Law and the other which concerns procedures within the New York City school system.

With respect to the former, your appeal pertains to a failure of a timely response by the records access officer of the New York City Board of Education regarding your request for a "PCCN". In this regard, I contacted the Office of Counsel to the Board of Education on your behalf in order to learn more about the contents of a PCCN. I was informed that the document in question is a form that is used and updated in any instance in which a change in an employee's status occurs. Such alterations might include a change in one's name, home address, or place of employment, for example. It appears that the alteration in the PCCN pertaining to you involved your transfer from PS 190 to PS 202.

In my view, since the PCCN contains factual information identifiable to you, it is available to you under the Freedom of Information Law. In addition, I was informed by a representative of the Office of Counsel that the PCCN is available to employees under a collective bargaining agreement. As such, I believe that the record should be made available to you under either the Freedom of Information Law or the collective bargaining agreement.

The remaining issue apparently deals with a refusal by a principal of a school to provide you with receipts for information from you that she has received. In my opinion, that issue is unrelated to the Freedom of Information Law and is a subject of internal policy of the Board of Education.

In order to attempt to expedite the process of making the PCCN available to you, copies of this opinion will be sent to both the records access officer of the Board of Education and Mr. Nolan, the appeals officer.

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: Committee Members
Ruth Bernstein, Records Access Officer
John Nolan, Appeals Officer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2290

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

December 18, 1981

Mr. Douglas E. Lee
75-A-1894
Greenhaven Correctional Facility
Stormville, NY 12582

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lee:

I have received your letter of November 18, November 23, December 3 and December 5.

I would like to make the following comments with respect to your correspondence.

First, in response to your first three letters it appears that the information you have been seeking has been made available. Mr. Barbara Maguire, Acting Director of the Division of Health Services, on November 24 sent a letter to you to which she attached an updated index to a Policy and Procedure Guidelines Manual.

Second, you requested comments with respect to a copy of a brief you included with your December 3 letter. Since the jurisdiction of the Committee is limited to providing advice under the Freedom of Information and Open Meetings Laws, it would be inappropriate to comment on your brief. If you want the brief returned to you, please inform me.

Third, I have also received a copy of a December 4, 1981 request made under the Freedom of Information Law directed to Mr. Charles Scully, Superintendent of the Greenhaven Correctional Facility. Apparently you are seeking access to the names of three individuals who you believe died at the Greenhaven Correctional Facility. Under §29 of the Corrections Law, the Department of

Correctional Services has promulgated regulations with respect to access to records within its possession. In my view, §5.24 of the regulations entitled "Medical records" appears to permit the Department to withhold medical information that identifies an inmate to anyone not falling within eleven categories of persons set forth in the cited provision. It is noted that the last category [see §5.24(l)] gives the Commissioner discretionary authority to disclose "upon good cause shown". Perhaps if you indicate the reasons for requesting the records in question, your likelihood of success might be enhanced.

Additionally, §89(3) of the Freedom of Information Law states in relevant part that:

> "Nothing in this article shall be construed to require any entity to prepare any record not possessed by such entity..."

Consequently, if the Department of Correctional Services has not created a list containing the information you are seeking, it would not be required to prepare such a record on your behalf.

Fourth, in you letter of December 5, addressed to Barbara Maguire, you requested information regarding experimentation which you believe is being conducted by certain federal agencies in New York State correctional facilities. Although I am not familiar with the nature of the records that you are seeking, it is possible that the records maintained with regard to these experiments might also be withheld under §5.24 for the reasons described above. Furthermore, such records or portions thereof might be justifiably denied under §87(2)(b) of the Freedom of Information Law if release would result in an unwarranted invasion of personal privacy of the inmates involved in the experiments.

Lastly, you are seeking information as to the possible employment of a particular person by a state agency. Section 87(3)(b) of the Freedom of Information Law requires each agency to maintain a list of employees by name, public office address, title and salary. However, in order to obtain the names of any FBI or CIA agents that you believe are involved in these experiments, it is suggested that you direct requests to the relevant federal agency.

Finally, in previous correspondence, the receipt of federal monies by a state agency does not automatically bring that agency within the scope of the federal Freedom of Information Act. To reiterate, the federal Act applies to records in possession of federal agencies, while the New York Freedom of Information Law is applicable to records in possession of agencies of government in New York 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

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2291

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

December 18, 1981

Ms. Adrienne Millstein
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Millstein:

I have received your letter of November 19, which reached this office on December 16.

According to your letter, you submitted a request for records to the New York City Board of Education under the Freedom of Information Law approximately two and a half years ago. As yet, however, you have not received a response.

I have discussed the implementation of the Freedom of Information Law and responses to requests made under the Law with officials of the Board of Education on many occasions. While the Board may have a substantial back-log of requests, I am sure that it is nowhere near the two and a half years to which you made reference. I would conjecture that your request was lost or misplaced, and that the failure to respond has been unintentional.

It is suggested that you renew your request and direct it once again to Ruth Bernstein, Deputy Records Access Officer, explaining that a request had been made in 1979 but that it was not answered.

I would also like to point out that the Freedom of Information Law and regulations promulgated by the Committee contain 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 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 additionaly 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 may be appealed 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. Moreover, 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: Ruth Bernstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2292

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

December 18, 1981

Mr. Barry Coker
78 B 1358
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Coker:

I have received your recent letter in which you indicated that you had your final parole hearing on December 7. In this regard, you requested copies of the transcripts of the hearing.

I would like to offer the following comments and observations with respect to your inquiry.

First, the Committee on Public Access to Records dies not have possession of records generally, such as those in which you are interested. The Committee is authorized to advise with respect to the Freedom of Information Law.

Second, in order to assist you, I have contacted the Office of Counsel of the Division of Parole on your behalf. In this regard, I was informed that, following a final parole hearing, you will, as a matter of course, receive records indicating findings of fact, the hearing officer's recommendations and the decision of the members of the Board of Parole. In addition, you may obtain a transcript of the hearing by writing to:

Ms. Eugenia Pawlik
Minutes Room Supervisor
Albany Area Parole Office
1092 Madison Avenue
Albany, NY 12208

I was told that it generally takes two to three weeks after a hearing to prepare a transcript. As such, by the time you receive this communication, it is possible that the transcript may have been prepared.

Lastly, it is noted that the transcript will be made available for a fee of twenty-five cents per photocopy payable to the Division of Parole.

I hope that 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-2293

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

December 23, 1981

Bernard M. Rice
Rice Genocide Research
3046 Roosevelt Street
Detroit, MI 48216

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rice:

Your letter of December 14 addressed to the Attorney General has been forwarded to the Committee on Public Access to Records. The Committee is charged with the responsibility of advising with respect to the New York Freedom of Information and Open Meetings Laws.

As you requested, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you.

In addition, you asked whether rights of access granted by the Law are limited to residents of New York State. In this regard, the Law does not distinguish among applicants. Further, in one of the initial judicial interpretations of the Law, it was held 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]. Consequently, I do not believe that one must be a resident of New York State in order to request and obtain records 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:ss

Enclosures

cc: Joseph Cooper

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2294

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

December 23, 1981

Mr. James Brocato
75-C-346
Box B
Dannemora, NY 12929

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brocato:

I have received your correspondence of November 10 and November 23.

I would like to offer the following comments with respect to your letters.

First, in your letter of November 10, 1981, you appealed to the Committee for consideration of a denial of access to records by the Police Commissioner of Buffalo. Please be advised that under §89(4)(a) of the Freedom of Information Law, the appeals access officer is required to send a copy of your appeal and his or her determination to the Committee. The Committee does not have any authority to determine appeals.

Second, in your letter of November 23, 1981 you made several comments regarding my previous correspondence to you of November 10. It is your contention that the records you are seeking should be released by the appropriate agency. In support of your position, you set forth various reasons why §87(2)(e) of the Law does not apply to the records sought. Since the Committee has no authority to review records in camera, it would be inappropriate to substitute my judgment for agencies' decisions to withhold material under §87(2)(e) of the Law.

Third, the reference to the People v. Billups case was intended to advise you of its possible relevance to requests you might direct to criminal law enforcement agencies. Since the State of New York has legislated specific time periods and procedures relevant to criminal discovery, it may be worthwhile to consider the relevance of Billups in conjunction with records withheld under §87 (2)(a) through (h) of the Freedom of Information Law.

Fourth, you stated the belief that the fees for records made available under the Freedom of Information Law should be waived. To reiterate a point made in earlier correspondence, there is a discretionary provision whereby fees can be waived under regulations promulgated by the Department of Correctional Services. Nevertheless, there is no general provision regarding the waiver of fees analogous with that which appears in the federal Freedom of Information Act.

Fifth, you also requested advice in obtaining records free of charge from the Appellate Division, Fourth Department. I am not familiar with the criteria for requesting a waiver of fees by the court system. Therefore, it is suggested that you request such information from the court which has possession of the records in which you are interested.

Lastly, I believe that you are partially correct in your assumption that failure by an agency to respond to an appeal under the Freedom of Information Law constitutes a denial. However, as indicated in the first paragraph of this letter, it is suggested that you address appeals to the agencies from which you are requesting records.

I regret that I am unable to offer you further assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2295

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

December 24, 1981

Mr. Charles Ramos
81-A-4316
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ramos:

I have received your letter on December 9 in which you requested assistance regarding access to records.

Specifically, you are trying to obtain material that you subpoenaed during your trial but apparently did not receive. It is your belief that the Division of Criminal Justice Services (DCJS) was responsible for delivery of this material; consequently, you are trying to determine if the DCJS responded to your subpoena. You also contended that the information you are seeking regarding the criminal record of another person can be obtained through the Freedom of Information Law.

I would like to offer the following comments with respect to your inquiry.

First, please be advised that the Committee is responsible for advising with respect to the Freedom of Information Law. Consequently, the Committee does not have the capacity to compel an agency, such as the DCJS, to make records available or to review records on its own initiative to determine rights of access.

Second, DCJS does maintain criminal history information; however, I am not sure of the extent to which you may obtain records pertaining to individuals other than yourself. To request criminal history information, you may write to the Division of Criminal Justice Services at Stuyvesant Plaza, Executive Park Tower, Albany, New York 12203. In the alternative, an inmate can also direct a request to the facility superintendent or his designee.

Third, in addition to the DCJS reports, it is noted that many court records are available. Specifically, §255 of the Judiciary Law states in brief that a clerk of a court must make available, upon payment of the appropriate fees, records in his or her possession. Therefore, if you want records regarding your judicial proceeding, in addition to the DCJS report, it is suggested that you direct a request for records to the clerk of the court in which proceedings were conducted. Such requests should provide as much identifying information as possible, such as names, dates, index and docket numbers, and other similar information that would enable a clerk to locate the records.

Lastly, I would like to point out that, in a situation in which a petitioner initiated a proceeding under Article 78 of the Civil Practice Law and Rules to obtain records under the Freedom of Information Law, the court held that the Freedom of Information Law could not be invoked since the petitioner had failed to make a timely discovery motion under Article 240 of the Criminal Procedure Law, which establishes the proper times and procedures for criminal discovery. In this regard, the court stated that "[T]he purpose of the Freedom of Information Law is not to allow a litigant to circumvent normal procedures for discovery" [see attached, People & C. v. Billy Billups, Sup. Ct., Queens Cty., NYLJ, (July 13, 1981)]. To the extent that the information which you originally attempted to subpoena is similar to that sought by the petitioner in Billups, you may now encounter difficulty in obtaining some of 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
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2296

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

December 28, 1981

Mr. William D. Bavoso
Cohen, Bavoso, Weinstein
& Fox
24 Front Street
Port Jervis, NY 12771

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bavoso:

I have received your letter of December 10 and appreciate your interest in compliance with the Freedom of Information Law. Please accept my apologies for the delay in response, which, I am pleased to report, was due to the birth of a son.

Your inquiry concerns the status of the Port Jervis Development Corporation under the Freedom of Information Law. You wrote that the entity in question is a not-for-profit corporation authorized under §1411 of the Not-For-Profit Corporation Law.

Questions regarding local development corporations have arisen in the past, and, based upon the direction provided by §1411 of the Not-For-Profit Corporation Law and the judicial interpretation of the Freedom of Information Law, it has been advised that such corporations are likely subject to the provisions of the Freedom of Informations Law.

Specifically, §1411(a) of the Not-For-Profit Corporation Law, which describes the purposes of local development corporations, states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

In view of the language quoted above, it is in my opinion clear that a local development corporation performs a governmental function, presumably for a public corporation, such as the City of Port Jervis.

What is not entirely clear, however, is whether a local development corporation falls within the definition of "agency" appearing in §86(3) of the Freedom of Information Law. In this regard, "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."

Since a local development corporation is a not-for-profit corporation, it is questionable whether it could be characterized as a "governmental entity", even though it performs a governmental function.

The only judicial determination of which I am aware that dealt with a similar issue is Westchester-Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. In that decision, the Court of Appeals found that a volunteer fire company, also a not-for-profit corporation, was an "agency" in view of its functions, notwithstanding its corporate status.

From my perspective, based upon the language of §1411(a) of the Not-For-Profit Corporation Law coupled with the Court of Appeals' determination cited above, it appears that the Port Jervis Local Development Corporation is subject to the requirements of the Freedom of Information Law.

I hope that I have been of some assistance and regret that a more definitive response could not be offered. 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-2297

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

December 28, 1981

Thomas F. Nealon, III
Town of Mamaroneck Democratic
Committee
60 Chatsworth Avenue
Larchmont, NY 10538

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nealon:

I have received your letter of December 9. Please accept my apologies for the delay in response, which I am pleased to report, was due to the birth of a son.

You have requested advice regarding the action that may be taken with respect to a request for records directed to the Town of Mamaroneck. According to your letter, an initial request was made at the end of October. Having received no response, you appealed to the Town Supervisor on November 23. As of the date of your letter to this office, however, no response had been received.

I would like to offer the following comments with respect to your inquiry and specify that those comments pertain only to the procedural aspects of the Freedom of Information Law and not to substantive rights of access to the materials sought.

As you may be aware, §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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

In view of the foregoing, and based upon the information provided in your correspondence, it appears that you have been constructively denied access, that you have exhausted your administrative remedies, and that you may, therefore, challenge the denial by means of initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Supervisor Goldsmith

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2299

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

December 28, 1981

A. Stovall
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stovall:

I have received your letter of December 9. Please accept my apologies for the delay in response.

According to your letter, you are seeking the assistance of this office in helping you to regain property that was allegedly stolen from you on August 19, 1979. You have indicated that the "perpetrators" were booked and arrested. However, it appears that you are uncertain as the disposition of the case and your property.

I would like to offer two suggestions with respect to the situation that you have described.

First, as you intimated, many court records are available under §255 of the Judiciary Law. In this regard, it is suggested that you request records pertaining to the case in question by writing to the clerk of the court in which the case was heard. In your request, you should provide as much identifying information as possible, including names, dates, charges, index and docket numbers and similar identifiers that will assist a clerk in locating the records sought. In addition, you should offer to pay whatever fees for photocopying there might be.

Second, if the court records do not indicate the location of the property which you are seeking, it is suggested that you might want to write to the property clerk at the precinct in which the property was confiscated. In the alternative, you could request records indicating the status of the property by directing an inquiry to the records access officer of the New York City Police Department at One Police Plaza, New York, NY 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2300

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

December 28, 1981

Richard H. DeMay
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeMay:

I have received your letter of December 7. Please accept my apologies for the delay in response, which, I am pleased to report, was due to the birth of a son.

According to your letter, you requested information "regarding the annual salary figure which appears on the check stubs..." of particular employees of the Keshequa Central School District that you identified. You indicated that the District supplied you with figures reflective of the contract salaries of those individuals, but would not supply you with the check stubs that you requested.

Having reviewed the correspondence attached to your letter and contacted Roger Ryan, the Business Manager of the School District on your behalf, it would appear that Mr. Ryan's response to you of November 23 was appropriate.

I would like to offer the following comments with respect to the situation that you have described.

First, §87(3)(b) of the Freedom of Information Law requires each agency, including a school district, to prepare and maintain on an ongoing basis a payroll record which identifies each officer or employee of an agency by name, public office address, title and salary. The equivalent of that information was given to you with respect to the particular employees that you identified.

Second, as a general rule, the Freedom of Information Law does not require that an agency create records in response to a request [see §89(3)]. In this regard, Mr. Ryan informed me that the check stubs are distributed to the employees with their paychecks. Therefore, the District does not have possession of the check stubs themselves. Although Mr. Ryan indicated that information equivalent to that which appears on the check stubs could be created, the District would not in my view be required to prepare such records on your behalf.

Third, Mr. Ryan informed me that the information included on check stubs involves items such as the nature and amount of deductions, the number of exemptions claimed, monies deducted for annuities, monies deducted if an employee is a garnishee, and similar personal information. Here I would like to point out that one of the grounds for denial appearing in the Freedom of Information Law involves records or portions of records the disclosure of which would, if disclosed, result in "an unwarranted invasion of personal privacy" [see attached, Freedom of Information Law, §87(2)(b)]. Although it has been held that many records identifiable to public employees are available, it has also been found that records concerning public employees that are not relevant to the performance of their official duties may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977)]. Based upon the description of the information found within chech stubs other than salary information, it would appear that the information could justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ss

cc: Roger Ryan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2301

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

December 28, 1981

John J. Sheehan
Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter of December 14. Please accept my apologies for the delay in response which, I am pleased to report, was due to the birth of a son.

According to your letter, you directed requests to the Corning Police Department on October 9 and the Corporation Counsel of the City of Corning on October 22. Nevertheless, as of the date of your letter, you had not received a response to either of the requests.

I would like to offer the following comments and suggestions with respect to your inquiry. Please note that the comments deal solely with the procedural aspects of the Law and not with the substance of your request for records.

First, as you are likely aware, the governing body of a municipality, such as the City of Corning, is required to promulgate uniform regulations that govern the procedural implementation of the Freedom of Information Law and which are applicable to each component agency of the City government. In this regard, pursuant to the regulations promulgated by the Committee, the City's regulations should include the designation of one or more records access officers as well as an appeals person or body.

I am not familiar with the regulations that may have been adopted within the City of Corning. However, it is possible that there is no designated records access officer at the Corning Police Department. Consequently, it is conceivable that your request may have been directed to the wrong person.

It is suggested that you obtain and review a copy of the regulations promulgated by the City of Corning to implement the Freedom of Information Law. If the individuals to whom you directed your requests and not those designated in the regulations, I recommend that you submit a new request.

Second, 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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

And lastly, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. While you may have done so by identifying the "Babcock incident of September 20, 1981" as the basis for the request, it is possible that the file regarding the incident may be voluminous and that the request, therefore, did not reasonably describe the records in question. You might want to renew your request and provide greater specificity with respect to the types of 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:ss

cc: Corporation Counsel
Corning Police Department

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2382

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518).474-2518, 2791

December 28, 1981

Eugene Nelson
79-A-2393 E-2-26
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nelson:

I have received your letter of December 7 and the correspondence attached to it. Please accept my apologies for the delay in response.

In brief, your correspondence deals with your unsuccessful efforts in gaining access to records from the New York City Police Department. According to your letter, a request was made initially on July 29. Having received no response, an appeal was made on August 12. You have indicated that, as of the date of your letter, you had received no response. Please note that although you stated in your letter that you attached copies of your request and appeal, those documents were not included with the correspondence that you sent to this office.

I would like to offer the following comments and suggestions with respect to the situation that you have described.

First, I would like to point out that the statute of limitations for the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules is four months. In all honesty, I am not sure of the manner in which a court would view the situation that you have described. More than four months have passed since the date upon which a determination on appeal should have been rendered. As such, it is possible that the statute of limitations may have expired. Consequently, it is suggested that you might want to submit a new request to the records access officer of the New York City Police Department.

Second, as you may be aware, §89(3) of the Freedom of Information Law requires that an applicant for records "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include as much identifying information as possible, such as names, dates, file designations, index, docket, and indictment numbers, and similar information that you would enable agency officials to locate records sought.

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 may be appealed 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

I hope that 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: Rosemary Carroll

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2303

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

December 31, 1981

Mr. Gary McCarthy
77-B-1949
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McCarthy:

I have received your letter of December 28 in which you requested rules and regulations concerning the procedures for complying with a freedom of information request.

As requested, enclosed is a copy of the regulations promulgated by the Committee on Public Access to Records, which govern the procedural aspects of the Freedom of Information Law.

Please note that the Freedom of Information Law also requires that each agency promulgate regulations regarding the implementation of the Law. In this regard, since you are at the Auburn Correctional Facility, I have enclosed a copy of the regulations adopted by the Department of Correctional Services.

You also raised a question regarding the identity of the individual to whom a request should be directed. In this regard, under §1401.2 of the Committee's regulations, the head or governing body of each agency is required to designate one or more "records access officers" to whom requests should be directed. Under the regulations of the Department of Correctional Services, requests for records of that Department should be directed to the facility superintendent or his designee.

I hope that 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-2304

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

December 31, 1981

Mr. Barry Coker
78 B 1358
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Coker:

I have received your most recent letter concerning your capacity to gain access to a transcript of your final parole hearing as well as other records concerning a case in which you were involved.

Specifically, I wrote to you wrote regarding your request for assistance in gaining access to a transcript of your final parole hearing. In my response to you, it was indicated that I contacted the Division of Parole on your behalf and was informed that the determination as well as other materials would be sent to you as a matter of course and that a transcript would be available within a relatively short period of time upon payment of the appropriate fees for photocopying. Nevertheless, you wrote that a Mr. Foley informed you that it would take six to eight weeks before you would learn of a decision. Further, you wrote that you could not afford the fees for photocopying, because the correctional facility is not, according to your letter, paying you at the daily rate that should be paid. Consequently, you have asked that I obtain the minutes for you.

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records has only the authority to advise with respect to the Freedom of Information Law. The Committee has no authority to enforce the provisions of the Freedom of Information Law or to compel an agency to disclose records. Further, neither the Committee nor myself has the capacity to review or gain access to records on behalf of an applicant. Consequently, I do not believe that this office can gain access to the records for you.

Second, you referred to a Mr. Foley with respect to the time in which you would receive a determination. As indicated in my earlier letter to you, I contacted the Office of Counsel at the Division of Parole, which provided me with a different response. It is suggested that you might want to write directly to the Office of Counsel at the Division of Parole to obtain more definitive information.

Third, you provided your attorney's name and your docket number in an effort to assist me in gaining access to records pertaining to a case in which you were involved. Again, this office has no right to obtain records on behalf of an applicant. It is suggested that you contact your attorney directly. In the alternative, you might want to discuss your problems with a representative of Prisoners' Legal Services. Perhaps an individual from that organization can provide more substantial advice and assistance.

And lastly, there is no provision in the Freedom of Information Law regarding a waiver of fees for photocopying. Stated differently, I do not believe that photocopies are required to be made available unless the appropriate fees are paid to the agency from which photocopies are 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2305

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518).474-2518, 2791

December 31, 1981

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

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nurick:

I have received your letter of December 18. Please accept my apologies for the delay in response, which, as you may be aware, was due to the birth of a son.

According to your letter, the New York Association of Homes for the Aging and the Office of Health Systems Management (OHSM) of the New York State Department of Health will be engaging in a cooperative effort in which the Association and two others will perform an independent audit of the 1982 Medicaid rate reimbursement methodology for nursing homes. While the Office of Health Systems Management has indicated that it will release information to the Association necessary to the performance of the audit, you wrote that "there is some feeling in OHSM that actual computer programs do not have to be made public". With respect to the computer programs, you indicated that:

> "[P]rograms consist of the set of instructions that a computer must follow. Programs are written in languages that are characterized by highly specific and inflexible vocabularies of commands".

Your question is whether the computer programs are available under the Freedom of Information Law.

In my opinion, as you have described them in your letter and during a telephone conversation, the computer programs are accessible under the Freedom of Information Law for the following reasons.

First, the 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 of the grounds for denial enumerated in §87(2)(a) through (h) of the Law.

Second, it does not appear that any of the eight grounds for denial could appropriately be cited to withhold the programs in question.

And third, due to the structure of one of the grounds for denial, I believe that it may be cited as basis for disclosing the programs. 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 noted 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, computer programs developed by OHSM could likely be characterized as "intra-agency" materials. Nevertheless, I believe they would consist of factual data and, therefore, would be available under §87(2)(g)(i). In addition, it is possible in my view that the programs might also be characterized as instructions to staff that affect the public. If so, I believe that they would be available under §87(2)(g)(ii).

I hope that 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: Steve Krill

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2306

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

December 28, 1981

Keith Grant
81-A-0863
P.O. Box 149
Attica, NY 14011-9688

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grant:

I have received your letter of December 7. Please accept my apologies for the delay in response.

You have requested advice with respect to your attempts to gain access to records of the United States Drug Enforcement Administration, the Supreme Court, New York County, and the New York City Department of Correction.

I would like to offer the following comments regarding your inquiry.

First, the New York Freedom of Information Law applies generally to agencies of government in New York. As such, it does not in my view apply to records in possession of a federal agency, such as the Drug Enforcement Administration. However, the federal Freedom of Information and Privacy Acts may be applicable to the records in which you are interested that may be in possession of the Drug Enforcement Administration.

Second, as indicated above, the Freedom of Information Law is applicable to agencies. In this regard, §86(3) of the Law defines "agency" 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".

Concurrently, §86(1) defines "judiciary" to include:

> "...the courts of the state, including any municipal or district court, whether or not of record".

In view of the definitions quoted above, the Freedom of Information Law does not in my opinion grant rights of access to court records in custody of a court clerk or court reporter.

Nevertheless, other provisions of law provide rights of access to many court records. For instance, §255 of the Judiciary Law states in brief that a court clerk must, as a general rule, search for and make available records in his or her possession upon payment of the required fees for copying. As such, in the future, it is suggested that requests for court records be directed to the clerk of the appropriate court. It is also suggested that a request provide as much identifying information as possible, including names, dates, docket, index, indictment numbers and similar details that might enable a clerk to locate records as easily as possible.

Third, having reviewed your request directed to the Department of Corrections, it would appear that the request is proper. However, it may be important to point out that a relatively recent judicial decision indicated that the Freedom of Information Law could not be used in lieu of criminal discovery after the time periods during which the criminal discovery provisions of Article 240 of the Criminal Procedure Law could be used had passed [see enclosed, People v. Billups, Sup. Ct., Queens County, NYLJ, July 13, 1981]. If your situation is similar to that described in Billups, you may have difficulty in gaining access to records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss
Enclosure